
SETTLEMENT: COURT APPROVAL

The Class Action Settlement: An Overview

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Introduction

As class actions move into their second decade in Ontario, it seems possible to draw at least one, tentative conclusion: very few class actions actually go to trial. Of over 400 class actions¹ which have been filed to date in Ontario, only four cases have in fact reached trial.²

Class actions which do not go to trial are not all resolved by settlement. Some may simply never be pursued. Others are dismissed at the certification stage or as a result of dispositive motions based on the pleadings or on the lack of a genuine issue to be tried. However, an important trend in the settlement of class actions is the increasing frequency with which defendants consent to the certification of a class action conditional upon the approval of a settlement. Sometimes, this occurs even where the court has declined to certify a similar class action against other defendants.³

This trend underlines both the pressures and incentives which operate on both sides of a class action to bring about an early resolution or disposition of the case, often by way of settlement. It also feeds the concern of class action targets that class actions place undue

pressures on defendants to settle regardless of the ultimate merits of the case. However, as we shall see, the courts themselves are developing a sensitivity towards recognizing class actions which are designed to force a settlement on a defendant where there is no merit. Also, although we will not be able to deal with the subject within the scope of this article, frequent targets of class actions often adopt a strategy of vigorously defending all actions which fundamentally lack merit, especially by resisting certification and filing motions for early dismissal of the proceeding. Many defendants have been successful in adopting such an approach.⁴

Perhaps the greatest driver of settlements from the perspective of both plaintiffs and defendants is certification risk.

For a class action defendant, usually a major corporation, the risk that a class action will be certified by the court carries with it not only the prospect of extremely expensive and protracted litigation, but damages and punitive awards on a scale which may materially affect the fortunes of the company. An even more significant risk is that the customers and shareholders of the company will have to be notified (often through direct mailing or mass media advertisements) of the existence of the lawsuit, the nature of the allegations which are being made and the fact that the court has determined that there is sufficient merit in the allegations to allow the matter to proceed as a class action. Faced with that prospect, most major corporations will pursue one of two courses: (i) commit significant resources to resisting certification or obtaining the early dismissal of the class action; or (ii) attempt to settle the case. Taking a wait and see approach does not work in class actions unless there is some doubt whether the action will be pursued at all.

From a plaintiff's perspective, given the fact that class actions tend to be funded wholly or substantially by the lawyers who filed the action, different considerations lead to the

¹ This is an estimate based on approximately 287 class actions having been filed by April 2001, W.K. Branch, *Class Actions in Canada*, looseleaf at paragraph 4. 1960 (Vancouver: Western Legal Publications, 1998, updated to December, 2002).

² *Windisman v. Toronto College Park Ltd.* (1996), 28 O.R. (3d) 29; *Peppiatt v. Nicol* (1998), 82 A.C.W.S. (3d) 243 (Gen. Div.); *Simpson v. Ontario*, [1999] O.J. No. 895; *Bywater v. Toronto Transit Commission*, [2001] O.J. No. 2384 (S.C.J.).

³ *Garipey v. Shell Oil Co.*, [2002] O.J. No. 4022 (Sup. Ct.) (Q.L.) [hereinafter *Garipey*].

⁴ See *Hughes v. Sunbeam Corp. (Canada)*, 61 O.R. (3d) 433; *Williams v. Mutual Life Assurance Co.*, [2001] O.J. No. 4952; *Joncas et al v. Spruce Falls and Power and Paper Company Limited et al.* (2000), 48 O.R. (3d) 179 (Sup. Ct.); *Nash v. C.I.B.C. Trust Co.*, [1996] O.J. No. 3940 (Gen. Div.); *Rivett v. Hospitals of Ontario Pension Plan*, [1995] O.J. No. 3270 (Gen. Div.).

same result. Certification risk for plaintiff's counsel means that the very substantial investment in developing a case and bringing it to the certification stage will be lost if certification is not achieved. Also, given the contingent nature of compensation for plaintiff's counsel and the availability of multipliers or fees based on a percentage of the recovery, the most remunerative settlements achieved with the least financial risk are likely to be those reached prior to certification.

