Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **JTI-MACDONALD CORP.**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED** AND **IMPERIAL TOBACCO COMPANY LIMITED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Applicants

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AND

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27. *Lindal v Lindal*, [1981] 2 SCR 629.

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29. *New Brunswick v Rothmans Inc.*, 2010 NBQB 381, 373 N.B.R. (2d) 157, leave to appeal to the New Brunswick Court of Appeal was denied; leave to appeal the NBCA decision to the Supreme Court of Canada was denied: *British American Tobacco (Investments) Ltd. v New Brunswick*, [2011] SCCA No 218*; B.A.T. Industries P.L.C. v New Brunswick*, [2011] SCCA No 219; *Carreras Rothmans Ltd. v New Brunswick*, [2011] SCCA No 221; and *British American Tobacco P.L.C. v New Brunswick*, [2011] SCCA No 222.

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TAB 6

Court File No.: 97-CU-129694

ONTARIO COURT (GENERAL DIVISION)

98 333 046

BETWEEN:

SARAH BYWATER	)	*Michael McGowan,*
	)	*Dorothy Fong* for the Plaintiff
Plaintiff	)	
-and-	)	
TORONTO TRANSIT COMMISSION	)	*Brian M. Leck,*
	)	*Gary Peacock* for the Defendant
Defendant	)	
Proceeding under the *Class Proceedings Act, 1992*	)	
	)	HEARD: NOVEMBER 25, 1998

REASONS FOR DECISION

WINKLER J.:

[1] This is a motion by the plaintiff for certification of this action as a class

proceeding pursuant to the *Class Proceedings Act 1992*, S.O. 1992, c. 6. The action arises from a fire in the Toronto Transit Commission subway system on August 6, 1997. The plaintiff also moves for partial summary judgment based on the defendant's admission of liability for the cause of the fire.

[2] The TTC is a statutory commission which operates the public transit system in Toronto. At approximately 7:15 p.m. on August 6, 1997 a fire occurred near the TTC's Donlands subway station. The fire, which was located in a pile of rubber pads, took place in a subway tunnel area between the Donlands and Greenwood subway stations. Smoke from the fire entered the two adjacent subway stations and spread as well to other areas of the subway system. As a result passengers were asked or forced to leave the system through various stations.

[3] The precise number of passengers affected by the fire and ensuing smoke is unknown but the TTC estimates that approximately 1200 to 1400 persons were caused to evacuate the subway system because of the incident. Although the TTC states that many passengers inhaled no or very little smoke and suffered a maximum exposure to smoke in the range of five minutes, it acknowledges that approximately 110 people were treated for smoke inhalation at the scene or at a hospital.

[4] The representative plaintiff is a passenger who exited a train at the Donlands station, and then, proceeding by way of the tunnel, left the system at the Pape station. Her estimate is that she was exposed to the smoke in the station for approximately three to five

minutes, and spent a similar amount of time moving through the tunnel to the Pape station, where there was also some smoke present. She was treated for smoke inhalation at Scarborough General Hospital. The following day she returned to work and for about one week after the incident suffered shortness of breath. Although she stated it was difficult to remove the smoke residue from her skin, she had no other symptoms related to the incident.

[5] The TTC conducted a subsequent review of the incident and a further clean up of the system. The Fire Department Inspectors also reviewed the system and found nothing of concern, nor did they identify any additional fire hazards.

[6] The instant intended class proceeding was commenced on or about August 8, 1997. The plaintiff claims $30,000,000 in damages on behalf of the proposed class for personal injury, property damage and *Family Law Act* claims. The statement of claim sets out allegations of negligence and breach of contract. On August 13, 1997, the TTC publicly accepted responsibility and admitted liability for the cause of the subway fire. The statement of defence delivered by the TTC on or about September 24, 1997, contained this admission of liability.

Analysis and Disposition

[7] In order to be certified as a class action, the criteria contained in s. 5(1) of the Act must be met:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4

if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

Cause of Action

[8] The first branch of the test requires a determination of whether the pleadings disclose a cause of action. The defendant has admitted liability for the cause of the fire. There is, therefore, no issue in this regard and the first requirement of the Act is met.

Identifiable Class

[9] The second requirement of the test for certification is that there be an identifiable class of two or more persons. The plaintiff proposes a class defined as follows:

> A. All persons other that TTC employees and emergency personnel, who were exposed to smoke and toxic gases in TTC vehicles or on TTC premises arising from a fire which commenced at approximately 7:15 p.m. on Wednesday, August 6, 1997 at or near the Donlands subway station or, where such a person died after the fire, the personal representative of the estate of the deceased person ...[referred to as the] Directly Affected Class Members; and
>
> B. All living parents, grandparents, children, grandchildren, siblings, and spouses (within the meaning of s. 61 of the *Family Law Act*) of the Directly Affected Class Members, or where such a family member died after the fire, the personal representative of the estate of the deceased family member [referred to as the] Family Claimants.

The defendant contends that in the present circumstances there is no identifiable class. It states that the class description proposed by the plaintiff is imprecise with the result that the class members will be unascertainable. I disagree.

[10] The purpose of the class definition is threefold: a) it identifies those persons who have a potential claim for relief against the defendant; b) it defines the parameters of the lawsuit so as to identify those persons who are bound by its result; and lastly, c) it describes who is entitled to notice pursuant to the Act. Thus for the mutual benefit of the plaintiff and the defendant the class definition ought not to be unduly narrow nor unduly broad.

[11] In the instant proceeding the identities of many of the passengers who would

come within the class definition are not presently known. This does not constitute a defect in the class definition. In *Anderson v. Wilson* (1998), 37 O.R. (3d) 235 (Div.Ct.), Campbell J. adopted the words of the Ontario Law Reform Commission and stated at 248:

> ...a class definition that would enable the court to determine whether any person coming forward was or was not a class member would seem to be sufficient.

On this point, *Newberg on Class Actions* (3d ed. Looseleaf) (West Publishing) states at 6-61:

> Care should be taken to define the class in objective terms capable of membership ascertainment when appropriate, without regard to the merits of the claim or the seeking of particular relief. Such a definition in terms of objective characteristics of class members avoids problems of circular definitions which depend on the outcome of the litigation on the merits before class members may be ascertained...

The *Manual for Complex Litigation, Third* (1995, West Publishing) states at 217:

> Class definition is of critical importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment, and (3) entitled to notice in a [class] action. It is therefore necessary to arrive at a definition that is precise, objective, and presently ascertainable... Definitions...should avoid criteria that are subjective (e.g. a plaintiff's state of mind) or that depend upon the merits (e.g., persons who were discriminated against). Such definitions frustrate efforts to identify class members, contravene the policy against considering the merits of a claim in deciding whether to certify a class, and create potential problems of manageability.

The defendant urges, in the alternative, that the class definition should include a reference to damages resulting from smoke inhalation. This requirement, if adopted, would run contrary to the tenets set out above. It would unduly narrow the class and it anticipates entitlement. Moreover, it would eliminate persons with strictly property damage claims. The reference to

damages impinges on the merits of the claim and, thus, goes beyond the purpose of class definition. The definition proposed by the plaintiff is approved with the deletion of words "and toxic gases".

Common Issues

[12] The third element of the test for certification is that claims of the class must raise common issues. The Act defines "common issues" in s. 1 as:

> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

The *Class Proceedings Act, 1992,* is an entirely procedural statute, and, as such, does not create any new cause of action. A decision on certification does not constitute a determination on the merits of the action. The presence of common issues is at the very center of a class proceeding. It is the advancement of the litigation through the resolution of the common issues in a single proceeding which serves the goals of the Act. It is clear from the language of s. 5(1)(c) that the Act contemplates that there be a connection between the common issues, the claims or defences and the class definition. In like fashion, the common issues must have a basis in the causes of action which are asserted.

[13] Here, the defendant admits liability for the cause of the fire. This admission, it contends, eliminates the common issue of liability. Since this, it asserts, is the only common

issue, the certification motion must fail.

[14] I cannot accede to this submission. This is not to in any way detract from the commendable and timely admission of fault by the defendant. However, an admission of liability in the air does not advance the litigation or bind the defendant in respect of the members of the proposed class. Without a certification order from this court no public statement by the defendant, and no admission in its defence to the nominal plaintiff, binds the defendant in respect of the members of the proposed class. A class proceeding by its very nature requires a certification order for the proposed class members to become parties to the proceeding. If the proposed class members are not parties to the proceedings, the admission of liability, as it relates to them, is no more than a bare promise. The words of the Divisional Court in *Westminer Canada Holdings Ltd. v. Coughlan* (1990), 75 O.R. (2d) 405, are apposite. Rosenberg J., speaking for the court, stated at 415:

> The defendants have undertaken to this court not to raise the limitation defence in Nova Scotia. The appellant did not seek such an undertaking. Such an undertaking does not end the matter. In my view the juridical disadvantage remains. In his text, James Cooper Morton, *Limitation of Civil Actions* (Toronto: Carswell, 1988), states at p. 106:
>
> > An agreement not to rely on the passage of time must meet the formal requirements of a contract before it can be considered binding. Specifically, consideration must pass between the parties. A bare promise not to rely on the passage of time is unenforceable.

In any event, absent a judgment by a court of competent jurisdiction on the basis of the admission, *res judicata* does not apply to the proposed class. See *Thoday v. Thoday*, [1964] 1 All

E.R. 341 at 352. Therefore the admission *simpliciter* does not resolve the common issue of liability as it relates to the class members nor does it bind the defendant to them.

[15] There is an additional common issue raised by the facts of this motion. One of the goals of the Act as stated by O'Brien J. in *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div.Ct.) is "judicial economy or the efficient handling of potentially complex cases of mass wrongs".

[16] Evidence of the circumstances surrounding the fire, the general background of the events on August 6, 1997, including the evacuation of the affected portion of the subway system, the composition of the smoke, the manner in which TTC staff reacted to the emergency, and other evidence of general application to all the individual claims is relevant and indeed essential for a determination of individual damage claims. It is expedient, and in the interests of judicial economy, that this evidence and any consequent findings be dealt with as common issues of fact. Apart from the obvious efficiencies, this has the added advantage of removing the risk of inconsistent findings which accompanies a multiplicity of proceedings.

[17] The plaintiff urges that an aggregate damages assessment applying to all class members be made a common issue. Section 24 of the Act permits of an aggregate determination of damages where appropriate, although the plaintiff concedes that this is a novel point and has never been ordered as a common issue under the Act. Section 24 provides in part:

> 24.(1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[18] In my view, the case at bar is not appropriate for an aggregate assessment of damages. The action advances claims for personal injury, property damage and claims under the *Family Law Act*. These claims cannot, "reasonably be determined without proof by individual class members" as required by s. 24(1)(c). Furthermore, each individual claim will require proof of the essential element of causation, which, in the words of 24(1)(b), is "a question of fact or law other than those relating to an assessment of damages".

[19] In addition, the assessment of damages in each case will be idiosyncratic. All of the usual factors must be considered in assessing individual damage claims for personal injury, such as: the individual plaintiff's time of exposure to smoke; the extent of any resultant injury; general personal health and medical history; age; any unrelated illness; and other individual considerations. Indeed here, the representative plaintiff was suffering from and experiencing symptoms of food poisoning at the time of the incident. The property damage claims of class members must be assessed individually as the underlying facts will vary from one class member

to the next.

[20] The issue of damages, said to be a common issue by the plaintiff, is an individual issue. Furthermore, aggregate assessment cannot be a common issue here because this case does not meet the requirements of ss. 24(1)(b) and (c). Even if by class definition the members of the proposed class have all suffered exposure to smoke, the extent of such exposure and any damage flowing from it will vary on an individual basis.

Preferable Procedure

[21] Before dealing with the fourth requirement for certification contained in s. 5(1), that is, whether a class proceeding would be the preferable procedure for the resolution of the common issues, a review of general principles may be useful. It is not necessary that a determination of the common issues will determine liability. Rather, the common issues need only be issues of fact or law, the determination of which will move the litigation forward. The reasoning of Cumming J.A. in *Campbell v. Flexwatt* (1998), 15 C.P.C. (4th) 1 (B.C.C.A.), leave to appeal to S.C.C. denied, was adopted by Campbell J. in *Anderson* at 243, where he stated:

> It is not necessary, in order to proceed with a class action, to demonstrate that the common issues will in themselves determine liability. The common issues need only be issues of fact or law that move the litigation forward...

and further at 247:

> ...a class proceeding does not have to be the preferable procedure for resolving the whole controversy, but merely the preferable procedure for *resolving the common issues.* (emphasis in original).

[22] The Act is remedial legislation. As such, the Act ought to be given a purposive interpretation consistent with its goals of promoting judicial economy, facilitating access to justice and encouraging the modification of behaviour of actual or potential wrongdoers. In determining preferable procedure, the court, in the exercise of its discretion, undertakes a functional analysis of the individual and the common issues. Each case will therefore turn on its own facts. As O'Brien J. stated in *Abdool*, in respect of the application of discretion in certification, at 461:

> Appellant's counsel, in argument, relied on the apparent mandatory wording of s. 5(1) of the Act, specifiying "the court shall certify" if certain requirements are met. I am not persuaded that the approach to be taken is that simple.
>
> Section 35 of the *Class Proceedings Act, 1992,* provides that the rules of court apply to class proceedings.
>
> Rule 1.04(1) of the *Rules of Civil Procedure* provides:
>
> > These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> I do not accept the submission that any complex, multiple-party lawsuit is entitled to certification merely because that is the "preferable procedure" for resolving common issues which may be involved in the litigation.
>
> In my view, some consideration must be given to individual issues involved in the litigation, the purposes of the Act, and the rights of the parties seeking, and opposing certification.

[23] Section 6 was inserted in the statute to remove what had been impediments to representative actions prior to the Act. The section speaks to individual issues:

> 6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
>
> > 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
> >
> > 2. The relief claimed relates to separate contracts involving different class members.
> >
> > 3. Different remedies are sought for different class members.
> >
> > 4. The number of class members or the identity of each class member is not known.
> >
> > 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

[24] Two points of view have emerged in *dicta* concerning the interpretation of s. 6. In *Abdool*, Moldaver J., as he then was, stated at 473:

> Section 6 of the Act directs that the court, in coming to its decision to certify or not, shall not refuse certification solely if any one of the five delineated grounds is found to exist. Implicit in this, however, is the recognition that a court is entitled to consider the grounds referred to in s. 6 and where two or more of them are found to exist, the cumulative effect of these may legitimately be factored into the s. 5(1)(d) equation.

In *Nantais v. Tectronics Proprietary (Canada) Limited* (1995), 25 O.R. (3d) 331 (Gen.Div.), Brockenshire J. stated at 341:

> I am not sure that this statement was essential to the result. I say this because I am not at all sure that this interpretation of the section is correct. With respect, I note that Moldaver J. has read in the word "one" after "any" in the beginning of s. 6 which in my view gives a restrictive effect to this remedial legislation. I think, in the context, "any" should be read as "any one or more". I would hope that a subsequent amendment to the section would remove any confusion.

Campbell J. in *Anderson* after referring to this difference of opinion concerning the interpretation of s. 6, found it unnecessary to decide the issue on the facts before the court and stated at 248:

> Each case will turn on its own facts and not on abstract arguments about the interpretation of s. 6. Even if there is a conflict between these two *obiter dicta*, it makes no difference on the facts of this case.

Upon a further analysis, in my view, any conflict between the reasoning of Moldaver J. in *Abdool* and Brockenshire J. in *Nantais* is more apparent than real. The reasons of both indicate that in each case they weighed all the factors including individual issues in deciding whether a class proceeding was the preferable procedure. Individual considerations such as those set out in s. 6 are, in the words of Moldaver J. in *Abdool,* "legitimately factored into the s. 5(1)(d) equation."

[25] The purpose for the inclusion of s. 6 in the Act is dealt with by Michael Cochrane in *Class Actions: A Guide to the Class Proceedings Act, 1992*, (Aurora: Canada Law Book, 1992) at 28:

> Prior to the enactment of the *Class Proceedings Act, 1992,* the courts had in their interpretation of Rule 12 and its predecessor (Rule 75), erected a variety of substantive, procedural and other barriers to representative litigation. To ensure

> that these barriers are not the subject of litigation at certification, s. 6 [was included] in the [Act]...

Thus the central thrust of s. 6 is to ensure that the enumerated individual issues cannot be raised as absolute bars to certification. That is not to say, however, that individual issues are not to be taken into consideration in determining if a class proceeding is the preferable procedure. Indeed to so conclude would render any such exercise meaningless. Moreover, to apply a cumulative or quantitative approach to the individual issues referenced in s. 6 would have a like effect; for while they may exist, they may be relatively insignificant in the total context, or of inequal weight relative to each other or to the common issues. The court in reaching its decision on preferable procedure must of necessity consider all of the common and individual factors as part of the factual matrix.

[26] In determining whether the class proceeding is the preferable procedure, the court does not inquire as to whether the common issues predominate the individual issues. The predominance test has been rejected by Ontario courts. Instead the proper approach is to weigh all of the relevant factors, including the common issues and the individual issues in the context of the goals of the Act. As Campbell J. stated in *Anderson* at 249:

> Even if there was an error in the interpretation of s. 6 it could not affect the result because none of the three factors present in this case, individually or cumulatively, are significant enough to outweigh the degree of judicial economy and increased access to justice provided by the certification as a class action.

[27] In the instant motion, four of the five factors in s. 6 are present. The plaintiff

concedes in her factum that individual damages assessments will be required for some class members, that there are separate contracts, and that the precise numbers and identities of the class members are not presently known. In addition, the nature of the claims are such that different remedies will be sought for different class members.

[28] In my view, none of these factors whether taken individually or together, are sufficient in the circumstances of this proceeding to support a conclusion that a class proceeding is not the preferable procedure. The personal injury and property damage claims are conceded by the plaintiff to be largely of a minor nature. There is a potential for hundreds of claims, each of which if dealt with separately would require a duplication of evidence to establish all of the background facts and circumstances.Thus, a class proceeding will undoubtedly promote judicial economies.

[29] The defendant proposes that the preferable procedure is for the class members to proceed individually in the small claims court or through the simplified rules of procedure. In my view, this would result in a denial of access to the courts and in relation to the amount of any potential recovery, the costs of proceeding in this fashion would be significant. As O'Brien J. stated in *Abdool* " the goal is to permit advancement of small claims where the legal costs make it uneconomic to advance them." The individual issues in this matter require an assessment of damages for personal injury or property damage caused by the exposure to the smoke which, after the common issues are resolved, would be relatively straightforward.

[30] The instant case, on its facts, is suited to be a class proceeding. The requirement that a class proceeding is the preferable procedure for resolution of the common issues is met.

Representative Plaintiff

[31] A representative plaintiff need not be typical of the class or share every characteristic of every other member of the class. It is sufficient that he or she would fairly and adequately represent the interests of the class and be without interests in conflict on the common issues. In addition, the representative plaintiff must have set out a workable plan for the litigation.

i) Lack of Conflict / Adequate Representation

[32] The representative plaintiff does not appear to have any interests which conflict with those of other class members on the common issues. There is no suggestion that she cannot fairly and adequately represent the class. These elements are satisfied.

ii) Litigation Plan

[33] I am satisfied that the plaintiff and her counsel have submitted a workable litigation plan as it relates to the common issues. The plaintiff may submit an amended litigation plan dealing with individual issues within 30 days of the release of these reasons, hopefully with

the consent of the parties as provided for in s. 25(1)(c), and failing that, the plaintiiff may submit a plan for approval of this court.

iii) Notice

[34] The issue of notice was not fully canvassed in argument. I advised counsel that I would hear submissions on the manner, form and content of the notice to the class if the disposition of the certification motion made this necessary. In light of these reasons, counsel may attend before me to make submissions on notice at a convenient time.

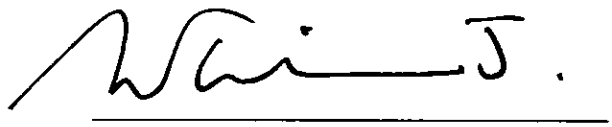
Partial Summary Judgment

[35] The defendant admits liability for the cause of the fire. Partial summary judgment is granted accordingly to the plaintiff class. As stated by Osborne J.A. in *Ford Motor Company of Canada Ltd. v. Ontario Municipal Employees Retirement Board* (1997), 36 O.R. (3d) 384 (C.A.) at 396:

> The purpose of rule 51.06 somewhat parallels Rule 20's purpose. If a party makes an admission (as occurred in the defendant's statement of defence in Roytor), rule 51.06 gives the beneficiary of the admission access to an order based on the admission. For example, if a defendant admits to liability, or a particular part of a loss claimed by the plaintiff, rule 51.06 would permit a motions judge to grant an order based on the admission. Such an order will typically take the form of a summary judgment for part of the plaintiff's claim.

[36] The motions for certification and for partial summary judgment are granted, for

the reasons stated, upon compliance by the plaintiff with the conditions set out herein relating to the litigation plan and notice and obtaining the requisite approval of this court.



WINKLER J.

Released: December 2, 1998

Court File No.: 97-CU-129694

ONTARIO COURT
(GENERAL DIVISION)

B E T W E E N:

SARAH BYWATER

Plaintiff

- and -

TORONTO TRANSIT COMMISSION

Defendant

REASONS FOR DECISION

WINKLER J.

Released: December 2, 1998

20p

Court File No.: 97-CV-129694

ONTARIO COURT (GENERAL DIVISION)

98380349

BETWEEN:

SARAH BYWATER

(Plaintiff)

-and-

TORONTO TRANSIT COMMISSION

(Defendant)

APPEARANCES: *Michael McGowan* and *Dorothy Fong* for the Plaintiff

Brian J.E. Brock, Q.C., Brian Leck and *Gary Peacock* for the Defendant

BEFORE: Winkler J.

DATE: January 12, 1999

ENDORSEMENT

[1] Further to reasons released December 2, 1998:

1. The issue of aggregate assessment was fully argued on the initial return of the certification motion and dealt with in my reasons of December 2, 1998.

2. The litigation plan as it relates to individual issues is unsatisfactory as presented. It is the plaintiff's obligation to provide this plan. However, in the circumstances here, it ought not to delay the issuance of a certification order. I am satisfied that the plan as it relates to common issues meets the requirements of the Act. The plaintiff will be required to submit a litigation plan as it relates to individual issues as part of the ongoing case management of this proceeding, given that the case management function pursuant to the statute provides for a flexible approach.

3. The notice, as amended, shall be sent by mail to all claimants presently known to either side. It shall be published in three Toronto daily newspapers and two ethnic newspapers on two successive Saturdays or, alternatively, two other days at the plaintiff's option. Additionally, the notice shall be posted in the three affected subway stations in a conspicuous place on the subway platform for a two week period. The cost, placement and publication of the notices shall be the obligation of the defendant.

[2] All counsel have agreed on the form and content of the notice in the amended form as approved by the court and plaintiff's counsel has undertaken to engross and deliver the amended notice.

WINKLER J.

Released: January 12, 1999

TAB 9

Caputo v. Imperial Tobacco

Ontario Judgments

Ontario Superior Court of Justice

W.K. Winkler J.

January 11, 2006.

No. 03/1207

[2006] O.J. No. 537

Between Caputo, et al., and Imperial Tobacco, et al.

(5 paras.)

Case Summary

Civil procedure — Discontinuance — Motion by representative plaintiffs for discontinuance of class proceeding allowed on a qualified with prejudice basis.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, s. 29(4)

Counsel

Kirk Baert & Celeste Poltak, for plaintiffs

Susan Wortzman, for JTI McDonald

Lyndon Barnes & Deborah Glendinning, for Imperial Tobacco

Steven Sofer & Marshall Reinhart, for RBH

ENDORSEMENT

W.K. WINKLER J. (endorsement)

1 This is a motion for discontinuance brought under s. 29(1) of the CPA. This proceeding was commenced as an intended class proceeding in 1995 seeking damages in relation to personal injuries allegedly caused by Tobacco products. The certification motion was dismissed in Reasons dated February 5, 2004. The court, in subsequent reasons, declined to make any order as to costs in favour of the Defendants.

2 The representative plaintiffs now seek to discontinue the action because they are not prepared to fund the proceedings as individual actions, their lawyers are not prepared to continue with the individual actions on a contingency basis and the plaintiffs are not prepared to assume any further risk as to costs. They base these

assertions on their experience thus far in the present proceeding. They were not cross-examined on their affidavits proffered in support of this motion.

3 The Defendants responded to the motion by stating that the discontinuance, which they do not oppose, should be granted only on a "with prejudice" basis. An earlier request for costs has been withdrawn. In my view the order should go on a "with prejudice" basis as against the representative plaintiffs only. Counsel agrees that this is appropriate in respect of any individual proceedings in the future. On their sworn evidence seeking discontinuance they say they do not wish to proceed individually and in any event, if they do, they need only withdraw the instant motion. The same holds true in respect of a future class proceeding. The only area of potential unfairness arises in the event they are included in a putative class in a future proceeding. The "with prejudice" stipulation would not apply in such event, so long as it is clear that they may not be a representative plaintiff, or directly or indirectly be involved in initiating, guiding, counselling, financing or instructing counsel in such future class action. They are being let out along with their counsel, of the present proceeding on a no costs basis and on their evidence before this court. This qualified "with prejudice" order is entirely consistent with their statements and any potential unfairness is addressed by the above qualification.