To the foregoing factors which militate in favour of the settlement of class actions at or before the certification stage, one more must be added. Given that it is in the financial interest of plaintiff's counsel to invest in cases which have a high probability of settling, it goes without saying that a significant number of cases filed may actually have merit. In such cases, it may well be in the interest of defendants to use the class action procedure to achieve what they cannot achieve through ordinary litigation, namely a resolution of the claim at a relatively fixed cost which is binding on the vast majority of potential claimants.

Settlement Procedure

In all Canadian provinces with class action legislation, to ensure the protection of the vast majority of class members who do not take an active part in the proceedings, the court must approve all settlements of class proceedings.⁵

This requirement is essential since a settlement made in the context of a certified (or conditionally certified) class action will be binding on every class member other than those who have chosen to opt out.⁶ In some provinces, this general rule is subject to an exception that class members not resident in the province will have to specifically opt-in to be included.⁷

⁵ British Columbia: *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 35; Saskatchewan: *Class Actions Act*, S.S. 2001, c. C-12.0-1, s. 38; Newfoundland and Labrador: *Class Actions Act*, S.N.L. 2001, c. C-18.1, s. 35; Manitoba: *The Class Proceedings Act*, S.M. 2002, c. 14, s. 35; Ontario: *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 29(2). See also U.S. Federal Rule 23(e).

⁶ R.S.B.C. 1996, c. 50, s. 35(4); S.S. 2001 c. C-12.01, s. 38(4); S.N.L. 2002 c. C-18.1, s. 35(4); S.M. 2002, c. 14, s. 35(4); S.O. 1992, c. 6, s. 29(3); See also Bill 25 – *Class Proceeding Act (Alberta)*, s. 35(4).

⁷ R.S.B.C. 1996, c. 50, s. 16; S.S. 2001 c. C-12.01, s. 18; S.N.L. 2002 c. C-18.1, s. 17; S.M. 2002, c. 14,

Once a settlement has been reached between class counsel and defendant's counsel, a motion is brought before the court for approval of the terms of the settlement.

Only Quebec legislation specifically sets out the information that must be provided to the court in an application for approval. It prescribes that the following information be included:⁸

63. *Content of transaction.* Every transaction presented to the Court for approval shall contain the following information (Article 1025 C.C.P.):

(a) a description of the class whose members will be bound by the transaction;

(b) the method of execution, whether by collective recovery, with or without individual liquidation of the claims of the members of the class or the distribution of an amount to each of them, or by individual recovery of the claims;

(c) where the transaction provides for collective recovery of the claims of the members of the class, it must indicate the total sum due by the debtor and stipulate that the debtor shall deposit that sum at the Office of the Court;

(d) in cases of collective recovery in accordance with Article 1033 C.C.P. or of individual claims, the procedure by which the claims will be liquidated and the method of distribution;

(e) the amount which will be reimbursed to the *Fonds* in any case where it has granted financial assistance to the representative (Section 30 of the Act);

(f) the amount which the debtor has agreed to pay as costs or fees (Section 32, 2nd paragraph of the Act);

(g) in cases of collective recovery, the designation of the proposed beneficiaries of the balance, where applicable.

Similar information should no doubt also be included in a motion for court approval in all other provinces as well. The material filed should also contain a form of consent judgment specifying the relief which has been

s. 16; See also Bill 25 – *Class Proceeding Act (Alberta)*, s. 17.

⁸ Quebec *Rules of Practice – Superior Court*, Rule 63.

CLASS ACTION

agreed to together with the methodology for proving individual claims to the settlement fund, for example, by way of affidavit, claims referee, trial of one or more issues or as the case may be.⁹

Reasonableness and Fairness of the Settlement

Dabbs v. Sun Life Assurance Co. of Canada,¹⁰ remains the leading Ontario case on approval of a class action settlement. In that case (which produced reported decisions at various stages of the action), Sharpe J. stated that, before a court will approve a settlement, the burden is on the plaintiff and defendant to demonstrate that the proposed settlement is fair, reasonable and in the best interests of those affected by it. At another hearing in *Dabbs v. Sun Life Assurance Co. of Canada*,¹¹ Sharpe J. cited a U.S. text, *Newberg on Class Actions*,¹² to list criteria that a court will consider in assessing the reasonableness of a proposed settlement. In a more recent case, *Parsons v. Canadian Red Cross Society*,¹³ Winkler J. appended two additional factors to this list, resulting in a total of ten considerations the court must have regard to. These ten criteria are:

Likelihood of Recovery

This factor involves the weighing of the strength of the plaintiff's case on the merits (but not to the extent of a full trial) against the monies or other relief offered in the settlement and the potential recovery.¹⁴ For example, in *Alfresh Beverages Canada Corp. v. Hoechst AG*,¹⁵ the Court noted the real risk that the plaintiff would not be able to prove any damages as a consideration for assessing the fairness of the settlement.