4 The only remaining issue relates to notice of discontinuance. The CPA requires in s. 29(4) that the court consider whether notice should be given or not in these circumstances. I think not. There has been no formal notice of a class proceeding in this case and there is no evidence nor is it suggested that any claims were not commenced or pursued because of this proceeding. All counsel are in agreement that no notice need be given in the circumstances of this case.

5 Order to go in accordance with these reasons.

W.K. WINKLER J.

TAB 16

COURT FILE NO.: 97-CV-128597
DATE: 10/07/04

04 295 067

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: GLENN GILBERT and GARY WORTLEY v. CANADIAN IMPERIAL BANK OF COMMERCE

BEFORE: Winkler R.S.J.

COUNSEL: Paul J. Pape and Harvey T. Strosberg, Q.C., for the Plaintiffs

Bonnie Tough and J.A. Prestage, for the Defendant

HEARD: 10/07/2004

Proceeding under the Class Proceedings Act, 1992

ENDORSEMENT

[1] This is a motion for certification as a class proceeding, on consent, and approval of a settlement in that class proceeding. There is a companion motion for approval of the class counsel fee.

[2] CIBC, a chartered bank, has issued credit cards known as VISA cards in three categories, classic, premier and corporate. These cardholders may use the cards to make purchases in a foreign currency and be charged in Canadian dollars.

[3] The Canadian dollar amount charged to cardholders in respect of foreign currency transactions since 1987 has been calculated using a foreign exchange rate established by applying a percentage mark-up to wholesale foreign exchange rates which are available to VISA International.

[4] The plaintiffs allege that the mark-up charged constitutes undisclosed and unauthorized fees or charges in respect of debits and credits on their CIBC VISA accounts in foreign currency. CIBC responds in numerous ways to these allegations.

[5] The specific allegations and claims were set forth in the statement of claim issued on July 22, 1997, later amended, and CIBC delivered its statement of defence as amended on November

19, 1998. On January 22, 2003, the plaintiffs received stage 1 funding from the Class Proceedings Committee.

[6] In October 2003 the parties entered into settlement discussions, with disclosure by CIBC of pertinent information, culminating in an agreement in principle and ultimately a Settlement Agreement on August 13, 2004.

[7] The essence of the settlement is as follows:

- CIBC will pay $16.5 million in full and final settlement of the claims of the class including interest.
- Up to $13.85 million will be paid directly to class members.
- At least $1 million will be paid to the United Way on behalf of certain class members.
- $1.65 million will be paid to the Class Proceedings Fund.
- Details of the particulars and mechanics of the settlement are contained in paragraph 3 of the plaintiffs' factum.
- CIBC will pay $3 million to counsel for the plaintiffs in full satisfaction of all fees, disbursements and taxes.

[8] I am satisfied that all of the elements necessary for certification as a class proceeding are present. Even where certification is on consent the court must be satisfied that the requirements of s.5 of the *Class Proceedings Act, 1992* S.O.1992 c.6 have been met. See: *Ontario New Home Warranty Program v. Chevron Chemical Company*, 46 O.R.(3d) 130. In the case at bar the pleadings disclose a cause of action within the meaning of rule 21. There are common issues as set out in the draft judgment filed. The amounts of the individual settlements to class members is relatively small, from less than one dollar to almost $15, making it clear that a class proceeding advances the goals of the Act of access to justice and judicial economy. The size of the overall settlement advances the goal of behavioral modification. Accordingly, a class proceeding is the preferable procedure for the resolution of the common issues. There are representative plaintiffs who meet the requirements of the CPA. Finally, there is an identifiable class defined as: all persons, anywhere in Canada, including corporations, who were issued one or more CIBC VISA cards on or before June 30, 2004.

[9] 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.

[10] 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.

[11] 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. See: *Dabbs v. Sun Life Assurance Co. of Canada,* 40 O.R. (3d) 429; *Parsons v. The Canadian Red Cross Society,* 40 C.P.C. (4th) 151.

[12] There is a risk in this proceeding that if the matter went to trial the plaintiffs could not establish liability against CIBC. CIBC raised numerous defences including no need to disclose, the mark-up was reasonable, was understood and accepted, it did not retain all of the mark-up and limitation periods. Most striking, however, is the defence that new cardholders after 1994 were on notice regarding the terms of such transactions and that in 1996 all cardholders were given specific notice to this effect. The bank states that litigation risk to it after 1994 is minimal.

[13] Even if the bank did not succeed on all of these defences there is a distinct possibility that it could reduce the recovery. If the case went to trial it would in all likelihood be a lengthy trial.

[14] CIBC disclosed adequate pertinent information to the plaintiffs and the court to evaluate the claims.

[15] I have reviewed the distribution schedule for the settlement funds as set out in paragraph 3 of the plaintiffs' factum. I am satisfied that it is appropriate in all of the circumstances. The distribution does not purport to reflect the actual transactions of each cardholder. 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. The bank justifies this scheme by stating that records are not available for a significant portion of the period in question and for periods when records are available the transactional analysis would simply be too costly and time consuming given the number and size of transactions. The CPA anticipates such a problem in s. 24(2) and (3) which provide that the court may order that an award be applied so that individual class members share in an award on an average or proportional basis and that the court shall consider whether it would be impractical or inefficient to identify class members entitled to share in the award or exact shares in making such a determination. This is the case in the present circumstances. One might observe that a situation such as this could be addressed with a settlement that is entirely C*y pres.* However, it is not the role of this court to substitute its settlement for that fashioned by the parties. Also, a disadvantage of settlement that is entirely C*y pres* is that it does not compensate individual class members.

[16] Past cardholders are not part of the distribution list. The payment to the United Way on their collective part is in lieu of this and is acceptable given the peregrinations involved in

pursuing those claims. This approach is acceptable in the present circumstances given the impossibility of identifying such class members. The CPA specifically contemplates a *Cy pres* distribution in s. 26(6). See: *Sutherland v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361. Other omissions from the distribution lists are also acceptable.

[17] Plaintiffs' class counsel recommend the settlement. I accept this recommendation. They are highly experienced in class action litigation and their opinions are accorded considerable weight by this court. See *Dabbs v. Sun Life, supra.*

[18] Here the practicalities are such that if this case were not settled the likelihood of lengthy and expensive litigation going forward many years is a virtual certainty if these claims were to be pursued to finality. The settlement is a marked preference over the alternative. The settlement is a sensible one, and it is fair and reasonable.

[19] Objections are a consideration in approving a settlement. The role of the court, however, is not to alter or amend a settlement. The court's exercise of discretion in determining whether to approve or reject a settlement is limited to approving or rejecting the settlement. Here counsel for the objectors William Dermody has received only 14 written objections. Given the size of the class, millions, this number is miniscule. Of the 14, two are not, in essence, objections. The remaining group includes some who became cardholders during the period when cardholders were on notice of the mark-up. These claims are problematic. The claims of others relate to periods when no records are available to track the transactions. There are only three objectors, other than these categories, whose claims are essentially that the amounts of compensation do not track their individual accounts. This may be so. If their claims involve substantial amounts, such persons may opt out and pursue their claims individually. Mr. Rhodes was the only objector to appear at the hearing and make submissions to the court. He submitted that the small number of objectors impugned the effectiveness of the notice. I cannot accept this submission. The notice was posted on the bank's web page and media notice was extensive although they were not, as he suggested they should be, sent to each account holder personally. His second point went to the arbitrary nature of the settlement distribution. He stated that he did not know what he was giving up for the settlement. His point in this respect has validity, although not in my view, sufficient to deny approval of the settlement. Without tracking each account no one knows these amounts, except perhaps individual cardholders. It must be remembered that the test is not whether the settlement meets the approval of each class member. Rather it is whether the settlement is in the best interests of the class as a whole.

[20] The complaint that the settlement is arbitrary is not correct insofar as the overall settlement is concerned. That was established taking into account the profits of the bank relating to these transactions. As for individual settlement amounts, although arbitrary, these reflect the fact that during the majority of the period when liability is strongest for the plaintiffs, data is non-existent to establish individual claim amounts. During the period when the data is still in existence, the liability of the bank is problematic given the notice given by it to cardholders. In light of these facts, the structure of the settlement is acceptable. One of the goals of the CPA is behavioral modification. This goal, often given short shrift, is meaningful. In cases such as this,

behavioral modification will justify the result achieved by class counsel. The amounts paid by the bank are substantial.

[21] Prior to the settlement counsel did not communicate with registered class members because of the vast size of the class. It was impracticable to do so. However, the representative plaintiffs support and recommend this settlement.

[22] I am satisfied that this settlement is fair, reasonable and in the best interests of the class as a whole. Accordingly, the settlement is approved.

[23] The fee agreement between class counsel and the representative plaintiffs provides for a fixed fee of 20% of the amount recovered plus GST and disbursements contingent upon success. This computes to $3,530,000 plus disbursements and GST. Class counsel succeeded in having CIBC agree to pay $3 million all-inclusive in full satisfaction of the fee. In considering a class counsel fee the court must consider the success achieved and the risk associated with pursuing the litigation. See: *Gagne v. Silcorp,*. 41 O.R. (3d) 417 (Ont. C.A.). As for the appropriateness of a percentage contingent fee unrelated to actual work done, see: *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Company*, 40 O.R. (3d) 83. The fee asked for and agreed to be paid by CIBC is within the accepted range and is approved.

[24] Counsel and the Class Proceedings Fund are in dispute as to the Funds entitlement to a 10% portion of the counsel fee. Counsel have agreed to segregate this amount from their fee until this issue has been resolved.

[25] Judgment will issue in terms of the draft order filed.

WINKLER R.S.J.

DATE: October 7, 2004

5p.

TAB 29

B.A.T. Industries P.L.C. v. New Brunswick

Supreme Court of Canada Rulings on Applications for Leave to Appeal and Other Motions

Supreme Court of Canada

Record created: May 18, 2011.

Record updated: October 13, 2011.

File No.: 34265

[2011] S.C.C.A. No. 219 | *[2011] C.S.C.R. no 219*

B.A.T. Industries P.L.C. v. Her Majesty the Queen in Right of the Province of New Brunswick

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Case Summary

Status:

Application for leave to appeal dismissed with costs (without reasons) October 13, 2011.

Catchwords:

International law — Conflicts of law — Jurisdiction — Real and substantial connection — Province of New Brunswick sued tobacco companies for recovery of health care costs under the Tobacco Damages and Health Care Costs Recovery Act, *S.N.B. 2006, c. T-7.5* — Motion by foreign tobacco companies to dismiss action for lack of jurisdiction — Whether the dismissal of a jurisdictional motion in New Brunswick is interlocutory or final? — Whether the Province has jurisdiction with respect to applicant tobacco company? — Whether the Province has a good arguable case against applicant?

Case Summary:

The applicant tobacco company brought a motion to challenge the jurisdiction of the Court of Queen's Bench over a claim against it and other tobacco companies by the Province of New Brunswick for recovery of health care costs under the Tobacco Damages and Health Care Costs Recovery Act, *S.N.B. 2006, c. T-7.5*. The Province contended that the companies knew cigarettes were addictive and caused disease, but circulated false and misleading information and conspired to resist health warnings and restrictions. The Province also alleged that the tobacco companies exposed non-smokers in New Brunswick to dangerous second-hand smoke.

The motions judge concluded that the Province's action was authorized by statute and the Province had presented a substantial amount of compelling evidence. The motions judge therefore concluded that the Province had established a good arguable case and that the court has jurisdiction with respect to the applicant. Consequently, the motion presented by the applicant was dismissed.

The Court of Appeal denied the applicant leave to appeal.

Counsel

Nancy G. Rubin (Stewart McKelvey), for the motion.

Philippe J. Eddie, Q.C., contra.

Chronology:

1. Application for leave to appeal:
   FILED: May 18, 2011. S.C.C. Bulletin, 2011, p. 866.

   SUBMITTED TO THE COURT: September 6, 2011. S.C.C. Bulletin, 2011, p. 1244.

   DISMISSED WITH COSTS: October 13, 2011 (without reasons). S.C.C. Bulletin, 2011, p. 1432.

   Before: Binnie, Abella and Rothstein JJ.

Procedural History:

Judgment at first instance: Motion to dismiss action for lack of jurisdiction and unauthorized service ex juris dismissed. Court of Queen's Bench of New Brunswick, Cyr J., November 15, 2010.

Judgment on appeal: Leave to appeal dismissed with costs. Court of Appeal of New Brunswick, Quigg J.A., April 11, 2011.

[2011] N.B.J. No. 112.

British American Tobacco P.L.C. v. New Brunswick

Supreme Court of Canada Rulings on Applications for Leave to Appeal and Other Motions

Supreme Court of Canada

Record created: May 18, 2011.

Record updated: October 13, 2011.

File No.: 34263

[2011] S.C.C.A. No. 222 | *[2011] C.S.C.R. no 222*

British American Tobacco P.L.C. v. Her Majesty the Queen in Right of the Province of New Brunswick

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Case Summary

Status:

Application for leave to appeal dismissed with costs (without reasons) October 13, 2011.

Catchwords:

International law — Conflicts of law — Jurisdiction — Real and substantial connection — Province of New Brunswick sued tobacco companies for recovery of health care costs under the Tobacco Damages and Health Care Costs Recovery Act, *S.N.B. 2006, c. T-7.5* — Motion by foreign tobacco companies to dismiss action for lack of jurisdiction — Whether the dismissal of a jurisdictional motion in New Brunswick is interlocutory or final? — Whether the Province has jurisdiction with respect to applicant tobacco company? — Whether the Province has a good arguable case against applicant?

Case Summary:

The applicant tobacco company brought a motion to challenge the jurisdiction of the Court of Queen's Bench over a claim against it and other tobacco companies by the Province of New Brunswick for recovery of health care costs under the Tobacco Damages and Health Care Costs Recovery Act, *S.N.B. 2006, c. T-7.5*. The Province contended that the companies knew cigarettes were addictive and caused disease, but circulated false and misleading information and conspired to resist health warnings and restrictions. The Province also alleged that the tobacco companies exposed non-smokers in New Brunswick to dangerous second-hand smoke.

The motions judge concluded that the Province's action was authorized by statute and the Province had presented a substantial amount of compelling evidence. The motions judge therefore concluded that the Province had established a good arguable case and that the court has jurisdiction with respect to the applicant. Consequently, the motion presented by the applicant was dismissed.

The Court of Appeal denied the applicant leave to appeal.

Counsel

David R. Byers (Stikeman Elliott LLP), for the motion.

Philippe J. Eddie, Q.C., contra.

Chronology:

1. Application for leave to appeal:
   FILED: May 18, 2011. S.C.C. Bulletin, 2011, p. 867.

   SUBMITTED TO THE COURT: September 6, 2011. S.C.C. Bulletin, 2011, p. 1244.

   DISMISSED WITH COSTS: October 13, 2011 (without reasons). S.C.C. Bulletin, 2011, p. 1428.

   Before: Binnie, Abella and Rothstein JJ.

Procedural History:

Judgment at first instance: Motion to dismiss action for lack of jurisdiction and unauthorized service ex juris dismissed. Court of Queen's Bench of New Brunswick, Cyr J., November 15, 2010.

Judgment on appeal: Leave to appeal dismissed with costs. Court of Appeal of New Brunswick, Quigg J.A., April 11, 2011.

[2011] N.B.J. No. 115.

TAB 33

COURT FILE NO.: 98-CV-141369

DATE:19990922

SUPERIOR COURT OF JUSTICE

99 274 015

BETWEEN:

DIANNA LOUISE PARSONS, MICHAEL HERBERT CRUICKSHANKS, DAVID TULL, MARTIN HENRY GRIFFEN, ANNA KARDISH, ELSIE KOTYK, Executrix of the Estate of Harry Kotyk, deceased and ELSIE KOTYK, personally	*Harvey Strosberg, Q.C., Heather Rumble Peterson* and *Patricia Speight* for the Plaintiffs
Plaintiffs	*Wendy Matheson, Jane Bailey* for the Canadian Red Cross Society
-and-	
THE CANADIAN RED CROSS SOCIETY, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AND THE ATTORNEY GENERAL OF CANADA	*Michèle Smith* and *R.F. Horak* for Her Majesty the Queen in Right of Ontario
	Ivan G. Whitehall, Q.C., Catherine Moore and *J.C. Spencer* for the Attorney General of Canada
Defendants	*Wilson McTavish, Q.C., Linda Waxman* and *Marian Jacko* for the Office of the Children's Lawyer
	Laurie Redden for the Office of the Public Guardian and Trustee
Proceeding under the *Class Proceedings Act, 1992*	*Beth Symes* for the Thalassemia Foundation of Canada, Friend of the Court
	William P. Dermody for the Intervenors, Hubert Fullarton and Tracey Goegan
	L.Craig Brown for the Hepatitis C Society of Canada, Friend of the Court
	Pierre R. Lavigne for Dominique Honhon, Friend of the Court
	Bruce Lemer for Anita Endean, Friend of

	the Court
	Elizabeth M. Stewart for the Provinces and Territories other than British Columbia and Quebec

COURT FILE NO.:98-CV-146405

SUPERIOR COURT OF JUSTICE

BETWEEN:

JAMES KREPPNER, BARRY ISSAC, NORMAN LANDRY, as Executor of the Estate of the late SERGE LANDRY, PETER FELSING, DONALD MILLIGAN, ALLAN GRUHLKE, JIM LOVE and PAULINE FOURNIER, as Executrix of the Estate of the late PIERRE FOURNIER	*Bonnie A. Tough* and *David Robins* for the Plaintiffs
Plaintiffs	*Wendy Matheson, Jane Bailey* for the Canadian Red Cross Society
-and-	*Michèle Smith* and *R.F. Horak* for Her Majesty the Queen in Right of Ontario
THE CANADIAN RED CROSS SOCIETY, THE ATTORNEY GENERAL OF CANADA AND HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO	*Ivan G. Whitehall, Q.C., Catherine Moore* and *J.C. Spencer* for the Attorney General of Canada
Defendants	*Janice E. Blackburn* and *James P. Thomson* for the Canadian Hemophilia Society, Friend of the Court
Proceeding under the *Class Proceedings Act, 1992*	Heard: August 19-21, 1999

REASONS FOR DECISION

WINKLER J.:

Nature of the Motion

[1] This is a motion for approval of a settlement in two companion class proceedings commenced under the *Class Proceedings Act 1992*, S.O. 1992, c. 6, the "Transfused Action" and the "Hemophiliac Action", brought on behalf of persons infected by Hepatitis-C from the Canadian blood supply. The Transfused Action was certified as a class proceeding by order of this court on June 25, 1998, as later amended on May 11, 1999. On the latter date, an order was also issued certifying the Hemophiliac Action. There are concurrent class proceedings in respect of the same issues before the courts in Quebec and British Columbia. The Ontario proceedings apply to all persons in Canada who are within the class definition with the exception of any person who is included in the proceedings in Quebec and British Columbia. The motion before this court concerns a Pan-Canadian agreement intended to effect a national settlement, thus bringing to an end this aspect to the blood tragedy. Settlement approval motions similar to the instant proceeding have been contemporaneously heard by courts in Quebec and British Columbia with a view to bringing finality to the court proceedings across the country.

The Parties

[2] The plaintiff class in the Transfused Action are persons who were infected with Hepatitis C from blood transfusions between January 1, 1986 to July 1, 1990. The plaintiff class in the Hemophiliac Action are persons infected with Hepatitis C from the taking of blood or blood products during the same time period.

[3] The defendants in the Ontario actions are the Canadian Red Cross Society ("CRCS"), Her Majesty the Queen in Right of Ontario, and the Attorney General of Canada. The Ontario classes are national in scope. Therefore, the other Provincial and Territorial Governments of Canada, with the exception of Quebec and British Columbia, have moved to be included in the Ontario actions as defendants but only if the settlement is approved.

[4] The court has granted intervenor status to a number of individuals, organizations and public bodies, namely, Hubert Fullarton and Tracy Goegan, the Canadian Hemophilia Society, the Thalassemia Foundation of Canada, the Hepatitis C Society of Canada, the Office of the Children's Lawyer and the Office of the Public Guardian and Trustee of Ontario.

[5] Pursuant to an order of this court, PricewaterhouseCoopers received and presented to the court over 80 written objections to the settlement from individuals afflicted with Hepatitis-C. In addition, 11 of the objectors appeared at the hearing of the motion to proffer evidence as to their reasons for objecting to the settlement.

[6] The approval of the settlement before the court is supported by class counsel and the Ontario and Federal Crown defendants. In addition to these parties, the Provincial and Territorial governments who seek to be included if the settlement is approved, and the intervenors, the Canadian Hemophilia Society, the Office of the Children's Lawyer and the Office of the Public Guardian and Trustee made submissions in support of approval of the settlement. The Canadian Red Cross Society ("CRCS") appeared, but did not participate, all actions against it having been

stayed by order of Mr. Justice Blair dated July 28, 1999, pursuant to a proceeding under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36. The other intervenors and individual objectors voiced concerns about the settlement and variously requested that the court either reject the settlement or vary some of its terms in the interest of fairness.

Background

[7] Both actions were commenced as a result of the contamination of the Canadian blood supply with infectious viruses during the 1980s. The background facts are set out in the pleadings and the numerous affidavits forming the record on this motion. The following is a brief summary.

[8] The national blood supply system in Canada was developed during World War II by the CRCS. Following WWII, the CRCS was asked to carry on with the operation of this national system, and did so as part of its voluntary activities without significant financial support from any government. As a result of its experience and stewardship of system, the CRCS had a virtual monopoly on the collection and distribution of blood and blood products in Canada.

[9] Over time the demand for blood grew and Canada turned to a universal health care system. Because of these developments, the CRCS requested financial assistance from the provincial and territorial governments. The governments, in turn, demanded greater oversight

over expenditures. This led to the formation of the Canadian Blood Committee which was composed of representatives of the federal, provincial and territorial governments. The CBC became operational in the summer of 1982. Other than this overseer committee, there was no direct governmental regulation of the blood supply in Canada.

[10] The 1970s and 80s were characterized medically by a number of viral infection related problems stemming from contaminated blood supplies. These included hepatitis and AIDS. The defined classes in these two class actions, however, are circumscribed by the time period beginning January 1, 1986 and ending July 1, 1990. During the class periods, the CRCS was the sole supplier and distributor of whole blood and blood products in Canada. The viral infection at the center of these proceedings is now known as Hepatitis C.

[11] Hepatitis is an inflammation of the liver that can be caused by various infectious agents, including contaminated blood and blood products. The inflammation consists of certain types of cells that infiltrate the tissue and produce by-products called cytokines or, alternatively, produce antibodies which damage liver cells and ultimately cause them to die.

[12] One method of transmission of hepatitis is through blood transfusions. Indeed, it was common to contract hepatitis through blood transfusions. However, due to the limited knowledge of the effects of contracting hepatitis, the risk was considered acceptable in view of the alternative of no transfusion which would be, in many cases, death.

[13] As knowledge of the disease evolved, it was discovered that there were different strains of hepatitis. The strains identified as Hepatitis A ("HAV") and Hepatitis B ("HBV") were known to the medical community for some time. HAV is spread through the oral-fecal route and is rarely fatal. HBV is blood-borne and may also be sexually transmitted. It can produce violent illness for a prolonged period in its acute phase and may result in death. However, most people infected with HBV eliminate the virus from their system, although they continue to produce antibodies for the rest of their lives.

[14] During the late 1960s, an antigen associated with HBV was identified. This discovery led to the development of a test to identify donated blood contaminated with HBV. In 1972, the CRCS implemented this test to screen blood donations. It soon became apparent that post-transfusion hepatitis continued to occur, although much less frequently. In 1974, the existence of a third form of viral hepatitis, later referred to as Non-A Non-B Hepatitis ("NANBH") was postulated.

[15] This third viral form of hepatitis became identified as Hepatitis C ("HCV") in 1988. Its particular features are as follows:

> (a) transmission through the blood supply if HCV infected donors are unaware of their infected condition and if there is no, or no effective, donor screening;
>
> (b) an incubation period of 15 to 150 days;
>
> (c) a long latency period during which a person infected may transmit the virus to others through blood and blood products, or sexually, or from mother to fetus; and

(d) no known cure.

[16] The claims in these actions are founded on the decision by the CRCS, and its overseers the CBC, not to conduct testing of blood donations to the Canadian blood supply after a "surrogate" test for HCV became available and had been put into widespread use in the United States.

[17] In a surrogate test a donor blood sample is tested for the presence of substances which are associated with the disease. The surrogate test is an indirect method of identifying in a blood sample the likelihood of an infection that cannot be identified directly because no specific test exists. During the class period, there were two surrogate tests capable of being used to identify the blood donors suspected of being infected with HCV, namely, a test to measure the ALT enzyme in a donor's blood and a test to detect the anti-HBc, a marker of HBV, in the blood.

[18] The ALT enzyme test was useful because it highlights inflammation of the liver. There is an increased level of ALT enzymes in the blood when a liver is inflamed. The test is not specific for any one liver disease but rather indicates inflammation from any cause. Elevated ALT enzymes are a marker of liver dysfunction which is often associated with HCV.

[19] The anti-HBc test detects exposure to HBV and is relevant to the detection of HCV because of the assumption that a person exposed to HBV is more likely than normal to have been exposed to HCV, since both viruses are blood-borne and because the populations with higher

rates of seroprevalence were believed to be similar.

[20] The surrogate tests were subjected to various studies in the United States. Among other aspects, the studies analyzed the efficacy of each test in preventing NANBH post-transfusion infection and the extent to which the rejection of blood donations would be increased. The early results of the studies did not persuade the agencies responsible for blood banks in the U.S. to implement surrogate testing as a matter of course. However, certain individuals, including Dr. Harvey Alter, a leading U.S. expert on HCV, began a campaign to have the U.S. blood agencies change their policies. In consequence, in April 1986 the largest U.S. blood agency decided that both surrogate tests should be implemented, and further, that the use of the tests would become a requirement of the agency's standard accreditation program in the future. This effectively made surrogate testing the national standard in the U.S. and by August 1, 1986, all or virtually all volunteer blood banks in the U.S. screened blood donors by using the ALT and anti-HBc tests.

[21] This course was not followed in Canada. Although there was some debate amongst the doctors involved with the CRCS, surrogate testing was not adopted. Rather, in 1984 a meeting was held at the CRCS during which a multi-centre study was proposed. The purpose of the study was to determine the incidence of NANBH in Canada. The CRCS blood centres proposed to take part in the study were those in Toronto, Montreal, Ottawa, Edmonton and Vancouver.

[22] Prior to the 1984 meeting however, Dr. Victor Feinman of Mount Sinai Hospital had already begun a study to determine the incidence of NANBH in those who had received blood

transfusions. This study had a significant limitation in that it did not measure the effectiveness of surrogate testing. Although the limitation was known to the CRCS, the medical directors agreed at their meeting on March 29-30, 1984 to review Dr. Feinman's research to determine whether the proposed CRCS multi-centre study was still required. Ultimately, the CRCS did not conduct the multi-centre study.

[23] The CRCS was aware of the American decision to implement surrogate testing in 1986 but opted instead to await a full assessment of the results of the Dr. Feinman study and the impact of testing for the Human-Immunodeficiency Virus ("HIV") and "self-designation" as possible surrogates to screen for NANBH.

[24] This decision was criticized by Dr. Alter. In an article published in the *Medical Post* in February 1988. Dr. Alter was quoted as stating that:

> "while the use of surrogate markers is far from ideal, the lack of any specific test to identify [NANBH], coupled with the serious chronic consequences of the disease, makes the need for these surrogate tests essential."

[25] The CRCS never implemented surrogate testing. In late 1988, HCV was isolated. The Chiron Corporation developed a test for anti-HCV for use by blood banks. In March 1990, the CRCS blood centres began implementing the anti-HCV test, and by June 30, 1990, all centres had implemented the test. Hence the class definitions stipulated in the two certification orders before this court, covers the period between January 1, 1986 and July 1, 1990, which corresponds to the interval between the widespread use of surrogate testing in the U.S. and the universal

adoption of the Chiron HCV test in Canada. The classes are described fully below.

The Claims

[26] It is alleged by the plaintiffs in both actions that had the defendants taken steps to implement the surrogate testing, the incidence of HCV infection from contaminated blood would have been reduced by as much as 75% during the class period. Consequently, they bring the actions on behalf of classes described as the Ontario Transfused Class and the Ontario Hemophiliac Class. The plaintiffs assert claims based in negligence, breach of fiduciary duty and strict liability in tort as against all of the defendants.

The Classes

[27] The Ontario Transfused Class is described as:

> (a) all persons who received blood collected by the CRCS contaminated with HCV during the Class Period and who are or were infected for the first time with HCV and who are:
>
> > (i) presently or formerly resident in Ontario and receive blood in Ontario and who are or were infected with post-transfusion HCV;
> >
> > (ii) resident in Ontario and received blood in any other Province or Territory of Canada other than Quebec and who are or were infected with post-transfusion HCV;
> >
> > (iii) resident elsewhere in Canada and received blood in Canada, other than in the Provinces of British Columbia and

Quebec, and who are or were infected with post-transfusion HCV;

(iv) resident outside Canada and received blood in any Province or Territory of Canada, other than in the Province of Quebec, and who are or were infected with post-transfusion HCV; and

(v) resident anywhere and received blood in Canada and who are or were infected with post-transfusion HCV and who are not included as class members in the British Columbia Transfused Class Action or the Quebec Transfused Class Action;

(b) the Spouse of a person referred to in subparagraph (a) who is or was infected with HCV by such person; and

(c) the child of a person referred to in subparagraph (a) or (b) who is or was infected with HCV by such person.

[28] The Ontario Hemophiliac Class is described as:

(a) all persons who have or had a congenital clotting factor defect or deficiency, including a defect or deficiency in Factors V, VII, VIII, IX, XI, XII, XIII or von Willebrand factor, and who received or took Blood (as defined in Section 1.01 of the Hemophiliac HCV Plan) during the Class Period and who are:

(i) presently or formerly a resident in Ontario and received or took Blood in Ontario and who are or were infected with HCV;

(ii) resident in Ontario and received or took Blood in any other Province or Territory of Canada other than Quebec and who are or were infected with HCV;

(iii) resident elsewhere in Canada and received or took Blood in Canada other than in the Provinces of British Columbia and Quebec. and who are or were infected with HCV;

(iv) resident outside Canada and received or took Blood in any Province or Territory in Canada, other than in the Province of Quebec, and who are or were infected with HCV; and

(v) resident anywhere and received or took Blood in Canada

and who are not included as class members in the British Columbia Hemophiliac Class Action or the Quebec Hemophiliac Class Action;

(b) the Spouse of a person referred to in subparagraph (a) who is or was infected with HCV by such person; and

(c) the child of a person referred to subparagraph (a) or (b) who is or was infected with HCV by such person.

[29] In addition in each of the actions, there is a "Family" class described, in the Ontario Transfused Class, as follows:

(a) the Spouse, child, grandchild, parent, grandparent or sibling of an Ontario Transfused Class Member;

(b) the spouse of a child, grandchild, parent or grandparent of an Ontario Transfused Class Member;

(c) a former Spouse of an Ontario Transfused Class Member;

(d) a child or other lineal descendant of a grandchild of an Ontario Transfused Class Member;

(e) a person of the opposite sex to an Ontario Transfused Class Member who cohabitated for a period of at least one year with that Class Member immediately before his or her death;

(f) a person of the opposite sex to an Ontario Transfused Class Member who was cohabitating with that Class Member at the date of his or her death and to whom that Class Member was providing support or was under a legal obligation to provide support on the date of his or her death; and

(g) any other person to whom an Ontario Transfused Class Member was providing support for a period of at least three years immediately prior to his or her death.

There is a similarly described Family Class in the Hemophiliac Action.

The Proposed Settlement

[30] The parties have presented a comprehensive package to the court. Not only does it pertain to these actions, but it is also intended to be a Pan-Canadian agreement to settle the simultaneous class proceedings before the courts in Quebec and British Columbia. The settlement will not become final and binding until it is approved by courts in all three provinces. It consists of a Settlement Agreement, a Funding Agreement and Plans for distribution of the settlement funds in the Transfused Action and the Hemophiliac Action.

[31] The Settlement Agreement creates the following two Plans:

> (1) the Transfused HCV Plan to compensate persons who are or were infected with HCV through a blood transfusion received in Canada in the Class Period, their secondarily-infected Spouses and children and their other family members; and
>
> (2) the Hemophiliac HCV Plan to compensate hemophiliacs who received or took blood or blood products in Canada in the Class Period and who are or were infected with HCV, their secondarily-infected Spouses and children and their other family members.

[32] To fund the Agreement, the federal, provincial and territorial governments have promised to pay the settlement amount of $1,118,000,000 plus interest accruing from April 1, 1998. This will total approximately $1,207,000,000 as of September 30, 1999.

[33] The Funding Agreement contemplates the creation of a Trust Fund on the following basis:

(i) a payment by the Federal Government to the Trust Fund, on the date when the last judgment or order approving the settlement of the Class Actions becomes final, of 8/11ths of the settlement amount, being the sum of approximately $877,818,181, subject to adjustments plus interest accruing after September 30, 1999 to the date of payment; and

(ii) a promise by each Provincial and Territorial Government to pay a portion of its share of the 3/11ths of the unpaid balance of the settlement amount as may be requested from time to time until the outstanding unpaid balance of the settlement amount together with interest accruing has been paid in full.

[34] The Governments have agreed that no income taxes will be payable on the income earned by the Trust, thereby adding, according to the calculations submitted to the court, a present value of about $357,000,000 to the settlement amount.

[35] The Agreement provides that the following claims and expenses will be paid from the Trust Fund:

(a) persons who qualify in accordance with the provisions of the Transfused HCV Plan;

(b) persons who qualify in accordance with the provisions of the Hemophiliac HCV Plan;

(c) spouses and children secondarily-infected with HIV to a maximum of 240 who qualify pursuant to the Program established by the Governments (which is not subject to Court approval);

(d) final judgments or Court approved settlements payable by any FPT Government to a Class Member or Family Class Member who opts out of one of the Class Actions or is not bound by the provisions of the Agreement or a person who claims over or brings a third-party claim in respect of the Class Member's receiving or taking of blood or blood products in Canada in the Class Period and his or her infection with HCV, plus one-third of Court-approved defence costs;

(e) subject to the Courts' approval, the costs of administering the Plans, including the costs of the persons hereafter enumerated to be appointed to perform various functions under the Agreement;

(f) subject to the Courts' approval, the costs of administering the HIV Program, which Program administration costs, in the aggregate, may not exceed $2,000,000; and

(g) subject to Court approval, fees, disbursements, costs, GST and other applicable taxes of Class Action Counsel.

Class Members Surviving as of January 1, 1999

[36] Other than the payments to the HIV sufferers, which I will deal with in greater detail below, the plans contemplate that compensation to the class members who were alive as of January 1, 1999, will be paid according to the severity of the medical condition of each class member. All class members who qualify as HCV infected persons are entitled to a fixed payment as compensation for pain and suffering and loss of amenities of life based upon the stage of his or her medical condition at the time of qualification under the Plan. However, the class member will be subsequently entitled to additional compensation if and when his or her medical condition deteriorates to a medical condition described at a higher compensation level. This compensation ranges from a single payment of $10,000, for a person who has cleared the disease and only carries the HCV antibody, to payments totaling $225,000 for a person who has decompensation of the liver or a similar medical condition.

[37] The compensation ranges are described in the Agreement as "Levels". In addition to the payments for loss of amenities, class members with conditions described as being at

compensation Level 3 or a higher compensation Level (4 or above), and whose HCV caused loss of income or inability to perform his or her household duties, will be entitled to compensation for loss of income or loss of services in the home.

[38] The levels, and attendant compensation, for class members are described as follows:

(i) Level 1

Qualification	Compensation
A blood test demonstrates that the HCV antibody is present in the blood of a class member.	A lump sum payment of $10,000 plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(ii) Level 2

Qualification	Compensation
A polymerase chain reaction test (PCR) demonstrates that HCV is present in the blood of a class member.	Cumulative compensation of $30,000 which comprises the $10,000 payment at level 1, plus a payment of $15,000 immediately and another $5,000 when the court determines that the Fund is sufficient to do so, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(iii) Level 3

Qualification	Compensation
If a class member develops non-bridging fibrosis, or receives compensable drug therapy (i.e. Interferon or Ribavirin), or	Option 1 — $60,000 comprised of the level 1 and 2 payments plus an additional $30,000

meets a protocol for HCV compensable treatment regardless of whether the treatment is taken, then the class member qualifies for Level 3 benefits.	Option 2 — $30,000 from the Level 1 and 2 benefits, and if the additional $30,000 from Option 1 is waived, compensation for loss of income or loss of services in the home, subject to a threshold qualification. In addition, at this level, the class member is entitled to an additional $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(iv) Level 4

Qualification	Compensation
If a class member develops bridging fibrosis, he or she qualifies as a Level 4 claimant	There is no further fixed payment beyond that of Level 3 at this level. In addition to those previously defined benefits, the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(v) Level 5

Qualification	Compensation
A class member who develops (a)cirrhosis; (b) unresponsive porphyria cutanea tarda which is causing significant disfigurement and disability; (c) unresponsive thrombocytopenia (low platelets) which result in certain other conditions; or (d)	$125,000 which consists of the prior $60,000, if the claimant elected Option 1 at Level 3, plus an additional $65,000 plus the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of

glomerulonephritis not requiring dialysis, he or she qualifies as a Level 5 claimant.	completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(vi) Level 6

Qualification	Compensation
If a class member receives a liver transplant, or develops: (a) decompensation of the liver; (b) hepatocellular cancer; (c) B-cell lymphoma; (d) symptomatic mixed cryoglobullinemia; (e) glomerulonephritis requiring dialysis; or (f) renal failure, he or she qualifies as a Level 6 claimant.	$225,000 which consists of the $125,000 available at the prior levels plus an additional $100,000 plus the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses. The claimant is also entitled to reimbursement for costs of care up to $50,000 per year.

[39] There are some significant "holdbacks" of compensation at certain levels. As set out in the table above, a claimant who is entitled to the $20,000 compensation payment at level 2 will initially be paid $15,000 while $5,000 will be held back in the Fund. If satisfied that there is sufficient money in the Fund, the Courts may then declare that the holdback shall be removed in accordance with Section 10.01(1)(i) of the Agreement and Section 7.03 of the Plans. Claimants with monies held back will then receive the holdback amount with interest at the prime rate from the date they first became entitled to the payment at Level 2. In addition, any claimant that qualifies for income replacement at Level 4 or higher will be subjected to a holdback of 30% of the compensation amount. This holdback may be removed, and the compensation restored, on the

same terms as the Level 2 payment holdback.

[40] There is a further limitation with respect to income, namely, that the maximum amount subject to replacement has been set at $75,000 annually. Again this limitation is subject to the court's review. The court may increase the limit on income, after the holdbacks have been removed, and the held benefits restored, if the Fund contains sufficient assets to do so.

[41] Payment of loss of income is made on a net basis after deductions for income tax that would have been payable on earned income and after deduction of all collateral benefits received by the Class Member. Loss of income payments cease upon a Class Member reaching age 65. A claim for the loss of services in the home may be made for the lifetime of the Class Member.

Class Members Dying Before January 1, 1999

[42] If a Class Member who died before January 1, 1999, would have qualified as a HCV infected person but for the death, and if his or her death was caused by HCV, compensation will be paid on the following terms:

> (a) the estate will be entitled to receive reimbursement for uninsured funeral expenses to a maximum of $5,000 and a fixed payment of $50,000, while approved family members will be entitled to compensation for loss of the deceased's guidance, care and companionship on the scale set out in the chart at paragraph 82 below and approved dependants may be entitled to compensation for their loss of support from the deceased or for the loss of the deceased's services in the home ("Option 1"); or

(b) at the joint election of the estate and the approved family members and dependants of the deceased, the estate will be entitled to reimbursement for uninsured funeral expenses to a maximum of $5,000, and the estate and the approved family members and dependants will be jointly entitled to compensation of $120,000 in full settlement of all of their claims ("Option 2").

[43] Under the Plans when a deceased HCV infected person's death is caused by HCV, the approved dependants may be entitled to claim for loss of support until such time as the deceased would have reached age 65 but for his death.

[44] Payments for loss of support are made on a net basis after deduction of 30% for the personal living expenses of the deceased and after deduction of any pension benefits from CPP received by the dependants.

[45] The same or similar holdbacks or limits will initially be imposed on the claim by dependants for loss of support under the Plans as are imposed on a loss of income claim. The $75,000 cap on pre-claim gross income will be applied in the calculation of support and only 70% of the annual loss of support will be paid. If the courts determine that the Trust Fund is sufficient and vary or remove the holdbacks or limits, the dependants will receive the holdbacks, or the portion the courts direct, with interest from the time when loss of support was calculated subject to the limit.

[46] Failing agreement among the approved dependants on the allocation of loss of support between them, the Administrator will allocate loss of support based on the extent of support

received by each of the dependants prior to the death of the HCV infected person.

Class Members Cross-Infected with HIV.

[47] Notwithstanding any of the provisions of the Hemophiliac HCV Plan, a primarily-infected hemophiliac who is also infected with HIV may elect to be paid $50,000 in full satisfaction of all of his or her claims and those of his or her family members and dependants.

[48] Persons infected with HCV and secondarily-infected with HIV who qualify under a Plan (or, where the person is deceased, the estate and his or her approved family members and dependants) may not receive compensation under the Plan until entitlement exceeds the $240,000 entitlement under the Program after which they will be entitled to receive any compensation payable under the Plan in excess of $240,000.

[49] Under the Hemophiliac HCV Plan, the estate, family members and dependants of a primarily-infected hemophiliac who was cross-infected with HIV and who died before January 1, 1999 may elect to receive a payment of $72,000 in full satisfaction of their claims.

The Family Class Claimants

[50] Each approved family class member of a qualified HCV infected person whose death was caused by HCV is entitled to be paid the amount set out below for loss of the deceased's

guidance, care and companionship:

Relationship	Compensation
Spouse	$25,000
Child under 21 at time of death of class member	$15,000
Child over 21 at time of death of class member	$5,000
Parent or sibling	$5,000
Grandparent or Grandchild	$500

[51] If a loss of support claim is not payable in respect of the death of a HCV infected person whose death was caused by his or her infection with HCV, but the approved dependants resided with that person at the time of the death, then these dependants are entitled to be compensated for the loss of any services that the HCV infected person provided in the home at the rate of $12 per hour to a maximum of 20 hours per week.

[52] The Agreement and/or the Plans also provide that:

(a) all compensation payments to claimants who live in Canada will be tax free;

(b) compensation payments will be indexed annually to protect against inflation;

(c) compensation payments other than payments for loss of income will not affect social benefits currently being received by claimants;

(d) life insurance payments received by or on behalf of claimants will not be taken into account for any purposes whatsoever under the Plans; and

(e) no subrogation payments will be paid directly or indirectly.

The Funding Calculations

[53] Typically in settlements in personal injury cases, where payments are to be made on a periodic basis over an extended period of time, lump sum amounts are set aside to fund the extended liabilities. The amount set aside is based on a calculation which determines the "present value" of the liability. The present value is the amount needed immediately to produce payments in the agreed value over the agreed time. This calculation requires factoring in the effects of inflation, the return on the investment of the lump sum amount and any income or other taxes which might have to be paid on the award or the income it generates. Dealing with this issue in a single victim case may be relatively straightforward. Making an accurate determination in a class proceeding with a multitude of claimants suffering a broad range of damages is a complex matter.

[54] Class counsel retained the actuarial firm of Eckler Partners Ltd. to calculate the present value of the liabilities for the benefits set out in the settlement. The calculations performed by Eckler were based on a natural history model of HCV constructed by the Canadian Association for the Study of the Liver ("CASL") at the request of the parties. As stated in the Eckler report at p. 3, "the results from the [CASL] study form the basis of our assumptions regarding the development of the various medical outcomes." However, the Eckler report also notes that in instances where the study was lacking in information. certain extensions to some of the

probabilities were supplied by Dr. Murray Krahn who led the study. In certain other situations, additional or alternative assumptions were provided by class counsel.

[55] The class in the Transfused Action is comprised of those persons who received blood transfusions during the class period and are either still surviving or have died from a HCV related cause. The CASL study indicates that the probable number of persons infected with HCV through blood transfusion in the class period, the "cohort" as it is referred to in the study, is 15,707 persons. The study also estimates the rates of survival of each infected person. From these estimates, Eckler projects that the cohort as of January 1, 1999 is 8,104 persons. Of those who have died in the intervening time, 76 are projected to be HCV related deaths and thus eligible for the death benefits under the settlement.

[56] In the case of the Hemophiliac class, the added factor of cross-infection with HIV, and the provisions in the plan dealing with this factor, require some additional considerations. Eckler was asked to make the following assumptions based primarily on the evidence of Dr. Irwin Walker:

> (a) the Hemophiliac cohort size is approximately 1645 persons
>
> (b) 15 singularly infected and 340 co-infected members of this cohort have died prior to January 1, 1999; the 15 singularly infected and 15 of those co-infected will establish HCV as the cause of death and claim under the regular death provisions (but there is no $120,000 option in this plan); the remaining 325 co-infected will take the $72,000 option.
>
> (c) a further 300 co-infected members are alive at January 1, 1999; of these, 80%, i.e. 240, will take the $50,000 option;

(d) 990 singularly infected hemophiliacs are alive at January 1, 1999

(e) the remaining 60 co-infected and the 990 singularly infected hemophiliacs will claim under the regular provisions and should be modeled in the same way as the transfused persons, i.e. apply the same age and sex profiles, and the same medical, mortality and other assumptions as for the transfused group, except that the 60 co-infected claimants will not have any losses in respect of income.

[57] Because of the structure of this agreement, Eckler was not required to consider the impact of income or other taxes on the investment returns available from the Fund. With respect to the rate of growth of the Fund, Eckler states at p. 10 that:

> A precise present value calculation would require a formula incorporating the gross rate of interest and the rate of inflation as separate parameters. However, virtually the same result will flow from a simpler formula where the future payments are discounted at a net rate equal to the excess of the gross rate of interest over the assumed rate of inflation.

Eckler calculates the annual rate of growth of the Fund will be 3.4% per year on this basis. This is referred to as the "net discount rate".

[58] There is one other calculation that is worthy of particular note. In determining the requirements to fund the income replacement benefits set out in the settlement, Eckler used the average industrial aggregate earnings rate in Canada estimated for 1999. From this figure, income taxes and other ordinary deductions were made to arrive at a "pre-claim net income". Then an assumption is made that the class members claiming income compensation will have other earnings post-claim that will average 40% of the pre-claim amount. The 60% remaining loss, in dollars expressed as $14,500, multiplied by the number of expected claimants, is the amount for which funding is required. Eckler points out candidly at p. 20 that:

> [in regard to the assumed average of Post-claim Net Income]...we should bring to your attention that without any real choice, the foregoing assumed level of 40% was still based to a large extent on anecdotal input and our intuitive judgement on this matter rather than on rigourous scientific studies which are simply not available at this time.

There are other assumptions and estimates which will be dealt with in greater detail below.

[59] The Eckler conclusion is that if the settlement benefits, including holdbacks, and the other liabilities were to be paid out of the Fund, there is a present value deficit of $58,533,000. Prior to the payment of holdbacks, the Fund would have a surplus of $34,173,000.

The Thalassemia Victims

[60] Prior to analyzing the settlement, I turn to the concerns advanced by The Thalassemia Foundation of Canada. The organization raises the objection that the plan contains a fundamental unfairness as it relates to claims requirements for members of the class who suffer from Thalassemia.

[61] Thalassemia, also known as Mediterranean Anemia or Cooley's Anemia, is an inherited form of anemia in which affected individuals are unable to make normal hemoglobin, the oxygen carrying protein of the red blood cell. Mutations of the hemoglobin genes are inherited. Persons with a thalassemia mutation in one gene are known as carriers or are said to have thalassemia minor. The severe form of thalassemia, thalassemia major, occurs when a child inherits two

mutated genes, one from each parent. Children born with thalassemia major usually develop the symptoms of severe anemia within the first year of life. Lacking the ability to produce normal adult hemoglobin, children with thalassemia major are chronically fatigued; they fail to thrive; sexual maturation is delayed and they do not grow normally. Prolonged anemia causes bone deformities and eventually will lead to death, usually by their fifth birthday.

[62] The only treatment to combat thalassemia major is regular transfusions of red blood cells. Persons with thalassemia major receive 15 cubic centimeters of washed red blood cells per kilogram of weight every 21 to 42 days for their lifetime. That is, a thalassemia major person weighing 60 kilograms (132 pounds) may receive 900 cubic centimeters of washed red blood cells each and every transfusion. Such a transfusion corresponds to four units of blood. Persons with thalassemia major have not been treated with pooled blood. Therefore, in each transfusion a thalassemia major person would receive blood from four different donors and over the course of a year would receive 70 units of blood from potentially 70 different donors. Over the course of the Class Period, a class member with thalassemia major might have received 315 units of blood from potentially 315 different donors.

[63] Over the past three decades, advances in scientific research have allowed persons with thalassemia major in Canada to live relatively normal lives. Life expectancy has been extended beyond the fourth decade of life, often with minimal physical symptoms. In Canada approximately 300 persons live with thalassemia major.

[64] Of the 147 transfused dependent thalassemia major patients currently being treated in the Haemoglobinopathy Program at the Hospital for Sick Children and Toronto General Hospital, 48 have tested positive using HCV antibody tests. Fifty-one percent of the population at TGH have tested positive; only 14% of the population of HSC have tested positive. The youngest of these persons was born in 1988; 9 of them are 13 years of age or older but less than 18 years of age; the balance are adults. Nine thalassemia major patients in the Haemoglobinopathy Program have died since HCV testing was available in 1991. Seven of these persons were HCV positive. The Foundation estimates that there are approximately 100 thalassemia major patients across Canada who are HCV positive.

[65] The unfairness pointed to by the Thalassemia Foundation is that class members suffering from thalassemia are included in the Transfused Class, and therefore must follow the procedures for that class in establishing entitlement. It is contended that this is fundamentally unfair to thalassemia victims because of the number of potential donors from whom each would have received blood or blood products. It is said that by analogy to the hemophiliac class, and the lesser burden of proof placed on members of that class, a similar accommodation is justified. I agree.

[66] This is a situation where it is appropriate to create a sub-class of thalassemia victims from the Transfused Class. Sub-classes are provided for in s. 5(2) of the *CPA* and the power to amend the certification order is contained in s. 8(3) of the *Act*. The settlement should be amended to apply the entitlement provisions in the Hemophiliac Plan *mutatis mutandis* to the Thalassemia

sub-class.

Law and Analysis

[67] Section 29(2) of the *CPA* provides that:

> A settlement of a class proceeding is not binding unless approved by the court.

[68] While the approval of the court is required to effect a settlement, there is no explicit provision in the *CPA* dealing with criteria to be applied by the court on a motion for approval. The test to be applied was, however, stated by Sharpe J. in *Dabbs v. Sun Life Assurance,* [1998] O.J. No. 1598 (Gen.Div.) (*Dabbs No.1)* at para. 9:

> ...the court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it.

[69] In the context of a class proceeding, this requires the court to determine whether the settlement is fair, reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular member. As this court stated in *Ontario New Home Warranty Program v. Chevron Chemical Co.*, [1999] O.J. No. 2245 (Sup.Ct.) at para. 89:

> The exercise of settlement approval does not lead the court to a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness.

[70] Sharpe J. stated in *Dabbs v. Sun Life Assurance* (1998), 40 O.R. (3d) 429 (Gen.Div.), aff'd 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. dismissed October 22, 1998, (*Dabbs No.*

2) at 440, that "reasonableness allows for a range of possible resolutions." I agree. The court must remain flexible when presented with settlement proposals for approval. However, the reasonableness of any settlement depends on the factual matrix of the proceeding. Hence, the "range of reasonableness" is not a static valuation with an arbitrary application to every class proceeding, but rather it is an objective standard which allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation.

[71] Generally, in determining whether a settlement is "fair, reasonable and in the best interests of the class as a whole", courts in Ontario and British Columbia have reviewed proposed class proceeding settlements on the basis of the following factors:

1. Likelihood of recovery, or likelihood of success;
2. Amount and nature of discovery evidence;
3. Settlement terms and conditions;
4. Recommendation and experience of counsel;
5. Future expense and likely duration of litigation;
6. Recommendation of neutral parties if any;
7. Number of objectors and nature of objections; and
8. The presence of good faith and the absence of collusion.

See *Dabbs No.1* at para. 13, *Haney Iron Works Ltd. v. Manufacturers Life Insurance Co.* (1998), 169 D.L.R. (4th) 565 (B.C.S.C.) at 571. See also Conte, *Newberg on Class Actions*, (3rd ed) (West Publishing) at para. 11.43.

[72] In addition to the foregoing, it seems to me that there are two other factors which might be considered in the settlement approval process: i) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation; and ii) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiation. These two additional factors go hand-in-glove and provide the court with insight into whether the bargaining was interest-based, that is reflective of the needs of the class members, and whether the parties were bargaining at equal or comparable strength. A reviewing court, in exercising its supervisory jurisdiction is, in this way, assisted in appreciating fully whether the concerns of the class have been adequately addressed by the settlement.

[73] However, the settlement approval exercise is not merely a mechanical *seriatim* application of each of the factors listed above. These factors are, and should be, a guide in the process and no more. Indeed. in a particular case, it is likely that one or more of the factors will have greater significance than others and should accordingly be attributed greater weight in the overall approval process.

[74] Morover, the court must take care to subject the settlement of a class proceeding to the proper level of scrutiny. As Sharpe J. stated in *Dabbs No. 2* at 439-440:

> A settlement of the kind under consideration here will affect a large number of individuals who are not before the court, and I am required to scrutinize the proposed settlement closely to ensure that it does not sell short the potential rights of those unrepresented parties. I agree with the thrust of Professor Watson's

> comments in "Is the Price Still Right? Class Proceedings in Ontario", a paper delivered at a CIAJ Conference in Toronto, October 1997, that class action settlements "must be seriously scrutinized by judges" and that they should be "viewed with some suspicion". On the other hand, 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.

[75] The preceding admonition is especially apt in the present circumstances. Class counsel described the agreement before the court as "the largest settlement in a personal injury action in Canadian history." The settlement is Pan-Canadian in scope, affects thousands of people, some of whom are thus far unaware that they are claimants, and is intended to be administered for over 80 years. It cannot be seriously contended that the tragedy at the core of these actions does not have a present and lasting impact on the class members and their families. While the resolution of the litigation is a noteworthy aim, an improvident settlement would have repercussions well into the future.

[76] Consequently, this is a case where the proposed settlement must receive the highest degree of court scrutiny. As stated in the *Manual for Complex Litigation*, 3rd Ed. (Federal Judicial Centre: West Publishing, 1995) at 238:

> Although settlement is favoured, court review must not be perfunctory; the dynamics of class action settlement may lead the negotiating parties— even those with the best intentions— to give insufficient weight to the interests of at least some class members. *The court's responsibility is particularly weighty when reviewing a settlement involving a non-opt-out class or future claimants.* (Emphasis added.)

[77] The court has been assisted in scrutinizing the proposed settlement by the submissions of several intervenors and objectors. I note that some of the submissions, as acknowledged by

counsel for the objectors, raised social and political concerns about the settlement. Without in any way detracting from the importance of these objections, it must be remembered that these matters have come before the court framed as class action lawsuits. The parties have chosen to settle the issues on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the classes as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review of the settlement.

[78] However, although there may have been social or political undertones to many of the objections, legal issues raised by those objections, either directly or peripherally, are properly considered by the court in reviewing the settlement. Counsel for the objectors described the legal issues raised, in broad terms, as objections to:

(a) the adequacy of the total value of the settlement amount;

(b) the extent of compensation provided through the settlement;

(c) the sufficiency of the settlement Fund to provide the proposed compensation;

(d) the reversion of any surplus;

(e) the costs of administering the Plans; and

(f) the claims process applicable to Thalassemia victims.

I have dealt with the objection regarding the Thalassemia victims above. The balance of these objections will be addressed in the reasons which follow.

[79] It is well established that settlements need not achieve a standard of perfection. Indeed, in this litigation, crafting a perfect settlement would require an omniscient wisdom to which neither this court nor the parties have ready recourse. The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. The *CPA* mandates that class members retain, for a certain time, the right to opt out of a class proceeding. This ensures an element of control by allowing a claimant to proceed individually with a view to obtaining a settlement or judgment that is tailored more to the individual's circumstances. In this case, there is the added advantage in that a class member will have the choice to opt out while in full knowledge of the compensation otherwise available by remaining a member of the class.

[80] This settlement must be reviewed on an objective standard, taking into account the need to provide compensation for all of the class members while at the same time recognizing the inherent difficulty in crafting a universally satisfactory settlement for a disparate group. In other words, the question is does the settlement provide a reasonable alternative for those Class Members who do not wish to proceed to trial?

[81] Counsel for the class and the Crown defendants urged this court to consider the question on the basis of each class member's likely recovery in individual personal injury tort litigation. They contend that the benefits provided at each level are similar to the awards class members who are suffering physical manifestations of HCV infection approximating those set out in the different levels of the structure of this settlement would receive in individual litigation. In my

view, this approach is flawed in the present case.

[82] An award of damages in personal injury tort litigation is idiosyncratic and dependent on the individual plaintiff before the court. Here, although the settlement is structured to account for Class Members with differing medical conditions by establishing benefits on an ascending classification scheme, no allowances are made for the spectrum of damages which individual class members within each level of the structure may suffer. The settlement provides for compensation on a "one-size fits all" basis to all Class Members who are grouped at each level. However, it is apparent from the evidence before the court on this motion that the damages suffered as a result of HCV infection are not uniform, regardless of the degree of progression.

[83] The evidence of Dr. Frank Anderson, a leading practitioner working with HCV patients in Vancouver, describes in detail the uncertain prognosis that accompanies HCV and the often debilitating, but unevenly distributed, symptomology that can occur in connection with infection. He states:

> Once infected with HCV, a person will either clear HCV after an acute stage of develop chronic HCV infection. At present, the medical literature establishes that approximately 20-25% of all persons infected clear HCV within approximately one year of infection. Those persons will still test positive for the antibody and will probably do so for the rest of their lives, but will not test positive on a PCR test, nor will they experience any progressive liver disease due to HCV.
>
> Persons who do not clear the virus after the acute stage of the illness have chronic HCV. They may or may not develop progressive liver disease due to HCV, depending on the on the course HCV takes in their body and whether treatment subsequently achieves a sustained remission. A sustained remission means that the virus is not detectable in the blood 6 months after treatment, the liver enzymes are normal, and that on a liver biopsy, if one were done, there would be no

inflammation. Fibrosis in the liver is scar tissue caused by chronic inflammation, and as such is not reversible, and will remain even after therapy. It is also possible to spontaneously clear the virus after the acute phase of the illness but when this happens and why is not well understood. The number of patients spontaneously clearing the virus is small.

HCV causes inflammation of the liver cells. The level of inflammation varies among HCV patients. ... the inflammation may vary in intensity from time to time.

...

Inflammation and necrosis of liver cells results in scarring of liver tissue (fibrosis). Fibrosis also appears in various patterns in HCV patients... Fibrosis can stay the same or increase over time, but does not decrease, because although the liver can regenerate cells, it cannot reverse scarring. On average it takes approximately 20 years from point of infection with Hepatitis C until cirrhosis develops, and so on a scale of 1 to 4 units the best estimate is that the rate of fibrosis progression is 0.133 units per year.

...

Once a patient is cirrhotic, they are either a compensated cirrhotic, or a decompensated cirrhotic, depending on their liver function. In other words, the liver function may still be normal even though there is fibrosis since there may be enough viable liver cells remaining to maintain function. These persons would have compensated cirrhosis. If liver function fails the person would then have decompensated cirrhosis. The liver has very many functions and liver failure may involve some or many of these functions. Thus decompensation may present in a number of ways with a number of different signs and symptoms.

A compensated cirrhotic person has generally more than one third of the liver which is still free from fibrosis and whose liver can still function on a daily basis. They may have some of the symptoms discussed below, but they may also be asymptomatic.

Decompensated cirrhosis occurs when approximately 2/3 of the liver is compromised (functioning liver cells destroyed) and the liver is no longer able to perform one or more of its essential functions. It is diagnosed by the presence of one or more conditions which alone or in combination is life threatening without a transplant. This clinical stage of affairs is also referred to as liver failure or end stage liver disease. The manifestations of decompensation are discussed below. Once a person develops decompensation, life expectancy is short and they will generally die within approximately 2-3 years unless he or she receives a liver transplant.

Patients who progress to cirrhosis but not to decompensated cirrhosis may

> develop hepatocellular cancer ("HCC"). This is a cancer, which originates from liver cells, but the exact mechanism is uncertain. The simple occurrence of cirrhosis may predispose to HCC, but the virus itself may also stimulate the occurrence of liver cell cancer. Life expectancy after this stage is approximately 1-2 years.
>
> ...
>
> The symptoms of chronic HCV infection, prior to the disease progressing to cirrhosis or HCC include: fatigue, weight loss, upper right abdominal pain, mood disturbance, and tension and anxiety....
>
> Of those symptoms, fatigue is the most common, the most subjective and the most difficult to assess... There is also general consensus that the level of fatigue experienced by an individual infected with HCV does not correlate with liver enzyme levels, the viral level in the blood, or the degree of inflammation or fibrosis on biopsy. It is common for the degree of fatigue to fluctuate from time to time.

Dr. Anderson identifies some of the symptoms associated with cirrhosis which can include skin lesions, swelling of the legs, testicular atrophy in men, enlarged spleen and internal hemorrhaging. Decompensated cirrhosis symptomatic effects, he states, can include jaundice, hepatic encephalopathy, protein malnutrition, subacute bacterial peritonitis and circulatory and pulmonary changes. Dr. Anderson also states, in respect of his own patients, that "at least 50% of my HCV infected patients who have not progressed to decompensated cirrhosis or HCC are clinically asymptomatic."

[84] It is apparent, in light of Dr. Anderson's evidence, that in the absence of evidence of the individual damages sustained by class members, past precedents of damage awards in personal injury actions cannot be applied to this case to assess the reasonableness of the settlement for the class.

[85] This fact alone is not a fatal flaw. There have long been calls for reform of the "once and for all" lump sum awards that are usually provided in personal injury actions. As stated by Dickson J. in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2. S.C.R. 229 at 236:

> The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of time and money in the determination of fault and of damage is prodigal. The disparity resulting from lack of provision for victims who cannot establish fault must be disturbing. When it is determined that compensation is to be made, it is highly irrational to be tied to a lump sum system and a once-and-for-all award.
>
> The lump sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and expensive care and a long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of the continuing needs of the injured person and the cost of meeting those needs.

[86] The "once-and-for-all" lump sum award is the common form of compensation for damages in tort litigation. Although the award may be used to purchase annuities to provide a "structured" settlement, the successful claimant receives one sum of money that is determined to be proper compensation for all past and future losses. Of necessity, there is a great deal of speculation involved in determining the future losses. There is also the danger that the claimant's future losses will prove to be much greater than are contemplated by the award of damages received because of unforeseen problems or an inaccurate calculation of the probability of future contingent events. Thus even though the claimant is successful at trial, in effect he or she bears the risk that there may be long term losses in excess of those anticipated. This risk is especially pronounced when dealing with a disease or medical condition with an uncertain prognosis or

where the scientific knowledge is incomplete.

[87] The present settlement is imaginative in its provision for periodic subsequent claims should the class member's condition worsen. The underlying philosophy upon which the settlement structure is based is set forth in the factum of the plaintiffs in the Transfused Action. They state at para. 10 that:

> The Agreement departs from the common law requirement of a single, once-and-for-all lump sum assessment and instead establishes a system of periodic payments to Class Members and Family Class Members depending on the evolving severity of their medical condition and their needs.

[88] This forward-looking provision addresses the concern expressed by Dickson J. with respect to the uncertainty and unfairness of a once and for all settlement. Indeed, the objectors and intervenors acknowledge this in that they do not take issue with the benefit distribution structure of the settlement as much as they challenge the benefits provided at the levels within the structure.

[89] These objections mirror the submissions in support of the settlement, in that they are largely based on an analogy to a tort model compensation scheme. For the reasons already stated, this analogy is not appropriate because the proper application of the tort model of damages compensation would require an examination of each individual case. In the absence of an individualized examination, the reasonableness, or adequacy, of the settlement cannot be determined by a comparison to damages that would be obtained under the tort model. Rather the only basis on which the court can proceed in a review of this settlement is to consider whether

the total amount of compensation available represents a reasonable settlement, and further, whether those monies are distributed fairly and reasonably among the class members.

[90] The total value of the Pan-Canadian settlement is estimated to be $1.564 billion dollars. This is calculated as payment or obligation to pay by the federal, provincial and territorial governments in the an amount of $1.207 billion on September 30, 1999, plus the tax relief of $357 million over the expected administrative term of the settlement. This amount is intended to settle the class proceedings in Ontario, British Columbia and Quebec. The Ontario proceeding, as stated above, covers all of those class members in Canada other than those included in the actions in British Columbia and Quebec.

[91] Counsel for the plaintiffs and for the settling defendants made submissions to the court with respect the length and intensity of the negotiations leading up to the settlement. There was no challenge by any party as to the availability of any additional compensation. I am satisfied on the evidence that the negotiations achieved the maximum total funding that could be obtained short of trial.

[92] In applying the relevant factors set out above to the global settlement figure proposed, I am of the view that the most significant consideration is the substantial litigation risk of continuing to trial with these actions. The CRCS is the primary defendant. It is now involved in protracted insolvency proceedings. Even if the court-ordered stay of litigation proceedings against it were to be lifted, it is unlikely that there would be any meaningful assets available to

satisfy a judgment. Secondly, there is a real question as to the liability of the Crown defendants. Counsel for the plaintiffs candidly admit that there is a probability, which they estimate at 35%, that the Crown defendants would not be found liable at trial. Counsel for the federal government places the odds on the Crown successfully defending the actions somewhat higher at 50%. I note that none of the opposing intervenors or objectors challenge these estimates. In addition to the high risk of failure at trial, given the plethora of complex legal issues involved in the proceedings, there can be no question that the litigation would be lengthy, protracted and expensive, with a final result, after all appeals are exhausted, unlikely until years into the future.

[93] Moving to the remaining factors, although there have been no examinations for discovery, the extensive proceedings before the Krever Commission serve a similar purpose. The settlement is supported by the recommendation of experienced counsel as well as many of the intervenors. There is no suggestion of bad faith or collusion tainting the settlement. The support of the intervenors, particularly the Canadian Hemophilia Society which made submissions regarding the meetings held with class members, is indicative of communication between class counsel and the class members. Although, there were some objectors who raised concerns about the degree of communication with the Transfused Class members, these complaints were not strenuously pursued. Perhaps the most compelling evidence of the adequacy of the communications with the class members regarding the settlement is the relatively low number of objections presented to the court considering the size of the classes. Finally, counsel for all parties made submissions, which I accept, regarding the rigourous negotiations that resulted in the final settlement.

[94] In conclusion, I find that the global settlement represents a reasonable settlement when the significant and very real risks of litigation are taken into account.

[95] The next step in the analysis is to determine whether the monies available are allocated in such a way as to provide for a fair and reasonable distribution among the class members. In my view, as the settlement agreement is presently constituted, they are not. My concern lies with the provision dealing with opt out claimants. Under the agreement, if opt out claimants are successful in individual litigation, any award such a claimant receives will be satisfied out of the settlement Fund. While this has the potential of depleting the Fund to the detriment of the class members, thus rendering the settlement uncertain, the far greater concern is the risk of inequity that this creates in the settlement distribution. The *Manual for Complex Litigation* states at 239 that whether "claimants who are not members of the class are treated significantly differently" than members of the class is a factor that may "be taken into account in the determination of the settlement's fairness, adequacy and reasonableness...".

[96] In principle, there is nothing egregious about the payment of settlement funds to non-class members. Section 26(6) of the *CPA* provides the court with the discretion to sanction or direct payments to non-class members. In effect, the opt out provision reflects the intention of the defendants to settle all present and future litigation. This objective is not contrary to the scheme of the *CPA per se.* See, for example, the reasons of Brenner J. in *Sawatzky v. Societe Chirurgiale Instrumentarium Inc.* [1999] B.C.J. 1814 (S.C.), adopted by this court in *Bisignano*

v. La Corporation Instrumentarium Inc. (September 1, 1999, Court File No. 22404/96, unreported.)

[97] However, given that the settlement must be "fair, reasonable and in the best interests of the class", the court cannot sanction a provision which gives opt out claimants the potential for preferential treatment in respect of access to the Fund. The opt out provision as presently written has this potential effect where an opt out claimant either receives an award or settlement in excess of the benefits that he or she would have received had they not opted out and which must be satisfied out of the Fund. Alternatively, the preferential treatment could also occur where the opt out claimant receives an award similar to their entitlement under the settlement in quantum but without regard for the time phased payment structure of the settlement.

[98] In my view, where a defendant wishes to settle a class proceeding by providing a single Fund to deal with both the claims of the class members and the claims of individuals opting out of the settlement, the payments out of the Fund must be made on an equitable basis amongst all of the claimants. Fairness does not require that each claimant receive equal amounts but what cannot be countenanced is a situation where an opt out claimant who is similarly situated to a class member receives a preferential payment.

[99] The federal government argues that fairness ensues, even in the face of the different treatment, because the opt out claimant assumes the risk of individual litigation. I disagree. Because the defendants intend that all claims shall be satisfied from a single fund, individual

litigation by a claimant opting out of the class pits that claimant against the members of the class. The opt out claimant stands to benefit from success because he or she may achieve an award in excess of the benefits provided under the settlement. This works to the detriment of the class members by the reducing the total amount of the settlement. More importantly however, the benefits to the class members will not increase as a result of unsuccessful opt out claimants.

[100] In the instant case, fairness requires a modification to the opt out claimant provision of the settlement. The present opt out provision must be deleted and replaced with a provision that in the event of successful litigation by an opt out claimant, the defendants are entitled to indemnification from the Fund only to the extent that the claimant would have been entitled to claim from the Fund had he or she remained in the class. This must of necessity include the time phasing factor. Such a provision ensures fairness in that there is no prospect of preferential distribution from the Fund, nor will the class suffer any detrimental effect as a result of the outcome of the individual litigation. The change also provides a complete answer to the complaint that the current opt out provision renders the settlement uncertain. Similarly, the modification renders the provision for defence costs to be paid out of the Fund unnecessary and thus it must be deleted.

[101] Accordingly, the opt out provision of the settlement would not be an impediment to court approval with the modifications set out above.

[102] In my view, the remainder of distribution scheme is fair and reasonable with this

alteration to the opt out provision. It is beyond dispute that the compensation at any level will not be perfect, nor will it be tailored to individual cases but perfection is not the standard to be applied. The benefit levels are fair. More pointedly, fairness permeates the settlement structure in that each and every class member is provided an opportunity to make subsequent claims if his or her condition deteriorates. An added advantage is that there is a pre-determined, objective qualifying scheme so that class members will be able to readily assess their eligibility for additional benefits. Thus, while a claimant may not be perfectly compensated at any particular level, the edge to be gained by a scheme which terminates the litigation while avoiding the pitfalls of an imperfect, one-time-only lump sum settlement is compelling.

[103] In any event, the settlement structure also provides a reasonable basis for the distribution of the funds available. Class counsel described the distribution method as a "need not greed" system, where compensation is meant, within limits, to parallel the extent of the damages. There were few concerns raised about the compensation provided at the upper levels of the scheme. Rather, the majority of the objections centred on the benefits provided at Levels 1, 2 and 3. The damages suffered by those whose conditions fall within these Levels are clearly the most difficult to assess. This is particularly true in respect of those considered to be at Level 2. However, in order to provide for the subsequent claims, compromises must be made and in this case, I am of the view that the one chosen is reasonable.

[104] Regardless of the submissions made with respect to comparable awards under the tort model, it is clear from the record that the compensatory benefits assigned to claimants at

different levels were largely influenced by the total of the monies available for allocation. As stated in the CASL study at p. 3:

> At the request of the Federal government of Canada, provincial governments, and Hepatitis C claimants, i.e. individuals infected with hepatitis C virus during the period of 1986 to 1990, an impartial group, the Canadian Association for the Study of the Liver (CASL) was asked to construct a natural history model of Hepatitis C. *The intent of this effort was to generate a model that would be used by all parties, as guide to disbursing funds set aside to compensate patients infected with hepatitis C virus through blood transfusion.*

[105] Of necessity, the settlement cannot, within each broad category, deal with individual differences between victims. Rather it must be general in nature. In my view, the allocation of the monies available under the settlement is "fair, reasonable and in the best interests of the class as a whole."

[106] In making this determination, I have not ignored the submissions made by certain objectors and intervenors regarding the sufficiency of the Fund. They asserted that the apparent main advantage of this settlement, the ability to "claim time and time again" is largely illusory because the Fund may well be depleted by the time that the youngest members of the class make claims against it.

[107] I cannot accede to this submission. The Eckler report states that with the contemplated holdbacks of the lump sum at Level 2 and the income replacement at Level 4 and above, the Fund will have a surplus of $34,173,000. Admittedly, Eckler currently projects a deficit of

$58,533,000 if the holdbacks are released.

[108] However, the Eckler report contains numerous caveats regarding the various assumptions that have been made as a matter of necessity, including the following, which is stated in section 12.2:

> A considerable number of assumptions have been made in order to calculate the liabilities in this report. Where we have made the assumptions, we used our best efforts based on our understanding of the plan benefits; in general, where we have made simplifying assumptions or approximations, we have tried to err on the conservative side, i.e. increasing costs and liabilities. In many instances we have relied on counsel for the assumptions and understand that they have used their best efforts in making these. Nevertheless, the medical outcomes are very unclear - e.g. the CASL report indicates very wide ranges in its confidence intervals for the various probabilities it developed. There is substantial room for variation in the results. The differences will emerge in the ensuing years as more experience is obtained on the actual cohort size and characteristics of the infected claimants. These differences and the related actuarial assumptions will be re-examined at each periodic assessment of the Fund.

[109] Unfortunately, but not unexpectedly, the limitations of the underlying medical studies upon which Eckler has based its report require the use of assumptions. For example, the report prepared by Dr. Remis, dated July 6, 1999, states at p. 642:

> There are important limitations to the analyses presented here and, in particular, with the precision of the estimates of the number of HCV-infected recipients who are likely to qualify for benefits under the Class Action Settlement...
>
> The proportion of transfusion recipients who will ultimately be diagnosed is particularly important in this regard and has substantial impact on the final estimate. We used an estimate of 70% as the best case estimate for this proportion based on the BC experience but the actual proportion could be substantially

> different from this, depending on the type, extent and success of targeted notification activities that will be undertaken, especially in Ontario and Quebec. This could alter the ultimate number who eventually qualify for benefits by as much as 1,500 in either direction.

[110] The report of the CASL study states at p. 22:

> Our attempt to project the natural history of the 1986-1990 post transfusion HCV infected cohort has limitations. Perhaps foremost among these is our lack of understanding of the long-term prognosis of the disease. For periods beyond 25 years, projections remain particularly uncertain. The wide confidence intervals surrounding long-term projections highlight this uncertainty.
>
> Other key limitations are lack of applicability of these projections to children and special groups.

[111] The size of the cohort and the percentage of the cohort which will make claims against the Fund are critical assumptions. Significant errors in either assumption will have a dramatic impact on the sufficiency of the Fund. Recognizing this, Eckler has chosen to use the most conservative estimates from the information available. The cohort size has been estimated from the CASL study rather than other studies which estimate approximately 20% less surviving members. Furthermore, Eckler has calculated liabilities on the basis that 100% of the estimated cohort will make claims against the Fund.

[112] Class counsel urged the court to consider the empirical evidence of the "take-up rate" demonstrated in the completed class proceeding, *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (Gen.Div.), leave to appeal dismissed (1995), 129 D.L.R. (4th) 110 (Ont.Div.Ct.), to support a conclusion that the Fund is sufficient. In *Nantais*, all of the class members were known and accordingly received actual notice of the settlement. Seventy-two per

cent of the class chose to make claims, or "take-up" the settlement. It was contended that this amounted to strong evidence that less than one hundred per cent of the classes in these proceedings would take up this settlement. I cannot accept the analogy. While I agree that it is unlikely that the entire estimated cohort will take up the settlement, it is apparent from the caveats expressed in the reports provided to the court that the estimate of the cohort size may be understated by a significant number. Accordingly, for practical purposes, a less than one hundred per cent take up rate could well be counter-balanced by a concurrent miscalculation of the cohort size.

[113] Although I cannot accept the *Nantais* experience as applicable on this particular point, the Eckler report stands alone as the only and best evidence before the court from which to determine the sufficiency of the Fund. Eckler has recognized the deficiencies inherent in the information available by using the most conservative estimates throughout. This provides the court with a measure of added comfort. Not to be overlooked as well, the distribution of the Fund will be monitored by this court and the courts in Quebec and British Columbia, guided by periodically revised actuarial projections. In my view, the risk that the Fund will be completely depleted for latter claimants is minimal.

[114] Consequently, given the empirical evidence proffered by Dr. Anderson as to the asymptomatic potential of HCV infection, the conservative approach taken by Eckler in determining the likely claims against the Fund and the role of the courts in monitoring the ongoing distributions, I am of the view that the projected shortfall of $58,000,000 considered in

the context of the size of the overall settlement, is within acceptable limits. I find on the evidence before me, that the Fund is sufficient to provide the benefits and, thus, in this respect, the settlement is reasonable.

[115] I turn now to the area of concern raised by counsel for the intervenor the Hepatitis C Society of Canada (the "Society"), namely the provision that mandates reversion of the surplus of the Plans to the defendants. The Society contends that this provision *simpliciter* is repugnant to the basis on which this settlement is constructed. It argues that the benefit levels were established on the basis of the total monies available, rather than a negotiation of benefit levels *per se.* Thus, it states there is a risk that the Fund will not be sufficient to provide the stated benefits and further, that this risk lies entirely with the class members because the defendants have no obligation to supplement the Fund if it proves to be deficient for the intended purpose. Moreover, the Society argues that the use of conservative estimates in defining the benefit levels, although an attempt at ensuring sufficiency, has the ancillary negative effect of minimizing the benefits payable to each class member under the settlement. Therefore, the Society contends that a surplus, if any develops in the ongoing administration of the Fund, should be used to augment the benefits for the class members.

[116] The issue here is whether a reversion clause is appropriate in a settlement agreement in this class proceeding, and by extension, whether the inclusion of this clause is such that it would render the overall settlement unacceptable.

[117] It is important to frame the submission of the Society in the proper context. This is not a case where the question of entitlement to an existing surplus is presented. Indeed, given the deficit projected by the Eckler report, it is conjectural at this stage whether the Fund will ever generate a surplus. If the Fund accumulates assets over and above the current Eckler projections, they must first be directed toward eliminating the deficit so that the holdbacks may be released.

[118] The plan also provides that after the release of the holdbacks, the administrator may make an application to raise the $75,000 annual cap on income replacement if the Fund has sufficient assets to do so. It is only after these two areas of concern have been fully addressed that a surplus could be deemed to exist.

[119] The clause in issue does not, according to the interpretation given to the court by class counsel, permit the withdrawal by the defendants of any actuarial surplus that may be identified in the ongoing administration of the Fund. Rather, they state that it is intended that the remainder of the Fund, if any, revert to the defendants only after the Plans have been fully administered in the year 2080.

[120] Remainder provisions in trusts are not unusual. Further, I reiterate that it is, at this juncture, complete speculation as to whether a surplus, either ongoing or in a remainder amount, will exist in the Fund. However, accepting the submission of class counsel at face value, the reversion provision is anomalous in that it is neither in the best interests of the plaintiff classes nor in the interests of defendants. The period of administration of the Fund is 80 years. No party

took issue with class counsel's submission that the defendants are not entitled under the current language to withdraw any surplus in the Fund until this period expires. Likewise, there is no basis within the settlement agreement upon which the class members could assert any entitlement to access any surplus during the term of the agreement. Thus, any surplus would remain tied up, benefitting neither party during the entire 80 year term of the settlement.

[121] Quite apart from the question of tying up the surplus for this unreasonable period of time, there is the underlying question of whether in the context of this settlement, it is appropriate for the surplus to revert in its entirety to the defendants.

[122] The court is asked to approve the settlement even though the benefits are subject to fluctuation and regardless that the defendants are not required to make up any shortfall should the Fund prove deficient. This is so notwithstanding that the benefit levels are not perfect. It is therefore in keeping with the nature of the settlement and in the interests of consistency and fairness that some portion of a surplus may be applied to benefit class members.

[123] This is not to say that it is necessary, as the Society suggests, that in order to be in the best interests of the class members, any surplus must only be used to augment the benefits within the settlement agreement. There are a range of possible uses to which any surplus may be put so as to benefit the class as a whole without focusing on any particular class member or group of class members. This is in keeping with the *CPA* which provides in s. 26(4) that surplus funds may "be applied in any manner that may reasonably be expected to benefit class members, even

though the order does not provide for monetary relief to individual class members...". On the other hand, in the proper circumstances, it may not be beyond the realm of reasonableness to allow the defendants access to a surplus within the Fund prior to the expiration of the 80 year period.

[124] To attempt to determine the range of reasonable solutions at present, when the prospect of a surplus is uncertain at best, would be to pile speculation upon speculation. In the circumstances therefore, the only appropriate course, in my opinion, is to leave the question of the proper application of any surplus to the administrator of the Fund. The administrator may recommend to the court from time to time, based on facts, experience with the Fund and future considerations, that all or a portion of the surplus be applied for the benefit of the class members or that all or a portion be released to the defendants. In the alternative, the surplus may be retained within the Fund if the administrator determines that this is appropriate. Any option recommended by the administrator would, of course, be subject to requisite court approval. This approach is in the best interests of the class and creates no conflicts between class members. Moreover, it resolves the anomaly created by freezing any surplus for the duration of the administration of the settlement. If the present surplus reversion clause is altered to conform with the foregoing reasons, it would meet with the court's approval.

[125] There was an expressed concern as to the potential for depletion of the Fund through excessive administrative costs. The court shares this concern. However, the need for efficient access to the plan benefits for the class members and the associated costs that this entails must

also be recognized. This requires an ongoing balancing so as to keep administrative costs in line while at the same time providing a user friendly claims administration. The courts, in their supervisory role, will be vigilant in ensuring that the best interests of the class will be the predominant criterion.

Disposition

[126] In ordinary circumstances, the court must either approve or reject a settlement in its entirety. As stated by Sharpe J. in *Dabbs No. 1* at para. 10:

> It has often been observed that the court is asked to approve or reject a settlement and that it is not open to the court to rewrite or modify its terms; *Poulin v. Nadon*, [1950] O.R. 219 (C.A.) at 222-3.

[127] These proceedings, emanating from the blood tragedy, are novel and unusually complex. The parties have adverted to this in the settlement agreement which contemplates the necessity for changes of a non-material nature in Clause 12.01:

> This Agreement will not be effective unless and until it is approved by the Court in each of the Class Actions, and *if such approvals are not granted without any material differences therein*, this Agreement will be thereupon terminated and none of the Parties will be liable to any other Parties hereunder. (Emphasis added.)

[128] The global settlement submitted to the court for approval is within the range of reasonableness having regard for the risk inherent in carrying this matter through to trial.

Moreover, the levels of benefits ascribed within the settlement are acceptable having regard for the accessibility of the plan to successive claims in the event of a worsening of a class member's condition. This progressive approach outweighs any deficiencies which might exist in the levels of benefits.

[129] I am satisfied based on the Eckler report that the Fund is sufficient, within acceptable tolerances to provide the benefits stipulated. There are three areas which require modification, however, in order for the settlement to receive court approval. First, regarding access to the Fund by opt out claimants, the benefits provided from the Fund for an opt out claimant cannot exceed those available to a similarly injured class member who remains in the class. This modification is necessary for fairness and the certainty of the settlement. Secondly, the surplus provision must be altered so as to accord with these reasons. Thirdly, in the interests of fairness, a sub-class must be created for the thalassemia victims to take into account their special circumstances.

[130] The defendants have expressed their intention to be bound by the settlement if it receives court approval absent any material change. As stated, this reflects their acknowledgment of the complexity of the case, the scientific uncertainty surrounding the infections and the fact this settlement is crafted with a degree of improvisation.

[131] The changes to the settlement required to obtain the approval of this court are not material in nature when viewed from the perspective of the defendants. Accepting the assumed value of $10,000,000 attributed to the opt outs by class counsel, a figure strongly supported by

counsel for the defendants, the variation indicated is *de minimis* in the context of a $1.564 billion dollar settlement. The change required in respect of the surplus provision resolves the anomaly of tying up any surplus for the entire 80 year period of the administration of the settlement. In any event, given the projected $58,000,000 deficit, the question of a surplus is highly conjectural. The creation of the sub-class of thalassemia victims, in the context of the cohort size is equally *de minimis*. I am prepared to approve the settlement with these changes.

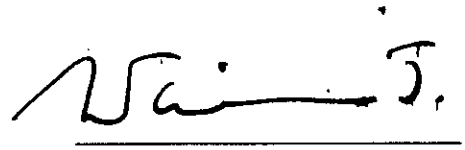
[132] However, should the parties to the agreement not share the view that these changes are not material in nature, they may consider the proposed changes as an indication of "areas of concern" within the meaning the words of Sharpe J. in *Dabbs No. 1* at para. 10:

> As a practical matter, it is within the power of the court to indicate areas of concern and afford the parties the opportunity to answer and address those concerns with changes to the settlement...

[133] The victims of the blood tragedy in Canada cannot be made whole by this settlement. No one can undo what has been done. This court is constrained in these settlement approval proceedings by its jurisdiction and the legal framework in which these proceedings are conducted. Thus, the settlement must be reviewed from the standpoint of its fairness, reasonableness and whether it is in the best interests of the class as a whole. The global settlement, its framework and the distribution of money within it, as well the adequacy of the funding to produce the specified benefits, with the modifications suggested in these reasons, are fair and reasonable. There are no absolutes for purposes of comparison, nor are there any assurances that the scheme will produce a perfect solution for each individual. However,

perfection is not the legal standard to be applied nor could it be achieved in crafting a settlement of this nature. All of these points considered, the settlement, with the required modifications, is in the best interests of the class as a whole.

I am obliged to counsel, the parties and the intervenors and especially to the individual objectors who took the time to either file a written objection or appear in person at the hearings.



WINKLER J.

Released: September 22, 1999

COURT FILE NO.: 98-CV-141369

SUPERIOR COURT OF JUSTICE

BETWEEN:

DIANNA LOUISE PARSONS et al.

Plaintiffs

-and-

THE CANADIAN RED CROSS SOCIETY et al.

Defendants

REASONS FOR DECISION

WINKLER J.

Released: September 22, 1999

59 p.

TAB 40

COURT FILE NO.: 00-CV-195587
DATE:200204

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
ALEXANDER TESLUK, MAYNARD SUTHERLAND, PATRICIA BAXTER, DALE BOZAK, and GLORIA ROUSSEAU	)	***Harvin Pitch*** and ***Kevin Sherkin***, for the Plaintiffs
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
	)	
BOOTS PHARMACEUTICAL PLC, BOOTS PHARMACEUTICALS, INC., BASF AG, BASF CORP., BASF INC., BASF CANADA INC., KNOLL PHARMACEUTICAL COMPANY, and KNOLL PHARMA INC.	)	***David Kent*** , for the Defendants ***Paul Harte***, for the Objector, Gloria Rousseau Paul Wizman, Objector, appearing in person
	)	
Defendants	)	
	)	
	)	
	)	**HEARD:** April 3, 2002

PROCEEDING UNDER THE ***CLASS PROCEEDINGS ACT, 1992***

REASONS FOR DECISION

WINKLER J.:

[1] This is a motion by the plaintiffs seeking certification of the action as a class proceeding, approval of the settlement agreement entered into January 21, 2002, approval of the retainer agreement between the plaintiffs and counsel concerning fees and disbursements and the determination of the fees and disbursements payable to counsel. In addition, the plaintiffs ask the court to award compensation to the Representative Plaintiffs and to fix the amount.

[2] The plaintiffs commenced this action under the *Class Proceedings Act, 1992*, S.O.1992 c.6, claiming damages for misrepresentation as a result of the marketing and sale of a pharmaceutical drug known as Synthroid which is prescribed in the treatment of a thyroid condition hypothyroidism. The plaintiff class includes all Canadians who have purchased Synthroid across Canada, other than in the provinces of Quebec and British Columbia, from January 1, 1991 to the date of any order of this court disposing of the claim. The claim has been settled by way of an agreement requiring the Defendants to pay $2.25 million dollars including costs and pre-judgment interest, which is to be paid by way of a Cy-pres distribution, subject to the approval of the court.

[3] The Representative plaintiffs all suffer from hypothyroidism, have purchased Synthroid during the class period and, as such, are members of the proposed class. Gloria Rousseau was a Representative Plaintiff but she withdrew on November 16, 2001. She is an objector in this proceeding having been granted leave to participate in the approval hearing by this court. Paul Wizman appeared in person and was granted objector status for purposes of the approval hearing.

[4] The proposed class includes approximately 520,000 persons as of the year 2002, having grown from about 75,000 in 1991.

[5] The Defendants manufactured and sold Synthroid during the class period. In 1995 the Defendant Knoll Pharmaceutical Company acquired the Defendant Boots Pharmaceutical Inc. and assumed all liabilities associated to the causes of action asserted here. The settling Defendants in this action are BASF Inc., BASF Corporation, BASF Canada Inc., Knoll Pharmaceutical Company and Knoll Pharma Inc. The business has since been divested by the settling defendants.

[6] Hypothyroidism is a disease caused when the thyroid gland does not function properly thus affecting the body's metabolic rate. If left untreated the disease can cause death. The drug prescribed for treatment is chemically known as levothyroxine sodium. The drug manufactured and sold by the Defendants for this purpose goes by the brand name of Synthroid. It, as well as various other brand name and generic drugs, have received the necessary regulatory approvals.

[7] The central allegation of the plaintiffs claim is that the Defendants are liable for supressing a study conducted in the United States by Betty Dong comparing Synthroid with other drugs and indicating that the other drugs were bioequivalent to Synthroid, while at the same time, conducting a marketing campaign stating that Synthroid was superior. The Defendants raise numerous defences to these assertions, including that the alternate products were not available in Canada, but most importantly, that evidence of usage since the publication was made available indicate that the absence or presence of the study had no effect in the marketplace. The period during which publication was denied was short. Finally, the Defendants state that the claims about misleading advertising are belied by the dramatic increase in Synthroid consumers since the Dong study was released.

[8] The Defendants consent to certification contingent upon the settlement being approved by the court. Notwithstanding the consent, I am satisfied that the five elements of the test for certification set out in s. 5 of the CPA are met in these circumstances. There is a cause of action, assuming the facts alleged by the plaintiffs are true and provable. The proposed class is acceptable. There is a common issue, namely, whether or not the Dong Study establishes the bioequivalency of Synthroid and other levothyroxine sodium drugs available in Canada. A class proceeding is the preferable procedure for resolving the common issue. The Representative Plaintiffs, as stated, are members of the class and have no disqualifying conflicts of interest.

[9] On or about January 21, 2002, the Representative Plaintiffs entered into a Settlement Agreement with the Settling Defendants. Pursuant to the terms of the agreement the Settling Defendants shall pay in settlement of the action the sum of $2.25 million, inclusive of the claim, pre-judgment interest and costs, plus certain incidental expenses covering notices and travel. The parties agreed that because of the large size of the class, some 520,000 members, the small dollar per claim damages, and the costs associated with distribution the proper approach was to distribute the aggregate amount of the settlement by way of a Cy-pres distribution to selected recipient organizations, hospitals and universities conducting research into hypothyroidism which will likely serve the interests of the class members. To this effect the agreement provides that after deduction of fees, disbursements and compensation for representative plaintiffs as determined by the court, the balance of the settlement funds shall be distributed, on an agreed formula, among the five recipients: the University Health Network; the Hospital for Sick Children; Dalhousie University and the University of Alberta; the Centre for Research into Women's Health; and the Thyroid Foundation of Canada. The monies are to be used for specific research projects, education and outreach having to do with thyroid disease.

[10] The test to be applied in determining whether a settlement ought to be approved is whether the settlement is, in all the circumstances, fair, reasonable and in the best interests of the class as a whole. The court does not look to the settlement with a view to perfection in every aspect, but rather whether it is in the best interests of the class as a whole as opposed to any individual member of the class. A list of criteria has been developed that the court may have regard to for this purpose, all of which will not necessarily be present in each case. These are guidelines only and not a rigid set of criteria for assessing the reasonableness of the settlement:

- likelihood of recovery
- amount and nature of discovery evidence
- settlement terms and conditions
- recommendation and experience of counsel
- future expenses and duration of the litigation
- recommendation of neutral parties, if any
- number of objectors and nature of objections
- the presence of good faith and the absence of collusion

- the degree and nature of communications with class members during the litigation
- information as to the dynamic of the negotiations of the settlement.

See: *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen.Div.); *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. Sup. Ct.).

[11] If this matter were to proceed to trial, the result would be far from certain in spite of the fact that other similar cases have settled in the United States and in Quebec. The evidence of the apparent lack of effect of the Dong Study once released would be very damaging to the plaintiff's case. The evidence is that the use of Synthroid increased rather than decreased after the study was released. Even if liability was established, the evidence is that the actual damages which could be assessed after a successful trial would appear to be in the neighborhood of the amount achieved in this settlement. Moreover, a trial would, given the nature of the case, be hard fought, expensive and lengthy. Thus in light of the risk and cost factors the settlement amount is in the ambit of reasonableness.

[12] There was no statement of defence delivered in the present case, nor examinations for discovery. The defendants raised numerous substantial defences to the claims asserted and shared certain expert reports with the plaintiffs counsel. In addition, class counsel conducted extensive investigative work particularly concerning damages.

[13] The settlement terms are comparable, if not superior to the Quebec settlement which received court approval on November 27, 2001,and from which there were no opt outs.

[14] The Representative Plaintiffs agree with the settlement terms. There are two objectors. Rousseau withdrew as a representative plaintiff and now objects to the settlement. She states that she does not object to the total amount of the settlement She does however, object to the distribution of the settlement, the quantum of legal fees, and compensation for the representative plaintiffs. She wishes the settlement funds to be distributed to the individual class members rather than by way of an aggregate Cy-pres distribution. However, given the amount of the individual claims, estimated to be from $30 to $70, and the class size of 520,000, and having regard for this courts experience with administration costs of class proceedings distributions, individual distribution of this settlement would be impracticable and not in the interests of the class as a whole. Costs would simply dissipate the settlement fund in large measure. The objector Paul Wizman, objects only on the ground that he wants the Cy-pres beneficiaries to include an advocacy association to assist consumers as to alternative drugs available. This would not be practicable nor achievable in the context of this settlement, no matter how desirable, and there is a federal agency within whose mandate this task falls.

[15] There does not appear to have been an overabundance of communication with class members in the present circumstances. The negotiation with the defendants was short and to the point, and was focused by the defendants. These facts are not fatal however, as

the Representative Plaintiffs provided information directed toward focusing the research objectives of the Cy-pres recipients. The fact that it was a short, focused negotiation casts no negative reflection on the quality of the negotiation contrary to the objector Rousseau's submission.

[16] I am satisfied that the settlement is fair, reasonable and in the best interests of the class as a whole. Where in all the circumstances an aggregate settlement recovery cannot be economically distributed to individual class members the court will approve a Cy-pres distribution to recognized organizations or institutions which will benefit class members. The CPA specifically contemplates such settlements in s.26(6). The selected recipients to which the settlement funds are directed by the present settlement meets this requirement. I adopt the reasoning of Cumming J. in *Alfresh Beverages Canada Corp. v. Hoechst AG*, [2002] O.J. 79 (Ont. Sup.Ct.) where he stated:

> 15 There are significant problems in identifying possible claimants below the manufacturing level. Hence, the monies allocated to intermediaries such as wholesalers and consumers are to be paid by a cy pres distribution to specified not-for-profit entities, in effect as surrogates for these categories of claimants, for the general, indirect benefit of such class members. The CPA provides the flexibility for this approach: see ss. 24 and 26.
> 16. Such a settlement and payments largely serve the important policy objective of general and specific deterrence of wrongful conduct through price fixing. That is, the private class action litigation bar functions as a regulator in the public interest for public policy objectives.

[17] The Retainer Agreement entered into between counsel and the Representative Plaintiffs provides for fees to be paid on a percentage basis of the total value of the settlement in the amount of 30% of the first $20 million plus disbursements. The CPA mandates in s. 32 that any retainer agreement and any fee or disbursement payable pursuant to such an agreement must receive court approval. The Act also provides in s. 33 that a solicitor and representative plaintiff may enter into an agreement that provides for payment only in the event of success, that is on a contingency basis. This approach is in furtherance of the goals of the Act in that it enables class members to obtain the services of the most experienced counsel who will work diligently on their behalf to obtain the best possible result for the class while at the same time assuming the risks involved in this type of litigation as well as the risk that they may not be paid. The total base fee sought by the counsel team for the plaintiffs is $276,925.50 up to February 28,2002. They estimate another $70,000 will be accrued for work after that date including these proceedings. The total, therefore, is $346,925.50. The CPA provides in s. 33 that class counsel may seek the courts approval for their fees to be increased by a multiplier. Courts have held that this incentive may take the form of a lump sum, percentage fee or a multiplier of the base fee. The total fee claimed is $616,822.00. The equivalates to 27.4% of the total settlement. On a risk-result premium multiplier basis, if the $70,000 yet to be billed is deducted for the purposes of the calculation, the total is 1.97 times the base fee. Total disbursements claimed are $50,000. The objector

Rousseau states that she does not object to the hours worked or hourly rates charged. She does however, object to the premium claimed by class counsel. I cannot accede to this objection. A multiplier of 1.97 is at the low end of the range that has received judicial sanction. The percentage of 27.4 is less than the fee stipulated in the retainer agreement. A higher percentage fee is justified in lower settlements, on the principle that as the amounts increase the percentage which would be justified should be less. The two factors that the court considers generally in determining the appropriate contingent fee are risk assumed and success achieved. See: *Gagne v. Silcorp Limited* (1998), 41 O.R. (3d) 417 (C.A.). Given the risk inherent in this litigation and the result achieved, I am satisfied that the fees are fair and reasonable. Accordingly, I approve the retainer agreement and the fees, disbursements and GST for a total of $710,000.

[18] The Representative Plaintiffs are requesting compensation for their work in completing the settlement. This claim is based primarily upon the work done by them in soliciting and evaluating the research projects to be funded by the Cy-pres payments. The contribution of the four individuals in question came largely after the settlement had been crafted. They carried on a dialogue with the physicians responsible for the proposed research projects to provide them with the patient's perspective on the issues that the researchers consider to be important to their research. This dialogue is intended to be of a continuing nature. The Representative Plaintiffs established a lay advisory panel, referred to as a research advisory panel, to provide input into the process of selecting worthwhile research areas. They met, established individual assignments, and panel objectives to examine, compare notes and provide recommendations to Dr. Daniel Drucker, who will administer the Thyroid Research Centre under the auspices of the University Health Network, comprised of the Toronto General Hospital, Western Hospital and Princess Margaret Hospital.

[19] Each of the four Representative Plaintiffs spent on average 100 hours of time for which they kept detailed records and for which they request $20,000 each based on an hourly rate of $200. The work performed by the Representative Plaintiffs other than that related directly to the research, consisted of meeting with counsel, reviewing options, providing instructions to counsel with respect to proposals and counter proposals and meeting amongst themselves to evaluate their position and develop strategy. These latter tasks are those expected to be undertaken by almost all representative plaintiffs. The vast majority of the work for which they seek to be remunerated has to do with the research based work that they performed.

[20] In *Windisman v. Toronto College Park Ltd.*, (1996), 3 C.P.C. (4th) 369 (Ont. Gen. Div.) Sharpe J. stated at para. 28:

> In my view, where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated on a quantum meruit basis for the time spent. I agree with the American commentators that such awards should not be seen as routine.

[21] In the present circumstances the work of the Representative Plaintiffs was unnecessary to the preparation or presentation of the case. Indeed, their work did not begin until after the settlement had been structured. Their work did not result in any monetary success for the class. If they were to be compensated in the manner requested they would be the only class members to receive any direct monetary compensation. The entire settlement is in the form of a Cy-pres distribution. The Representative Plaintiffs are seeking some $80,000 in total which is to be deducted from the settlement. By way of contrast, in *Windisman*, the representative plaintiff took an active part at all stages of the proceeding, the case would not have been brought except for her initiative, she assumed the risk of costs, and devoted an unusual amount of time communicating with class members and assisting counsel. The class members received a direct monetary benefit due in part to her efforts.

[22] While the work of the Representative Plaintiffs is commendable, to compensate them for their work when the settlement funds for the entire class are being donated to research without a single penny finding its way into the hands of a class member would be contrary to the precept of a Cy-pres distribution in particular and to a class proceeding generally. Compensation for representative plaintiffs must be awarded sparingly. The operative word is that the functions undertaken by the Representative Plaintiffs must be "necessary", such assistance must result in monetary success for the class and in any event, if granted, should not be in excess of an amount that would be purely compensatory on a *quantum meruit* basis. Otherwise, where a representative plaintiff benefits from the class proceeding to a greater extent than the class members, and such benefit is as a result of the extraneous compensation paid to the representative plaintiff rather than the damages suffered by him or her, there is an appearance of a conflict of interest between the representative plaintiff and the class members. A class proceeding cannot be seen to be a method by which persons can seek to receive personal gain over and above any damages or other remedy to which they would otherwise be entitled on the merits of their claims. This request is denied.

[23] An order will go certifying the proceeding as a class proceeding, approving the settlement, approving the retainer agreement, and fixing the class counsel fees and disbursements.

J.

WINKLER J.

Released: April 09 , 2002

COURT FILE NO.: 00-CV-195587
DATE:20020408

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ALEXANDER TESLUK, MAYNARD SUTHERLAND, PATRICIA BAXTER, DALE BOZAK, and GLORIA ROUSSEAU

Plaintiffs

- and -

BOOTS PHARMACEUTICAL PLC, BOOTS PHARMACEUTICALS, INC., BASF AG, BASF CORP., BASF INC., BASF CANADA INC., KNOLL PHARMACEUTICAL COMPANY, and KNOLL PHARMA INC.

Defendants

REASONS FOR DECISION

WINKLER J.

RELEASED: APRIL 09, 2002

8p

TAB 102

The Modern Cy-près Doctrine

RACHAEL P. MULHERON
BCom, LLB (Hons) (UQ), LLM (Adv) (UQ), DPhil (Oxon)
Solicitor of the Supreme Court of Queensland and of the
High Court of Australia

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

Summary of Contents

1

Introduction

A INTRODUCTION

1. The *Cy-près* Doctrine: Traditional Definition

TRADITIONALLY, AND STATED in its simplest of terms, the *cy-près* doctrine is the vehicle by which the intentions of a donor (settlor or testator) may be given effect 'as nearly as possible' in circumstances where literal compliance with the donor's stated intentions cannot be effectuated. Accordingly, in the law of charitable trusts, the *cy-près* doctrine states that where a donor has directed a gift of money or property to a charitable object (purpose), but has expressed a general charitable intention that is impossible or impractical to effect, the courts will allow the intention to be carried out in an approximate fashion.

In this, its most traditionalist context, the doctrine has received widespread judicial recognition and adoption. Indeed, from the materials explored in developing this book, it could be said that the doctrine has virtual universal acceptance, at least in common law jurisdictions. This generalisation is evidenced by the referenced materials from a number of widespread and culturally-diverse jurisdictions. By way of introduction and illustration, examples are taken of the following: England,[1] the United States,[2] Australia,[3] Canada,[4] New Zealand,[5] Ireland,[6] Scotland,[7] South Africa,[8] India,[9]

[1] Eg: *Oldham BC v A-G* [1993] Ch D 210 (CA) 221.

[2] Eg: *Evans v Abney*, 396 US 435, 437 (1970).

[3] Eg: *Royal North Shore Hospital of Sydney v A-G (NSW)* (1938) 60 CLR 396 (HCA) 415 (Latham CJ) 428 (Dixon J).

[4] Eg: *Nova Scotia (A-G) v Axford* (1885), 13 SCR 294.

[5] Eg: *Re Lushington (decd), Manukau County v Wynyard* [1964] NZLR 161 (CA) 172 (North J), 181 (McCarthy J).

[6] Eg: *The Representative Church Body v A-G* [1988] IR 19, 22.

[7] Eg: *Guild v Russell* 1987 SCLR 221 (Court of Session, Outer House) 222.

[8] Eg: *Ex p Wit Deep and Knights Central Joint Medical Society* 1918 WLD 13.

[9] Eg: *Merchant v Shaifuddin* [2000] 1 LRI 1028 (SC App), and no longer *only* applicable to testamentary gifts, since: *State of Uttar Pradesh v Bansi Dhar* [1974] AIR 1084 (SC). Cf the position when LA Sheridan and VTH Delany, *The Cy-près Doctrine* (Sweet & Maxwell, London, 1959) 24, and fn 44, was written.

Singapore,[10] Malaysia,[11] Hong Kong,[12] Northern Ireland,[13] and elsewhere.[14]

One of the most succinct, yet fulsome, definitions of the traditional *cy-près* doctrine is provided by the *American Restatement of the Law (Second), Trusts*:

> If property is given in trust to be applied to a charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general charitable intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.[15]

Such is the clarity of enunciation in this definition that it has been cited with approval by courts from New Zealand[16] to Canada,[17] and by leading academic charity texts.[18] (The definition has since been redrafted by the American Law Institute,[19] although not, in this author's opinion, for the better.[20]) Notably, current law dictionaries from several jurisdictions also define the doctrine singularly by reference to its charitable trusts genesis.[21]

2. Redefining the *Cy-près* Doctrine

Whilst historically (and 'historical' may be traced to 'Roman law') the doctrine has its roots, by and large, in the context of the law of charitable trusts, notably

[10] Eg: *Hwa Soo Chin v Personal Representatives of the Estate of Lim Soo Ban (decd)* 1994 2 SLR 657 (HC).

[11] Eg: *Tai Kien Luing v Tye Poh Sun* [1961] 1 MLJ 78 (OCJ Penang).

[12] Eg: *A G (Hong Kong) v Pon Yup Chong How Benevolent Assn* [1992] 24 HKCU 1 (SC).

[13] Eg: *In re Millar (decd); Millar v Ben Hardwick Memorial Fund* (NI Ch, 5 Sep 1997).

[14] Eg, in Jersey Islands: *Re the Greville Bathe Fund* [1973] IJJ 2513. Further, all jurisdictions which have implemented non-charitable purpose trust statutory regimes (considered in Chapter 6) have either expressly or impliedly acknowledged within those regimes that the charitable trusts *cy-près* doctrine comprises part of their body of law.

[15] American Law Institute, *Restatement of the Law (Second), Trusts* (ALI Publishers, St Paul Minn, 1959) Vol II, § 399, p 297.

[16] *Re Collier (decd)* [1998] 1 NZLR 81, 93.

[17] *Re Christian Brothers of Ireland in Canada* (2000), 47 OR (3d) 674 (CA) [71].

[18] H Picarda, *The Law and Practice Relating to Charities* (3rd edn, Butterworths, London, 1999) 295; LA Sheridan and VTH Delany, *The Cy-près Doctrine* (Sweet & Maxwell, London, 1959) 4. Also preferred as the definition of choice by: EL Fisch, *The Cy-près Doctrine in the United States* (Matthew Bender & Co, Albany NY, 1950) 2, citing the version in the *First Restatement* (1935) which was in similar terms.

[19] See: ALI, *Restatement of the Law (Third), Trusts (Tentative Draft No 3)* (ALI Publishers, St Paul Minn, 5 Mar 2001) § 67, p 189–90.

[20] The revised definition permits *cy-près* where 'it is or becomes wasteful to apply all of the property to the designated purpose'—too wide a trigger power, in this author's opinion. The triggers for the *cy-près* jurisdiction, in the Commonwealth context, are explored in ch 4, sections C and D.

[21] In Australia, eg: PE Nygh and P Butt (eds), *Australian Legal Dictionary* (Butterworths, Sydney, 1997) 316. In England, eg: JB Saunders (ed), *Words and Phrases Legally Defined* (Butterworths, London, 1988) vol 1, 394; D Greenberg and A Millbrook (eds), *Stroud's Judicial Dictionary of Words and Phrases* (6th edn, Sweet & Maxwell, London, 2000) 594. In the United States, eg; *Words and Phrases* (Permanent edn, West Publishing Co, St Paul Minn, 1968) vol 10A, 558–78; BA Garner (ed), *Black's Law Dictionary* (8th edn, West Group, St Paul Minn, 2004) 415.

3

Charitable Trusts: General Cy-près

A INTRODUCTION

SIMPLY STATED, THE general law doctrine of *cy-près* applies wherever a trust is used as a method for dedicating property to charity, and where that property cannot be applied in accordance with the intention of the donor. The doctrine enables the court (or, in England, most commonly the Charity Commissioners) to make a scheme for the application of the property for some other charitable purpose 'as near as possible' to the purpose designated by the donor. It will be recalled that, where the gift is made directly with no trust device employed, and the gift fails, the Crown must deal with the property under its prerogative *cy-près* jurisdiction. This chapter will proceed on the basis that the settlor or trustee has used a *trust* to dedicate the property to charity.

The general doctrine of *cy-près* requires that several issues be systematically examined (and in this order[1]). As a preliminary matter, the gift must be directed toward a charitable object (considered in Section B). Next, it must be manifest that the charitable object has become impossible or impracticable to carry out (the so-called *cy-près* triggers). The treatment of this issue under general law will be dealt with in Section C—somewhat briefly, for that aspect of the doctrine has been substantially reformed by statutory *cy-près*, the subject of study in the next chapter. As a further issue, in the case of *initial* failure of the charitable object which is impossible or impracticable to carry out, a general (as opposed to a specific) charitable intention must be proven (Section D). Lastly, some substituted scheme for application of the property which is 'as near as possible' to the donor's intention must be devised. The extent to which that standard, 'as near as possible', must be satisfied will be considered in Section E. Throughout this and the following chapter, emphasis will be placed upon English charitable trusts jurisprudence. However, to the extent that any significant developments in other Commonwealth jurisdictions such as Australia or in Canada differ or else provide a neat illustration of a legal point, these will be highlighted as and where appropriate.

[1] The order of treatment of the legal issues is very important to avoid doctrinal confusion, as international commentary has reiterated. Eg, in Australia: *Halsbury's Laws of Australia* (Butterworths, Sydney, 1991–) [looseleaf], '*Cy-près* Schemes', [75–705]; in England: M Chesterman, *Charities, Trusts and Social Welfare* (Weidenfeld and Nicolson, London, 1979) 277; in Canada: OLRC, *Report on the Law of Charities* (1996) 403; and in the United States: EL Fisch, *The Cy-près Doctrine in the United States* (Matthew Bender & Co, Albany NY, 1950) 129 and ch 5.

7

Class Actions Cy-près: *An Introduction*

A INTRODUCTION

THE NOTION UNDERPINNING class actions *cy-près* is that where a judgment or settlement has been achieved against a defendant, and where distribution to the class of plaintiffs who should strictly receive the sum is 'impracticable' or 'inappropriate', then (subject always to court approval) the damages should be distributed in the 'next best' fashion in order, as nearly as possible, to approximate the purpose for which they were awarded.[1] In other words, where a *cy-près* trigger manifests, the court orders that the damages, whose original purpose was to compensate those victims harmed by the defendant's unlawful conduct, be distributed 'for the indirect prospective benefit of the class.'[2] This phrase is something of a misnomer, for even non-class members—those who suffered no loss or damage whatsoever—may benefit under *cy-près* orders within the class actions context.

It has frequently been judicially acknowledged by American courts, in particular, that the *cy-près* doctrine applicable in class actions jurisprudence is derived from, and intended to be analogous to, the doctrine's application to charitable trusts.[3] For example, the charitable trust doctrine (it has been stated):

[1] *In re Folding Carton Antitrust Litig*, 557 F Supp 1091, 1108 (ND Ill 1983). Another good definition is drawn from the South African Law Comm, *The Recognition of a Class Action in South African Law* (Working Paper 57, 1995) [5.38] ('application of [an aggregate] award in a way which compensates or benefits the class members, where actual division and distribution of the award among the class members is impossible or impracticable').

[2] *Powell v Georgia-Pacific Corp*, 119 F 3d 703, 706 (8th Cir 1997), citing: HB Newberg and A Conte, *Newberg on Class Actions* (3rd edn, Shepard McGraw-Hill Inc, Colorado Springs, 1992) § 10.17. See also, for early American academic endorsement: Deems, 'The *Cy-près* Solution to the Damage Distribution Problems of Mass Class Actions' (1975) 9 *Georgia L Rev* 893, 904, and SR Shepherd, 'Damage Distribution in Class Actions: The *Cy-près* Remedy' (1972) 39 *U Chicago L Rev* 448, 452, both cited and explained further in: OLRC, *Report on Class Actions* (1982) 573.

[3] Eg: *In re Holocaust Victim Assets Litig*, 311 F Supp 2d 407, 415–16 (EDNY 2004) ('[t]he *cy-près* doctrine developed in the context of testamentary charitable trusts. Where a trust would otherwise fail, a court would attempt to fulfill the testator's charitable intent "as near as possible". . . . The same basic notion is now employed in class action settlements such as this one'). Also, the analogy is noted in, eg: *In re Compact Disc Minimum Advertised Price Antitrust Litig*, 2005 US Dist LEXIS 11332, at 7 (D Maine 2005); *Van Gemert v Boeing Co*, 573 F 2d 733, fn 7 (2nd Cir 1978); *Schwartz v Dallas Cowboys Football Club Ltd*, 362 F Supp 2d 574, 576 (ED Pa 2005); *In re 'Agent Orange' Prod Liab Litig*, 611 F Supp 1396, 1403 (EDNY 1985); *In re Department of Energy Stripper Well Exemption Litig*, 578 F Supp 586, 594 (D Kans 1983); *In re Matzo Food Prods Litig*, 156 FRD 600, 605 (DNJ 1994); *Brewer v Southern Union Co*, 1987 US Dist LEXIS 15940, at 7 (D Colo 1987); *In re Folding Carton Antitrust Litig*, 557 F Supp 1091, 1108–9 (ND Ill 1983); *Pray v Lockheed Aircraft Corp*,

> originated to save testamentary charitable gifts that would otherwise fail. Under *cy-près*, if the testator had a general charitable intent, the court will look for an alternate recipient that will best serve the gift's original purpose. In the class action context, it may be appropriate for a court to use *cy-près* principles to distribute unclaimed funds. In such a case, the unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated.[4]

Essentially, the doctrine allows the damages award or settlement sum to be distributed to the 'next best' class whenever the class members (or some of them—*cy-près* funds often deal with residual parts of class actions judgments or settlements) are unable to be compensated individually.[5] The *cy-près* fund varies inversely with the number of claims made by individual class members,[6] and can also result from a 'trickle-on' effect where damages funds set aside for designated categories of plaintiffs have not been fully dispersed.[7]

This chapter will deal with some introductory matters concerning class actions *cy-près*. Section B discusses the various terminology, and the two main strands of application, associated with the doctrine. The manifestation of class actions *cy-près* in the leading jurisdictions which have implemented opt-out class action regimes is outlined in Section C, whilst the principal alternatives to *cy-près* orders in this context—from reversionary orders in favour of the defendant to the damages simply falling into governmental coffers—are explored in Section D.

B THE WIDE AND NARROW MEANINGS OF '*CY-PRÈS*'

This field of jurisprudence is, unfortunately, rife with terminological obfuscation. The descriptors, '*cy-près*' and 'fluid recovery' appear, on occasion, to be

644 F Supp 1289, 1303 (DDC 1986); *In re Wells Fargo Securities Litig*, 991 F Supp 1193, 1194 (ND Cal 1998); *Six (6) Mexican Workers v Arizona Citrus Growers*, 641 F Supp 259, 265 (D Ariz 1986).

[4] *Airline Ticket Commission Antitrust Litig Travel Network Ltd v United Air Lines Inc*, 307 F 3d 679, 682 (8th Cir 2002), citing: *In re Airline Ticket Commission Antitrust Litig*, 268 F 3d 619, 625–26 (D Minn 2001); *Democratic Central Committee of District of Columbia v Washington Metro Area Transit Comm*, 84 F 3d 451, 455 fn 1 (DC Cir 1996).

[5] *Weber v Goodman*, 1998 US Dist LEXIS 22832, at 16 (EDNY 1998); *Democratic Central Committee of District of Columbia v Washington Metro Area Transit Comm*, 84 F 3d 451, 455 (DC Cir 1996).

[6] Note the discussion and cases cited in: RA Higgins, 'The Equitable Doctrine of *Cy-près* and Consumer Protection' (Annex 1, ACA Submission, Trade Practices Act Review, 15 Jul 2002) 4 and fn 13.

[7] As occurred in, eg: *Ford v F Hoffmann-La Roche Ltd* (SCJ, 23 Mar 2005) [65] ('no unclaimed money will be repaid to the Settling Defendants. Any monies not paid out of the Direct Purchaser Fund will trickle down to the Consumer Fund. The Intermediate Purchaser Fund and Consumer Fund will be fully distributed *cy-près*'). For lawyers' representatives' comments on this settlement outcome, see: J Jaffey, 'Settlement Reached on Vitamin Price-Fixing' (2005) *Lawyers' Weekly* Vol 24 No 6. Incidentally, termed a 'pour-over provision' by Higgins, *ibid.*

TAB 104

Reducing Tobacco Use

A Report of the Surgeon General

DEPARTMENT OF HEALTH AND HUMAN SERVICES
U.S. Public Health Service

Suggested Citation

U.S. Department of Health and Human Services. *Reducing Tobacco Use: A Report of the Surgeon General.* Atlanta, Georgia: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2000.

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degree possible under legal constraints, the strategy advised relating the pleasure of smoking cigarettes to the pleasures of adult or illicit activities, such as drinking alcohol, smoking marijuana, or having sex (Myers et al. 1981). Brown & Williamson Tobacco Corporation stated that these proposals were never implemented and did not represent their policy.

In sum, the marketing and research firm recommended that successful cigarette advertising must either consciously or unconsciously deal with smoking and health issues by repressing the health concerns of the consumers of the product and providing a rationalization for consumption. The 1981 FTC report also concluded that the federally mandated health warning had little impact on the public's level of knowledge and attitudes about smoking. The report further observed that the warning was outworn, abstract, difficult to remember, and not perceived as personally relevant (Myers et al. 1981). These concerns contributed to Congress' enactment of the Comprehensive Smoking Education Act of 1984 (Public Law 98-474), which required four specific, rotating health warnings on all cigarette packages and advertisements (Comprehensive Smoking Education Act, sec. 4):

> SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy.
>
> SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.
>
> SURGEON GENERAL'S WARNING: Smoking by Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight.
>
> SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

The Comprehensive Smoking Education Act of 1984 thus amended the Federal Cigarette Labeling and Advertising Act and required warnings to be placed on advertisements as well as on cigarette packages. The act preempts state and federal attempts to place additional warnings on packages, but it preempts only state action with regard to advertising. The FTC retains such jurisdiction under section 5.

From the first, the exact appearance of warning labels (wording, layout, and positioning on packages and advertisements) has represented compromises between the recommendations of the FTC and smoking prevention advocates and those of the tobacco industry. In 1969, for example, the FTC recommended a warning on cigarette packages that specifically mentioned death, cancer, heart disease, chronic bronchitis, and emphysema. The resulting legislation required the legend to provide the general warning only that smoking is "dangerous" to one's health (Public Health Cigarette Smoking Act of 1969, sec. 4). Similarly, in its 1981 report on cigarette advertising, the FTC recommended that new warning labels use a "circle-and-arrow" format that would be more effective than the traditional rectangular format, but Congress did not take this approach in the Comprehensive Smoking Education Act of 1984. Also, the new labels did not incorporate the FTC's recommendations to contain specific references to addiction, miscarriage, and death and to disclose the brand's yields of tar, nicotine, and carbon monoxide.

Smokeless Tobacco Warning Labels

Requirements for warning labels on smokeless tobacco products lagged behind those on cigarettes by more than 20 years. By the mid-1980s, the strong evidence that smokeless tobacco causes oral cancer, nicotine addiction, and other health problems and that its use was increasing among boys led Massachusetts to adopt legislation requiring warning labels on packages of snuff and caused 25 other states to consider similar legislation (USDHHS 1989).

The Massachusetts law was preempted, before it could take effect, by the federal Comprehensive Smokeless Tobacco Health Education Act of 1986 (Public Law 99-252). This law not only required three rotating warning labels on smokeless tobacco packaging and in all advertising (except billboards) but also stipulated that the labels have the circle-and-arrow format that the FTC had recommended earlier for cigarette warnings. The three rotating labels read as follows (Comprehensive Smokeless Tobacco Health Education Act of 1986, sec. 3):

> WARNING: This product may cause mouth cancer.
>
> WARNING: This product may cause gum disease and tooth loss.
>
> WARNING: This product is not a safe alternative to cigarettes.

Initially, the FTC excluded utilitarian items—such as hats, T-shirts, lighters, and jackets—bearing the name or logo of smokeless tobacco products. A consortium

of Public Citizen and several prominent health organizations sued the FTC, arguing that this exclusion was contrary to the provisions of the act, which sought a comprehensive rather than a narrow use of health warnings (*Public Citizen v. Federal Trade Commission*, 869 F.2d 1541 [D.C. Cir. 1989]). The Court of Appeals for the District of Columbia ruled for the plaintiff, stating that the act was intended to cover utilitarian items, since those were among the smokeless tobacco industry's most effective means of promoting its products to adolescents. The court elaborated its point, saying that adolescents were less likely than adults to read magazines and newspapers and thereby less likely to encounter the mandated warnings there. Adolescents were also likely to have passed the critical moment of decision by the time they obtained the product itself and encountered its warning label. Accordingly, in 1991, the FTC issued a final rule requiring health warnings to be displayed on utilitarian items and providing for the manner in which the warnings were displayed.

All advertising of smokeless tobacco products is also banned on any medium of electronic communication subject to the jurisdiction of the FTC. Under this act, federal agencies and state and local governments are preempted from imposing additional health warnings on smokeless tobacco products and advertisements (except for billboards, which were excluded from this act). Furthermore, instead of stipulating where the labels must be positioned, the act required only "conspicuous and prominent" placement (Comprehensive Smokeless Tobacco Health Education Act of 1986, sec. 3). Implementation was left to the FTC, which enacted enabling regulations on November 4, 1994.

Regulation of Tobacco Packaging

Package size of tobacco products has been another area of public health concern and action. Evidence that levels of tobacco consumption reflect the affordability of tobacco products (see Chapter 6) has raised concern about selling cigarettes in packs containing fewer than the usual 20 cigarettes. In many countries, cigarettes are sold in packages of 15, 10, or 5 cigarettes. These smaller package formats have been dubbed "kiddie" packs in Canada by smoking prevention activists (Chrétien 1994). Research has shown that young people account for many sales of smaller cigarette packages (Wilson et al. 1987; Nova Scotia Council on Smoking and Health 1991; IMPACT Research 1993), probably because of their low price and ease of concealment.

These findings have led some jurisdictions to prohibit the marketing of packages containing fewer than 20 cigarettes. An Australian state legislature has also passed such a ban (the Western Australia Tobacco Control Act of 1990). In Canada, several provinces have banned small package sizes, and the revised federal Tobacco Sales to Young Persons Act of 1993 nationally banned packages of fewer than 20 cigarettes.

Another issue of concern regarding tobacco packaging is the use of potentially misleading descriptive words in the labeling of some tobacco products (Davis et al. 1990). A recent Gallup poll found that words such as "slim," "low tar," and "light" conveyed messages viewed as healthful (Gallup Organization, Inc. 1993, pp. 23, 25). Cohen (1992) reported that tobacco companies have long known that their customers equate the marketing term "low tar" (p. 85) with health benefits. Chapman and colleagues (1986) reported that smokers tend to systematically underestimate the actual tar deliveries of their particular brands, and Gori (1990) found that one-half of smokers interviewed in the United States and Europe assume that the lower the tar rating, the lower the brand's propensity to cause disease. The Coalition on Smoking OR Health (1988) has further analyzed how promoting cigarette brands as having low tar and low nicotine content communicates a message to consumers that these brands have health benefits.

The use of such descriptive words in cigarette brand names has been called into question because variations in the way cigarettes are actually smoked may mean that the actual yield of toxic constituents from cigarettes differs from the levels determined by currently accepted testing procedures (Henningfield et al. 1994; see "Compensatory Smoking," later in this chapter). For example, smokers of reduced-tar cigarettes may (deliberately or not) inhale harder to draw more smoke through the denser filter and deep into the lungs and may smoke the cigarette down closer to the filter, thereby inhaling greater concentrations of toxins. This concern led to the appointment of an ad hoc committee of the President's Cancer Panel of the National Cancer Institute (NCI) to evaluate the current FTC protocol for testing tar, nicotine, and carbon monoxide. One of the conclusions of this panel was that "brand names and brand classifications such as 'light' and 'ultra light' represent health claims and should be regulated and accompanied, in fair balance, with an appropriate disclaimer" (NCI 1996, p. vii). This recommendation has not yet been carried out.

A further aspect of tobacco packaging that is currently receiving significant attention, although primarily outside the United States, is the possibility of

legislated plain (or "generic") packaging for tobacco products. This initiative is partly motivated by the belief that removing much of the brand image of tobacco products would not only make the product less attractive but also weaken the connection with—and thus lessen the effect of—visual and verbal image-linked efforts to promote particular brands (Mahood 1995). There is evidence that young people find plain packaging less attractive (Beede and Lawson 1992; Centre for Health Promotion 1993) and that plain packaging makes health messages more noticeable (Centre for Behavioural Research in Cancer 1992). In Canada, the federal government has considered using plain packaging for tobacco products (Standing Committee on Health 1994; Health Canada 1995b), and the province of Ontario, in enacting the Tobacco Products Control Act in 1994, authorized the requirement for plain packaging on all cigarettes sold in Ontario. Such packaging reforms have not yet been enacted in any jurisdiction.

Examples of Product Labeling in Other Countries

In recent years, many countries have taken significant action on specifying packaging and warning labels for tobacco products. All countries of the European Union must comply with a May 15, 1992, directive (Council Directive 92/41/EEC 1992 O.J. [L 158]) that requires stipulated health warnings on each of the main package panels. In Thailand, pursuant to its Tobacco Products Control Act, which was based on principles developed in Canadian regulations (discussed later in this section), prominent black-and-white health messages are required on the front of the package. South Africa and New Zealand require detailed health messages on the main package panels; the messages are based largely on Australian packaging.

The messages appearing on Australian cigarette packages are based on the work of the Centre for Behavioural Research in Cancer (1992). These messages were required as of January 1, 1995, and were incorporated into a broad effort "to inform smokers of the long-term health effects of tobacco use" (Lawrence 1994, p. 1). The Australian system uses six rotating messages covering 25 percent of the front of the cigarette packets. One side of the packet is entirely given to the labeling of dangerous constituents, and all the labels must be in black and white. Thirty-three percent of the rear main packet panel must be covered by the same health message given on the front of the pack and followed by an elaboration of that message (Chapman 1995).

Of special interest are the package regulations currently in place in Canada. The Canadian health messages were established by regulatory power granted under the 1988 federal Tobacco Products Control Act, which came into effect on January 1, 1989. This legislation gives broad regulatory powers over tobacco product packaging. It also gives regulatory authority to require package inserts, although this power has not yet been acted on. By eventually delegating formulation of the precise warnings to administrative regulation, this legislation took the approach that had been recommended 25 years earlier by the U.S. Department of Health, Education, and Welfare (Celebrezze 1965; see also "Cigarette Warning Labels," earlier in this chapter). This law also makes clear that the various provinces of Canada can require additional messages and that the provision of federal messages does not preempt other messages. The first set of regulations following this law required that four specific rotating health messages be placed on the two main panels of cigarette packages and be printed in a large typeface; this set of regulations stipulated that the messages must be "prominently displayed in contrasting colours" (Department of National Health and Welfare 1989, p. 64) and cover at least 20 percent of the panel face.

When the mandated Canadian health messages started appearing on tobacco products in 1989, it was clear to many public health workers that the language of the regulations had left the tobacco companies too much room for interpretation and had resulted in less prominence and contrast than the regulations had intended. Minister of National Health and Welfare Henry Perrin Beatty commented, "It's very clear that, when you look at [the health warning on cigarette packs], it's not designed to stand out. If our experts [at the Department of National Defence] knew as much about camouflage as the tobacco company did, nobody'd ever find our fellows" (*Spectator* 1989). This situation gained more attention when it was revealed that a prominent tobacco lobbyist had apparently influenced development of the regulations (Fraser 1989). Health advocates subsequently campaigned to attain more prominent messages through revising the regulations (Mahood 1995).

New legislation was enacted on August 11, 1993 (Department of National Health and Welfare 1993), and all packaging for tobacco products destined for sale in Canada had to comply by September 11, 1994. Among these precedent-setting regulations (Mahood 1995) were the following requirements:

- The message must cover at least 25 percent of the top of each main panel.

- The message must be framed by a stipulated border (on many packs, this border yields a total message area that uses over 40 percent of the surface).
- Each of eight rotating messages must be presented one-half of the time in black on a white background with a black border. The other one-half of the time, the messages must be white on a black background surrounded by a white border.
- One entire side panel must be used to present information on the toxic constituents.
- Every side panel of tobacco cartons must display a black-on-white message covering 25 percent of the panel area and stating "Cigarettes are addictive and cause lung cancer, emphysema, and heart disease" (Department of National Health and Welfare 1993, p. 3278).
- The message must bear no attributions.

One ironic result of these requirements was that cigarettes manufactured in the United States for the Canadian market were produced, albeit only for export, with health messages that conform with the recommendations provided in 1965 by the U.S. Department of Health, Education, and Welfare.

The Canadian regulations were reversed in 1995, when the Supreme Court of Canada held that the country's complete ban on overt tobacco advertisements (another key component of the 1993 regulations) and its requirement of unattributed health warnings on packages were in violation of the tobacco industry's freedom of expression and the *Canadian Charter of Rights and Freedoms* (*RJR-MacDonald Inc. v. Attorney General of Canada*, File Nos. 23460, 23490 [Can. Nov. 29–30, 1994, Sept. 21, 1995], *cited in* 10.6 TPLR 2.167 [1995]). These central elements of Canada's Tobacco Products Control Act fell because the Canadian government did not meet its constitutional obligation of proving that the approach taken was the least drastic means of achieving a public health objective. These narrow evidentiary grounds on which the decision was made left room for the Canadian government to counter. The government offered a new proposal, called *Tobacco Control: A Blueprint to Protect the Health of Canadians*, that reinstated the advertising ban, imposed restrictions on brand-name promotion and sponsorship, instituted controls over packaging and labeling, and increased product regulation and reporting requirements.

In creating a new legal framework, the Canadian government would make tobacco a de facto illegal product whose sale could be permitted but would be subject to specific conditions. This reversal of the burden of proof gives constitutional allowance to the advertising restrictions in Canada. Following the unveiling of the *Blueprint*, the tobacco industry brought forward a voluntary proposal to restrict advertising. Subsequent resumption of advertising has been controversial, and the industry has been accused of breaching its own code (LeGresley 1996).

Tobacco Advertising, Commercial Speech, and the First Amendment

Regulation of tobacco advertising in the United States is legally problematic. Although protections afforded by the First Amendment to the U.S. Constitution may be modified for commercial speech, including advertising, such modification is an area of intensive legal debate. The two decades of lawsuits described in this section make it clear that a concerted and persistent government interest is essential if such restriction of free speech is to be upheld in courts. To satisfy legal scrutiny, the government's efforts must clearly show that any restrictions directly and materially advance its asserted interest—protecting the health of the American people.

The United States Supreme Court has defined commercial speech as "expression related solely to the economic interests of the speaker and its audience" (*Central Hudson Gas & Electric v. Public Service Commission of New York*, 447 U.S. 557 [1980]). Commercial speech thus includes advertisements by cigarette manufacturers that invite consumers to buy their product. As the Supreme Court has observed, "For most of this Nation's history, purely commercial advertising was not considered to implicate the constitutional protection of the First Amendment" (*United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2703 [1993]). Restrictions on commercial speech were viewed as being similar to economic regulation and were routinely upheld. A midcentury example key to later efforts to restrict tobacco advertising occurred when the Supreme Court, in *Valentine v. Chrestensen* (316 U.S. 52 [2d Cir. 1942], *rev'd*), held that the state could prohibit the street distribution of handbills containing commercial advertising matter (see also *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 [1980]). Such precedents enabled the courts to uphold the 1972 congressional ban on tobacco advertising on radio and television (*Capital Broadcasting Co.*, 405 U.S. 1000). Subsequent legal scrutiny, however, has acted to reverse this trend.

TAB 105

SMOKING *and* HEALTH

REPORT OF THE ADVISORY COMMITTEE
TO THE SURGEON GENERAL
OF THE PUBLIC HEALTH SERVICE

U.S DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Public Health Service

Public Health Service Publication No. 1103

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Washington, D.C., 20402 - Price $1.25

studies can provide the basis upon which judgments of causality may be made.

It is recognized that no simple cause-and-effect relationship is likely to exist between a complex product like tobacco smoke and a specific disease in the variable human organism. It is also recognized that often the coexistence of several factors is required for the occurrence of a disease, and that one of the factors may play a determinant role; that is, without it, the other factors (such as genetic susceptibility) seldom lead to the occurrence of the disease.

The Effects of Smoking: Principal Findings

Cigarette smoking is associated with a 70 percent increase in the age-specific death rates of males, and to a lesser extent with increased death rates of females. The total number of excess deaths causally related to cigarette smoking in the U.S. population cannot be accurately estimated. In view of the continuing and mounting evidence from many sources, it is the judgment of the Committee that cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate.

Lung Cancer

Cigarette smoking is causally related to lung cancer in men; the magnitude of the effect of cigarette smoking far outweighs all other factors. The data for women, though less extensive, point in the same direction.

The risk of developing lung cancer increases with duration of smoking and the number of cigarettes smoked per day, and is diminished by discontinuing smoking. In comparison with non-smokers, average male smokers of cigarettes have approximately a 9- to 10-fold risk of developing lung cancer and heavy smokers at least a 20-fold risk.

The risk of developing cancer of the lung for the combined group of pipe smokers, cigar smokers, and pipe and cigar smokers is greater than for non-smokers, but much less than for cigarette smokers.

Cigarette smoking is much more important than occupational exposures in the causation of lung cancer in the general population.

Chronic Bronchitis and Emphysema

Cigarette smoking is the most important of the causes of chronic bronchitis in the United States, and increases the risk of dying from chronic bronchitis and emphysema. A relationship exists between cigarette smoking and emphysema but it has not been established that the relationship is causal. Studies demonstrate that fatalities from this disease are infrequent among non-smokers.

For the bulk of the population of the United States, the relative importance of cigarette smoking as a cause of chronic broncho-pulmonary disease is much greater than atmospheric pollution or occupational exposures.

Cardiovascular Diseases

It is established that male cigarette smokers have a higher death rate from coronary artery disease than non-smoking males. Although the causative role of cigarette smoking in deaths from coronary disease is not proven, the Committee considers it more prudent from the public health viewpoint to assume that the established association has causative meaning than to suspend judgment until no uncertainty remains.

Although a causal relationship has not been established, higher mortality of cigarette smokers is associated with many other cardiovascular diseases, including miscellaneous circulatory diseases, other heart diseases, hypertensive heart disease, and general arteriosclerosis.

Other Cancer Sites

Pipe smoking appears to be causally related to lip cancer. Cigarette smoking is a significant factor in the causation of cancer of the larynx. The evidence supports the belief that an association exists between tobacco use and cancer of the esophagus, and between cigarette smoking and cancer of the urinary bladder in men, but the data are not adequate to decide whether these relationships are causal. Data on an association between smoking and cancer of the stomach are contradictory and incomplete.

The Tobacco Habit and Nicotine

The habitual use of tobacco is related primarily to psychological and social drives, reinforced and perpetuated by the pharmacological actions of nicotine.

Social stimulation appears to play a major role in a young person's early and first experiments with smoking. No scientific evidence supports the popular hypothesis that smoking among adolescents is an expression of rebellion against authority. Individual stress appears to be associated more with fluctuations in the amount of smoking than with the prevalence of smoking. The overwhelming evidence indicates that smoking—its beginning, habituation, and occasional discontinuation—is to a very large extent psychologically and socially determined.

Nicotine is rapidly changed in the body to relatively inactive substances with low toxicity. The chronic toxicity of small doses of nicotine is low in experimental animals. These two facts, when taken in conjunction with the low mortality ratios of pipe and cigar smokers, indicate that the chronic toxicity of nicotine in quantities absorbed from smoking and other methods of tobacco use is very low and probably does not represent an important health hazard.

The significant beneficial effects of smoking occur primarily in the area of mental health, and the habit originates in a search for contentment. Since no means of measuring the quantity of these benefits is apparent, the Committee finds no basis for a judgment which would weigh benefits against hazards of smoking as it may apply to the general population.

TAB 106

THE LAW OF CLASS ACTIONS IN CANADA

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Chapter 1

THE NATURE AND PROCESS OF CLASS PROCEEDINGS

A. Objectives of Class Proceedings

The class action is a procedural device for people who have suffered a common wrong. One or more plaintiffs can bring an action on behalf of many, and in this way have an efficient mechanism to achieve legal redress.[1]

Class actions have a long pedigree in the United States and in the common law. The modern class proceeding in the United States and Canada is the successor to the English common law's representative action, which authorized a plaintiff to sue on behalf of others who would be bound as a matter of *res judicata* and issue estoppel to the outcome of the litigation.[2] Historically, representative proceedings served the practical purpose of efficiently determining the rights of persons who were not parties to the litigation. Class action legislation was introduced in the United States in 1938, and the current Rule 23 of the American *Federal Rules of Civil Procedure* was enacted in 1966.[3] In 1978, Québec became the first Canadian province to introduce class action legislation.[4] Ontario followed in 1993,[5] as did British Columbia in 1996.[6] In the years that followed, the federal government[7] and all of the provinces with the exception of Prince Edward Island enacted class action regimes.[8]

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1 The Ontario Law Reform Commission, in its *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982), vol. 1, at p. 15, defined a class action as an "action brought on behalf of, or for the benefit of numerous persons having a common interest. It is a procedural mechanism that is intended to provide an efficient means to achieve redress for widespread harm or injury by allowing one or more persons to bring the action on behalf of the many."

2 For a discussion of the history of class actions, see 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.

3 *Federal Rules of Civil Procedure*, r. 23.

4 *Code of Civil Procedure*, C.Q.L.R. c. C-25, arts. 1002-1051.

5 *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

6 *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

7 *Federal Courts Rules*, SOR/98-106, enacted pursuant to *Federal Courts Act*, R.S.C. 1985, c. F-7.

8 Alberta: *Class Proceedings Act*, S.A. 2003, c. C-16.5; British Columbia: *Class Proceedings Act*, R.S.B.C. 1996, c. 50; Manitoba: *The Class Proceedings Act*, C.C.S.M. c. C.130; New Brunswick: *Class Proceedings Act*, R.S.N.B. 2011, c. 125; Newfoundland and Labrador:

In its modern formulation, the class action promotes more than just efficiency; there is also the idea that modern society creates harms that affect large numbers of people who do not have the means to seek redress.[9] As discussed further in this chapter and a theme throughout the text, the three public policy purposes that underlie the modern class action are: (1) access to justice; (2) behaviour modification; and (3) judicial economy, including the avoidance of a multiplicity of proceedings.

Access to Justice

The fundamental policy idea supporting class proceedings is access to justice for a group of claimants who have suffered a common wrong. For example, in a class proceeding (typically an action, but in some jurisdictions, also applications), numerous consumers, all injured by a negligently manufactured pharmaceutical or medical device, can sue the manufacturer for compensation for their personal injuries in a single proceeding. Similarly, all passengers injured or killed in a train derailment, a sinking boat, or a plane crash can sue the carrier for their losses. Class actions have been used to advance claims regarding aboriginal rights, trade and competition offences, breaches of contract, employment and labour relations, environmental harm, the spread of diseases and infections, illegal interest charges, Ponzi schemes, pension plans and disability benefits, and defective products causing personal injuries or economic harm.

These myriad types of claims raise at least three different kinds of economic barriers to justice. First, there is the cost of obtaining legal services to prosecute what are usually small claims. Second, the economics of litigation (economies of scale and efficiency) favour the defendant wrongdoer and not the claimant. Third, in some jurisdictions, there is the claimant's exposure to an adverse costs award payable to the defendant. Class action legislation is designed, in part, to overcome or at least reduce these barriers.

The availability of contingency fee agreements and the court's supervision of lawyers' fees address the first economic barrier. In exchange for not charging a fee and for assuming the expense of the disbursements, the class action lawyer obtains a share of the recovery if the client's claim on behalf of the class ultimately succeeds. As will be noted more than once throughout this text, the legislatures in Canada have determined that

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Class Actions Act, S.N.L. 2001, c. C-18.1; Nova Scotia: *Class Proceedings Act*, S.N.S. 2007, c. 28; Ontario: *Class Proceedings Act, 1992*, S.O. 1992, c. 6; Québec: *Code of Civil Procedure*, C.Q.L.R. c. C-25, Book IX, arts. 999 to 1026; Saskatchewan: *The Class Actions Act*, S.S. 2001, c. C-12.01.

9 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.), at paras. 26-28.

access to justice can be promoted by means of entrepreneurial lawyers taking on the risks of group litigation in exchange for a share in the claimant's recovery on behalf of the class.

Second, by aggregating the group members' individual claims, a class action is designed to balance the litigation efficiencies that normally favour the defendant, whose investment in mounting a defence to one claimant's case has utility for resisting other claimants' cases. Without a class proceeding, a plaintiff's investment in his or her individual litigation has no additional economic utility, because it cannot be shared and must be repeated by the next claimant. The ability to share the costs of prosecuting an action between hundreds or thousands of class members improves access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually.[10]

The third economic barrier to access to justice is the risk in some jurisdictions of paying costs to the opposing party (a loser-pays costs rule). The exposure of the representative plaintiff varies depending upon the jurisdiction in which the action is being prosecuted. However, as the discussion in the chapters about costs and about legal fees (Chapters 19 and 20) will reveal, plaintiffs in class actions have developed mechanisms to shift the exposure and the burden of an adverse costs award onto class counsel and, in a recent development, onto third-party litigation funders.

Thus, reducing economic barriers promotes access to the courts and is an important feature of the class action regime. Class proceedings also remove psychological, societal, and other barriers to the compensatory, restitutionary, and declaratory remedies of the judicial system. For example, the willingness of one plaintiff to represent a class of vulnerable persons in institutional abuse litigation ensures that the emotional barriers to pursuing a court action do not preclude redress.[11]

Behaviour Modification

In addition to providing access to justice for mass claims, another policy goal of the modern class action is behaviour modification.[12] To the extent that the procedural device is used to litigate claims that would not be

[10] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.), at para. 28: "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" (citations omitted).

[11] For a discussion of the meaning of access to justice in the context of class actions, see Hon. Frank Iacobucci, "What is Access to Justice in the Context of Class Actions?" (2011), 53 S.C.L.R. 17, at p. 20; Jasminka Kalajdzic, "Access to a Just Result: Revisiting Settlement Standards and Cy Près Distributions" (2010), 6 Can. Class Action Rev. 215, at pp. 216-221, and *Access to Justice for the Masses: A Critical and Empirical Discussion of Class Actions in Canada* (Vancouver: UBC Press, forthcoming); Mathew Good, "Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions" (2009), 47 Alta L. Rev. 185, pp. 185-227.

economical to pursue individually, class actions serve a regulatory and public law function by encouraging compliance with the substantive law. Both specific and general deterrence may be achieved. For example, exposure to a class proceeding not only compels a defendant to take into account the full cost of its conduct, but may also deter it and others from conduct in the future that may cause harm.[13]

In recommending a class action regime, the Ontario Law Reform Commission viewed behaviour modification as an inevitable but valuable by-product of achieving the legislation's primary purposes of furthering access to justice and promoting judicial economy.[14]

Judicial Economy

The third goal of a class proceeding is judicial economy. The class action procedures adopted by the legislatures across the country were designed to provide opportunities to aggregate claims and thereby negate the need for a multiplicity of proceedings. A class action is designed to avoid, rather than encourage, the unnecessary filing of repetitious papers and motions.[15] Class proceedings legislation is meant to achieve the efficient handling of potentially complex cases of wrongs affecting more than one person.[16]

B. Benefits of a Class Proceeding

As the discussion in later chapters will reveal, class actions provide advantages over traditional litigation to both plaintiffs and defendants. For plaintiffs, the advantages include: (a) the tolling of the limitation period for the class; (b) a notice program to advise interested persons about the status of the litigation; (c) the availability of counsel attracted by contingency fee arrangements; (d) preventing the defendant from creating procedural obstacles that would confront individual litigants; (e) the ability of class members to participate in the litigation; (f) case management by a single judge; (g) court powers to protect the interests of absent members; (h) protection from adverse costs awards against class members; (i) ability of the court to create structures and procedures to resolve individual issues; and (j) any order or settlement will accrue to the benefit of the whole class.[17]

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12 Craig Jones, in *Theory of Class Actions* (Toronto: Irwin Law, 2003), analyzes class actions from the perspective of behaviour modification.

13 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.), at para. 29.

14 Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982), vol. 1, at p. 145.

15 *Hoffman v. Monsanto Canada Inc.*, 2002 SKCA 120 (Sask. C.A.), at para. 16.

16 *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.), at p. 455.

17 *Bouchanskaia v. Bayer Inc.*, 2003 BCSC 1306 (B.C. S.C.), at para. 150.

Chapter 4

DEFINING THE CLASS

A. Introduction: The Identifiable Class Criterion

An identifiable class of claimants constitutes the second of the five criteria for the certification of an action as a class proceeding under the class action statutes of the common law provinces. For an action to be certified as a class proceeding, there must be an "identifiable class of two or more persons that would be represented by the representative plaintiff or defendant."[1]

To satisfy the identifiable class requirement, the plaintiff must establish "some basis in fact" that two or more persons will be able to determine that they are in fact members of the class.[2] Class action legislation is designed to provide an effective means of resolving situations where two or more people have the same or similar complaints, not to create complaints where none exist. As was explained in *Lau v. Bayview Landmark Inc.*:[3]

> [A] class proceeding cannot be created by simply shrouding an individual action with a proposed class. That is to say, it is not sufficient to make a bald assertion that a class exists. The record before the court must contain a sufficient evidentiary basis to establish the existence of the class.

In this chapter, the purpose of the second certification criterion is described, and the law related to class definition is explored. The issues of class size, non-resident class members and subclasses are also discussed.

B. Purpose of the Identifiable Class Criterion

The criterion of an identifiable class serves three purposes:

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1 *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(1)(b). Virtually identical language appears in *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 4(1)(b); *Class Proceedings Act*, S.A. 2003, c. C-16.5, s. 5(1)(b); *Class Proceedings Act*, S.N.S. 2007, c. 28, s. 7(1)(b); *The Class Proceedings Act*, C.C.S.M. c. C130, s. 4(b); *Class Proceedings Act*, R.S.N.B. 2011, c. 125, s. (6(1)(b); *The Class Actions Act*, S.S. 2001, c. C-12.01, s. 6(1)(b); *Class Actions Act*, S.N.L. 2001, c. C-18.1, s. 5(1)(b). Saskatchewan's statute does not specify that the identifiable class be of "two or more persons".

2 *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58 (S.C.C.), at paras. 52-76; *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158, 2001 SCC 68 (S.C.C.), at para. 25.

3 (1999), 40 C.P.C. (4th) 301, [1999] O.J. No. 4060 (Ont. S.C.J.), at para. 23, additional reasons (1999), 92 A.C.W.S. (3d) 752 (Ont. S.C.J.).

(1) it identifies the persons who have a potential claim against the defendant;

(2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and

(3) it describes who is entitled to notice.[4]

The class definition criterion is critically important because it is connected to the cause of action criterion and it also affects the three other certification criteria. The class definition influences the commonality of proposed common issues, the manageability of the procedure, and whether a class action is preferable. In addition, the class definition affects the appropriateness of the litigation plan and the ability of the representative plaintiff(s) to represent the class members without conflict.[5]

The class definition will determine the size of the class, which may influence whether a class action will attract class counsel to the case, since a small class size may not justify the economic risks associated with prosecuting a class action. The class definition and how it affects class size is also of interest to the defendant because it will influence the extent of the defendant's exposure to liability. If the action settles, class size will determine the scope of the releases exchanged for the settlement proceeds.

C. Satisfying the Identifiable Class Criterion

The class definition criterion is not an onerous requirement to satisfy. In *Hollick v. Metropolitan Toronto (Municipality)*,[6] Chief Justice McLachlin stated:

> It falls to the putative representative to show the class is defined sufficiently narrowly. The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad — that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues. Where the class

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4 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.), at para. 38; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.), additional reasons (1999), 30 C.P.C. (4th) 131 (Ont. Gen. Div.); *Davis v. Canada (Attorney General)*, 2007 NLTD 25 (N.L. T.D.), at para. 42, affirmed 2008 NLCA 49 (N.L. C.A.); *Sorotski v. CNH Global N.V.*, 2007 SKCA 104 (Sask. C.A.), reversing 2006 SKQB 168 (Sask. Q.B.), leave to appeal refused (2008), 451 W.A.C. 319 (note).

5 *Fischer v. IG Investment Management Ltd.*, 2010 ONSC 296 (Ont. S.C.J.), at para. 133, additional reasons 2010 ONSC 2839 (Ont. S.C.J.), reversed but not on this point 2011 ONSC 292 (Ont. Div. Ct.), affirmed 2012 ONCA 47 (Ont. C.A.), affirmed 2013 SCC 69 (S.C.C.); *Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301, [1999] O.J. No. 4060 (Ont. S.C.J.), at paras. 21-31, additional reasons (1999), 92 A.C.W.S. (3d) 752 (Ont. S.C.J.).

6 [2001] 3 S.C.R. 158, 2001 SCC 68 (S.C.C.), at paras. 20-21.

resolved on the motion for certification.[37] This is because the determination whether a class proceeding should be certified is made by reference only to the pleadings and any documents identified in the pleadings.[38]

E. The Definition Must Contain Objective Measures that are not Merits-Based

Although it is not necessary to list each class member, it is essential that the class be defined clearly at the outset of the litigation, using objective measures by which members of the class can be identified.[39] These criteria should bear a rational relationship to the common issues asserted by all class members; however, the criteria should not depend on the outcome of the litigation.[40]

In *R. v. Nixon*,[41] an action commenced on behalf of penitentiary inmates who allegedly suffered injury from a fire, the court held that a class definition that would have included all inmates in a particular part of the building "other than those who set the fires" was not acceptable. Such a definition would require a series of mini-trials to determine who did not set the fires or impede efforts of correctional officers to extinguish the fires and who were therefore disqualified as a member of the class. The members of the class could not be defined clearly at the start of the litigation.

The plaintiff's state of mind is a subjective factor to be avoided in the class definition. For example, in *Paron v. Alberta (Minister of Environmental Protection)*, the court rejected a class definition that stated: "All Alberta residents *who claim that*, between 1996 and 2005 they owned residential lands contiguous to Wabamun Lake and that their use and enjoyment of their lands or the value of their lands were adversely affected by diminished water levels in or pollution of Wabamun Lake."[42] Since membership was dependent on a state of mind, *i.e.*, those plaintiffs who claim to have experienced loss of enjoyment of the lake, it was impossible for the defendants to know who was in or out of the class. Persons who would otherwise be class members could argue that they were not bound by

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37 *Mayotte v. Ontario*, 2010 ONSC 3765 (Ont. S.C.J.), at para. 64, leave to appeal refused 2010 ONSC 5275 (Ont. Div. Ct.); *Fantl v. Transamerica Life Canada*, 2013 ONSC 2298 (Ont. S.C.J.), at para. 168, additional reasons 2013 ONSC 5198 (Ont. S.C.J.), leave to appeal refused 2013 ONCA 580 (Ont. C.A.).

38 *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2013 ONCA 254 (Ont. C.A.), at para. 5, leave to appeal refused 2013 CarswellOnt 13700, [2013] S.C.C.A. No. 266 (S.C.C.).

39 *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.), at p. 554.

40 *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.), at p. 554.

41 (2002), 21 C.P.C. (5th) 269, [2002] O.J. No. 1009 (Ont. S.C.J.).

42 *Paron v. Alberta (Minister of Environmental Protection)*, 2006 ABQB 375 (Alta. Q.B.), at para. 40.

the result of the class action, because they did not "claim" anything during the relevant time, resulting in the undesirable potential of multiple proceedings despite the class action.[43]

The class must be defined without elements that require a determination of the merits of the claim.[44] A class of claimants cannot be defined meaningfully in terms of persons to whom the defendant is liable, or to whom the defendant owes a duty of care, if liability or the existence of a duty of care owed to class members is a common issue.[45]

Definitions where membership depends on a successful claim (*i.e.*, merits-based class definitions) are problematic because unsuccessful claimants would not be bound by the outcome and would be free to commence repeat litigation.[46] In other words, if the class is defined by success on the merits, then, tautologically, it follows that unsuccessful claimants will not be bound by being members of the class. The purposes of the legislation are thereby frustrated because the goals of access to justice and judicial economy are not achieved.

There are many examples where merits-based definitions have been rejected. In *Chadha v. Bayer Inc.*,[47] for example, a class that was defined in terms of persons who suffered damages as a result of the defendant's conduct was rejected on the basis that the definition turned on the merits of the claim.

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43 *Paron v. Alberta (Minister of Environmental Protection)*, 2006 ABQB 375 (Alta. Q.B.), at para. 49.

44 *Spurr v. R.*, 2009 SKQB 478 (Sask. Q.B.), leave to appeal refused 2010 SKCA 99 (Sask. C.A. [In Chambers]); *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (Ont. C.A.), at para. 19, reversing 78 O.R. (3d) 38 (Ont. Div. Ct.), which affirmed 71 O.R. (3d) 741 (Ont. S.C.J.), leave to appeal refused [2007] 3 S.C.R. xii (note), [2007] S.C.C.A. No. 346 (S.C.C.); *Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 (Ont. S.C.J.), at para. 30, additional reasons (1999), 92 A.C.W.S. (3d) 752 (Ont. S.C.J.); *R. v. Nixon* (2002), 21 C.P.C. (5th) 269 (Ont. S.C.J.); *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (Ont. S.C.J.), affirmed (2008), 54 C.P.C. (6th) 167 (Ont. Div. Ct.), additional reasons (2009), 71 C.P.C. (6th) 394 (Ont. Div. Ct.); *Wuttunee v. Merck Frosst Canada Ltd.*, 2009 SKCA 43 (Sask. C.A.), reversing 2007 SKQB 29 (Sask. Q.B.) and 2008 SKQB 78 (Sask. Q.B.) and 2008 SKQB 229 (Sask. Q.B.), leave to appeal granted 2008 SKCA 79 (Sask. C.A.), leave to appeal refused 359 Sask. R. 318 (note), [2008] S.C.C.A. No. 512 (S.C.C.).

45 *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (Ont. S.C.J.), at para. 13, affirmed (2008), 54 C.P.C. (6th) 167 (Ont. Div. Ct.), additional reasons (2009), 71 C.P.C. (6th) 394 (Ont. Div. Ct.).

46 *Frohlinger v. Nortel Networks Corp.* (2007), 40 C.P.C. (6th) 62 (Ont. S.C.J.), at para. 21; *Wuttunee v. Merck Frosst Canada Ltd.*, 2009 SKCA 43 (Sask. C.A.), reversing 2007 SKQB 229 (Sask. Q.B.), leave to appeal refused 359 Sask. R. 318 (note), [2008] S.C.C.A. No. 512 (S.C.C.); *Keatley Surveying Ltd. v. Teranet Inc.*, 2012 ONSC 7120 (Ont. S.C.J.), at paras. 159-167, additional reasons 2013 ONSC 1361 (Ont. S.C.J.), reversed 2014 ONSC 1677 (Ont. Div. Ct.), additional reasons 2014 ONSC 3690 (Ont. Div. Ct.).

47 (2003), 63 O.R. (3d) 22 (Ont. C.A.), at paras. 69-70, additional reasons (2003), 170 O.A.C. 126 (Ont. C.A.), leave to appeal refused [2003] 2 S.C.R. vi (note), [2003] S.C.C.A. No. 106 (S.C.C.).

Although a class definition that includes criteria for membership that depend on the outcome of litigation of the common issues certified is prohibited, this prohibition does not necessarily extend to all cases where the class definition turns on whether an individual has suffered injury or loss.[48] Some courts have held that, provided it does not offend the prohibition against merits-based class descriptions, a limiting phrase in the class description to the effect of "all those persons who claim" in respect of the alleged harm (a claims-made limiter) is a possible way to define a class.[49] Other courts, however, do not accept claims-made limiters.[50]

Some courts have concluded that the addition of the qualifying words "who claim to" does not rectify the underlying problem of the overly-broad definition of class members.[51] In *L. (T.) v. Alberta (Director of Child Welfare)*, the court stated that it "is not an acceptable situation for a class member to potentially argue in the future that they are not bound by the result of the class proceedings, or a settlement, because they never 'claimed' anything, or that they never claimed anything at a relevant point in time."[52] Thus, care must be taken when using claims-limiters, especially because the case law is inconsistent and difficult to reconcile.

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48 *Wuttunee v. Merck Frosst Canada Ltd.*, 2009 SKCA 43 (Sask. C.A.), reversing 2007 SKQB 29 (Sask. Q.B.) and 2008 SKQB 78 (Sask. Q.B.) and 2008 SKQB 229 (Sask. Q.B.), leave to appeal granted 2008 SKCA 79 (Sask. C.A.), leave to appeal refused 359 Sask. R. 318 (note), [2008] S.C.C.A. No. 512 (S.C.C.), at paras. 67-69.

49 *Attis v. Canada (Minister of Health)* (2007), 46 C.P.C. (6th) 129 (Ont. S.C.J.), at paras. 55-58, additional reasons 2007 CarswellOnt 4258 (Ont. S.C.J.), affirmed 2008 ONCA 660 (Ont. C.A.), leave to appeal refused (2009), 303 D.L.R. (4th) vi, [2008] S.C.C.A. No. 491 (S.C.C.); *Wheadon v. Bayer Inc.*, 2004 NLSCTD 72 (N.L. T.D.), at paras. 103-111, leave to appeal refused 2005 NLCA 20 (N.L. C.A.), leave to appeal refused 257 Nfld. & P.E.I.R. 359 (note), [2005] S.C.C.A. No. 211 (S.C.C.); *Walls v. Bayer Inc.*, 2005 MBQB 3 (Man. Q.B.), at paras. 27-28, leave to appeal refused 2005 MBCA 93 (Man. C.A. [In Chambers]), leave to appeal refused (2005), 389 W.A.C. 318 (note), [2005] S.C.C.A. No. 409 (S.C.C.); *Thorpe v. Honda Canada Inc.*, 2011 SKQB 72 (Sask. Q.B.), at paras. 55-58, additional reasons 2011 SKQB 72 (Sask. Q.B.).

50 *L. (T.) v. Alberta (Director of Child Welfare)*, 2006 ABQB 104 (Alta. Q.B.); *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (Ont. S.C.J.), at para. 44, affirmed (2008), 54 C.P.C. (6th) 167 (Ont. Div. Ct.), additional reasons (2009), 71 C.P.C. (6th) 394 (Ont. Div. Ct.).

51 *Bryson v. Canada (Attorney General)*, 2009 NBQB 204 (N.B. Q.B.), at paras. 45-50; *Ring v. Canada (Attorney General)*, 2010 NLCA 20 (N.L. C.A.), reversing 2007 NLTD 146 (N.L. T.D.), leave to appeal refused (2010), 962 A.P.R. 362 (note), [2010] S.C.C.A. No. 187 (S.C.C.).

52 *L. (T.) v. Alberta (Director of Child Welfare)*, 2010 ABQB 262 (Alta. Q.B.), at para. 65. See also *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (Ont. S.C.J.), at para. 44, affirmed (2008), 54 C.P.C. (6th) 167 (Ont. Div. Ct.), additional reasons (2009), 71 C.P.C. (6th) 394 (Ont. Div. Ct.).

that class counsel would receive $190,000 in legal fees and that the class members would receive nothing. The court viewed the settlement as demonstrating that the action was a strike suit, and the court did not approve the settlement.

Kidd v. Canada Life Assurance Co.[142] involved a rejection of a proposed amendment to an already approved settlement agreement. The amendment was rejected by the court because it was unfair in all the circumstances.

In *Waldman v. Thomson Reuters Canada Ltd.*, a copyright infringement case, the court rejected a settlement that would have required class members to grant a non-exclusive licence in respect of their court documents, which provided no direct benefit to class members, a *cy près* fund of $350,000 and an $850,000 counsel fee.[143] The motion judge found that the settlement agreement brought the administration of justice into disrepute because the settlement was more beneficial to class counsel than to class members, and amounted to an expropriation of the class members' property rights in exchange for a charitable donation.[144]

K. *Cy près* Distribution

Ideally, to achieve the access to justice purpose of a class proceeding, all of a judgment or all of the settlement funds, less class counsel's share, should be distributed to the class members, who are the intended beneficiaries of the judgment or the settlement. However, sometimes the amounts in question are so small as to make it impractical to identify each individual class member for distribution purposes.[145] At other times surplus or unclaimed funds remain after the distribution to class members. In these circumstances, courts have the authority to order the judgment or settlement funds be distributed *cy près*.

Under the general law about trusts and charities, when a donor or testator makes a gift with conditions that cannot be performed as prescribed by the donor, courts may permit the gift or donation to be completed *cy près* — "as nearly as may be practicable" — to the terms of the gift as intended by the donor so as to honour the spirit if not the letter of the donor's gift or bequest. In the context of a class proceeding, a *cy près*

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141 (2000), 2 B.L.R. (3d) 30, [2000] O.J. No. 452 (Ont. S.C.J.).

142 2013 ONSC 1868 (Ont. S.C.J.). The plaintiffs and defendants appealed the order, and then subsequently abandoned the appeal when they negotiated a new amendment to the settlement. The amended settlement was ultimately approved: *Kidd v. Canada Life Assurance Co.*, 2014 ONSC 457 (Ont. S.C.J.).

143 *Waldman v. Thomson Reuters Canada Ltd.*, 2014 ONSC 1288 (Ont. S.C.J.).

144 *Waldman v. Thomson Reuters Canada Ltd.*, 2014 ONSC 1288 (Ont. S.C.J.), at para. 95.

145 *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58 (S.C.C.), at paras. 24-27; *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507 (Ont. S.C.J.), at paras. 82-83.

distribution of a judgment or settlement fund is used in a similar way to provide indirect benefits for the class members. However, as the discussion below will reveal, the use of a *cy près* distribution is sometimes controversial.[146]

Class action statutes provide for the possibility of *cy près* distributions.[147] Although not specifically referred to by this name, *cy près* awards have been approved pursuant to s. 26 of the Ontario *Class Proceedings Act, 1992*[148] and similar provisions in other statutes.[149] These provisions authorize the court to order the distribution of money "whether or not all of the class members can be identified, or the exact share of each can be determined, and notwithstanding the fact that persons other than class members may incidentally benefit."[150] The statutes contemplate that the distribution will indirectly benefit the class. The Ontario Law Reform Commission in its *Report on Class Actions*, said that the purpose of a *cy près* distribution is compensation for class members through a benefit that "approaches as nearly as possible some form of recompense for injured class members."[151]

For example, in *Serhan Estate v. Johnson & Johnson*,[152] the representative plaintiff sued the manufacturer of an allegedly defective medical device used by diabetics to monitor their blood sugar. The settlement had a cash

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146 J. Kalajdzic, "The 'Illusion of Compensation': *Cy près* Distributions in Canadian Class Actions" (2014), 92 Can. Bar Rev. (forthcoming); L.A. Bihari, "Saving the Law's Soul: A Normative Perspective on the *Cy Près* Doctrine" (2011), 7 Can. Class Action Rev. 293; C. Sgro, "The Doctrine of *Cy Près* in Ontario Class Actions: Towards a Consistent, Principled, and Transparent Approach" (2011), 7 Can. Class Action Rev. 265; J. Berryman, "Nudge, Nudge, Wink, Wink: Behavioural Modification, *Cy près* Distributions and Class Actions" in J. Kalajdzic, *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley* (Markham, Nexis Lexis Canada, 2011); J. Kalajdzic, "Access to Justice: Revisiting Settlement Standards and *Cy près* Distributions" (2010), 6 Can. Class Action Rev. 215; E.R. Potter and N. Razack, "*Cy Près* Awards in Canadian Class Actions: A Critical Interrogation of What is Meant by 'As Near as Possible'" (2010), 6 Can. Class Action Rev. 297; J. Berryman, "Class Actions and the Exercise of *Cy près* Doctrine: Time for Improved Scrutiny" in J. Berryman and R. Bigwood, *The Law of Remedies: New Directions in the Common Law* (Toronto: Irwin Law, 2009); J.C. Kleefeld, "Book Review: The Modern *Cy près* Doctrine: Applications and Implications by Rachael P. Mulheron (2006)" (2007), 4 Can. Class Action Rev. 203.

147 *Gilbert v. Canadian Imperial Bank of Commerce* (2004), 3 C.P.C. (6th) 35, [2004] O.J. No. 4260 (Ont. S.C.J.), at paras. 14-15; *Cassano v. Toronto Dominion Bank* (2009), 98 O.R. (3d) 543 (Ont. S.C.J.), at para. 14.

148 S.O. 1992, c. 6, s. 26(4).

149 Alberta: *Class Proceedings Act*, S.A. 2003, c. C-16.5, s. 34(1); British Columbia: *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 34(1); Manitoba: *The Class Proceedings Act*, C.C.S.M. c. C130, s. 34(1); New Brunswick: *Class Proceedings Act*, R.S.N.B. 2011, c. 125, s. 36(1); Newfoundland and Labrador: *Class Actions Act*, S.N.L. 2001, c. C-18.1, s. 34(1); Nova Scotia: *Class Proceedings Act*, S.N.S. 2007, c. 28, s. 37(1); Saskatchewan: *The Class Actions Act*, S.S. 2001, c. C-12.01, s. 37(1); Québec: *Code of Civil Procedure*, C.Q.L.R. c. C-25, arts. 1033, 1034 and 1036.

150 *McCutcheon v. Cash Store Inc.* (2006), 27 C.P.C. (6th) 293 (Ont. S.C.J.), at para. 76.

151 Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982) (3 vols.), vol. 2. at p. 573.

value of $2.75 million and glucose monitors, strips and lancets worth $1.25 million. The whole settlement was distributed *cy près*, with the products to be distributed by the Canadian Diabetes Association and $1.25 million in cash funds being used: (a) to purchase monitors that would be distributed by the Canadian Diabetes Association through an education program; and (b) to create a public awareness program to raise awareness of the dangers of untreated diabetes.[153] This *cy près* distribution was approved because it was not practical to distribute the benefits of the settlement in any other manner, and the distribution was directly related to the issues in the lawsuit so that class members would receive an indirect benefit from the settlement.

By benefiting the class, albeit indirectly, the *cy près* distribution provides access to justice. In addition, the payment of monies by the defendant may provide some behaviour modification in that the defendant is required to internalize the cost of its products or activities. In considering whether to approve a *cy près* distribution, the court should have regard to the objectives of access to justice for class members and behaviour modification of the defendant.[154] *Cy près* relief should attempt to serve the objectives of the particular case and the interests of the class members.[155] The prospect of a *cy près* distribution should not be used by class counsel, defence counsel, or the defendant as an opportunity to benefit an organization with which they are associated or that they favour.[156] The benefits of the class action are meant for the class members.

As a general rule, *cy près* distributions should not be approved where direct compensation to class members is practicable.[157] Where the expense of any distribution among the class members individually would be prohibitive in view of the limited funds available and the problems of identifying them and verifying their status as members, a *cy près* distribution of the settlement proceeds is appropriate.[158] Where in all the circumstances an aggregate settlement recovery cannot be economically distributed to individual class members, the court will approve a *cy près* distribution to credible organizations or institutions whose services or

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152 2011 ONSC 128 (Ont. S.C.J.).

153 The remaining $1.5 million in cash was paid to class counsel for their fees.

154 *Cassano v. Toronto Dominion Bank* (2009), 98 O.R. (3d) 543 (Ont. S.C.J.), at paras. 14-49; *Sorenson v. Easyhome Ltd.*, 2013 ONSC 4017 (Ont. S.C.J.), at paras. 26-30.

155 See B.J. Rothstein and Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges*, 3rd ed. (Federal Judicial Center, 2010).

156 *Sorenson v. Easyhome Ltd.*, 2013 ONSC 4017 (Ont. S.C.J.), at paras. 32-33.

157 *Cassano v. Toronto Dominion Bank* (2009), 98 O.R. (3d) 543 (Ont. S.C.J.), at para. 17.

158 *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 (Ont. S.C.J.), at para. 27; *Helm v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602 (Ont. S.C.J.), at para. 11; *Elliott v. Boliden Ltd.* (2006), 34 C.P.C. (6th) 339 (Ont. S.C.J.); *Serhan Estate v. Johnson & Johnson*, 2011 ONSC 128 (Ont. S.C.J.), at paras. 57-59; *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507 (Ont. S.C.J.), at paras. 82-83.

programs would benefit class members.[159] The benefit is indirect in the sense of advancing the cause or social purposes of the class action but without providing direct compensation to the class members.

Once it is determined that a *cy près* award is appropriate, class counsel bears the responsibility of designating the beneficiary.[160] Class counsel should consider the views of individual class members about who the recipient should be.[161] Where a class member requests a particular recipient, class counsel will have to be satisfied that it is not a self-serving request that fails to benefit all class members.[162] Class counsel's recommendation will generally be respected by the court, since the court's role is not to remake the settlement agreement or to adjudicate a dispute between the representative plaintiff and class members over who the beneficiary should be. However, in one case where a class member selected a recipient whom class counsel agreed was a worthy recipient, but whom class counsel did not ultimately select as the beneficiary of the *cy près* award, the motion judge ordered that this recipient should receive a portion of the *cy près* award having regard to class counsel's obligation to consider the wishes of class members.[163]

Cy près provisions are also routinely included in settlement agreements to account for any residual funds not distributed to class members at the conclusion of the claims process. Courts have signalled a preference for such residual *cy près* clauses because agreements that revert unclaimed funds back to the defendant may fail to achieve the behaviour modification purpose of the class proceedings legislation. For class counsel, a *cy près* distribution of the residue of a settlement fund is advantageous because this approach preserves the constant value of the settlement of which the counsel fee will be a percentage and diminishes arguments that the counsel fee should be tied to the actual take-up by class members.

Cy près distributions have been approved in numerous cases, mainly in Ontario[164] and Québec,[165] with a few in British Columbia[166] and

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159 *Tesluk v. Boots Pharmaceutical PLC* (2002), 21 C.P.C. (5th) 196 (Ont. S.C.J.), at para. 16; *Alfresh Beverages Canada Corp. v. Hoechst AG* (2002), 16 C.P.C. (5th) 301 (Ont. S.C.J.).

160 *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507 (Ont. S.C.J.), at paras. 128 and 132-133.

161 *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507 (Ont. S.C.J.), at paras. 132-133.

162 *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507 (Ont. S.C.J.), at para. 134.

163 *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507 (Ont. S.C.J.), at paras. 122-142.

164 See, *e.g.*, *Tesluk v. Boots Pharmaceutical PLC* (2002), 21 C.P.C. (5th) 196 (Ont. S.C.J.), at para. 16; *Alfresh Beverages Canada Corp. v. Hoechst AG* (2002), 16 C.P.C. (5th) 301 (Ont. S.C.J.); *Gilbert v. Canadian Imperial Bank of Commerce* (2004), 3 C.P.C. (6th) 35 (Ont. S.C.J.); *Cassano v. Toronto Dominion Bank* (2009), 98 O.R. (3d) 543 (Ont. S.C.J.); *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (Ont. S.C.J.); *Garland v. Enbridge Gas Distribution Inc.* (2006), 56 C.P.C. (6th) 357, [2006] O.J. No. 4907 (Ont. S.C.J.), varied 2008 ONCA 13 (Ont. C.A.); *Elliott v. Boliden Ltd.* (2006), 34 C.P.C. (6th) 339 (Ont. S.C.J.); *Currie v. McDonald's Restaurants of Canada Ltd.* (2006), 27 C.P.C. (6th) 286 (Ont. S.C.J.), additional reasons (2007), 51 C.P.C. (6th) 99 (Ont. S.C.J.); *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507 (Ont. S.C.J.).

elsewhere.[167] According to a study published in 2014, *cy près* distributions were approved in at least 65 cases in the 12-year period ending in 2012.[168]

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165 See, *e.g.*, *D'Urzo v. Tnow Entertainment Group*, 2014 QCCS 365 (Que. S.C.); and *Stieber v. Joseph Ülie ltée*, 2009 QCCS 2498 (Que. S.C.).

166 See, *e.g.*, *R.N. Parton Ltd. v. Bayer Inc.*, 2006 BCSC 1621 (B.C. S.C. [In Chambers]).

167 *Bishay Estate v. Maple Leaf Foods Inc.*, 2009 SKQB 326 (Sask. Q.B.).

168 J. Kalajdzic, "The 'Illusion of Compensation': *Cy près* Distributions in Canadian Class Actions" (2014), 92 Can. Bar Rev. 1 (forthcoming).

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JTI-MACDONALD CORP.

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ROTHMANS, BENSON & HEDGES INC.

Applicants

Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

SECOND AMENDED AND RESTATED COURT-APPOINTED MEDIATOR'S AND MONITORS' CCAA PLANS

BOOK OF AUTHORITIES FOR

PAN-CANADIAN CLAIMANTS' COMPENSATION PLAN: METHODOLOGY AND ANALYSIS

AND

THE CY-PRÈS FUND: METHODOLOGY AND ANALYSIS