⁹ Supra note 1 at paragraph 16.29.

¹⁰ [1998] O.J. No. 2811 at paragraph 46 [hereinafter *Dabbs (O.J. No. 2811)*].

¹¹ [1998] O.J. No. 1598 (Gen. Div.) at paragraph 13 [hereinafter *Dabbs (O.J. No. 1598)*].

¹² H.B. Newberg & A. Conte, *Newberg on Class Actions*, 3d ed. (Colorado Springs: McGraw Hill, 1992) at paragraph 11.43 [hereinafter *Newberg*].

¹³ [1999] O.J. No. 3572 (Sup. Ct.) [hereinafter *Parsons*].

¹⁴ *Newberg*, supra note 12 at paragraph 11.45.

¹⁵ [2002] O.J. No. 79 (Sup. Ct.).

Amount and Nature of Discovery Evidence

The court need not possess evidence to decide the merits of the issue (since the purpose of a settlement proposal is to avoid further litigation). However, at a minimum, the court must possess sufficient information to raise its decision above mere conjecture.¹⁶ A settlement can be approved "early" in the process even where no discovery has been completed. However, in the absence of formal discovery, presumably a reasonable level of investigation of the matters in issue will need to have been conducted to support the reasonableness of the settlement. In *Dabbs (O.J. No. 1598)*,¹⁷ where counsel had interviewed hundreds of potential class members, this condition – relating to the amount and reasonableness of discovery evidence – was satisfied. More recently, in *Gariepy*,¹⁸ Nordheimer J. considered that although discoveries had not taken place, this component had been satisfied as the factual basis for the claims were sufficiently well-known given that there had already been many years of litigation in the U.S. and voluminous materials were available to class counsel.

Settlement Terms and Conditions

This condition requires that the settlement secures an adequate advantage for the class in return for the surrender of litigation rights against the defendants.¹⁹ In this regard, Nordheimer J. in *Gariepy* stated at paragraph 44:

It is not the function of the court in reviewing a settlement to reopen the settlement or to attempt to re-negotiate it in the hope of improving its terms. Simply put, the court must decide either to approve the settlement or to reject it. Similarly, in deciding whether to approve the settlement, the court must be wary of second-guessing the parties in terms of the settlement that they have reached. Just because the court might have approached the resolution from a different perspective, or might have reached a resolution on a different basis, is not a reason to reject the proposed settlement unless the court is of the view that the settlement is inadequate or unfair or unreasonable.

¹⁶ *Newberg*, supra note 12 at paragraph 11.45.

¹⁷ Supra note 11.

¹⁸ [2002] O.J. No. 4022 (Sup. Ct.).

¹⁹ *Newberg*, supra note 12 at paragraph 11.46.

Similarly, in *Dabbs (O.J. No. 1598)*²⁰ it was stated that a court cannot rewrite a settlement – it can only indicate “areas of concern” to the parties. In practice, however, this may be a distinction without a significant difference. In *Parsons*,²¹ for example, Winkler J. refused to approve a settlement unless the parties modified particular provisions of the agreement in order to address specific issues.

The *Parsons* case arose in the context of mass tort claims against certain defendants as a result of contaminated blood transfusions to the class members. The plaintiffs alleged that had the defendants taken steps to implement surrogate testing, the incidence of infection from contaminated blood would have been reduced by as much as 75%. One of the terms of the settlement agreement provided that if opt out claimants were successful in individual litigation, any award such a claimant would receive would have been satisfied out of the settlement Fund. In Winkler J.’s view, this had the potential of depleting the Fund to the detriment of the class members who did not opt out, thus rendering uncertain the benefits of the settlement. Of greater concern was the risk of inequity that this created in the settlement distribution. Winkler J. considered that the opt-out provision had the potential effect of giving the opt out claimant preferential treatment in respect of access to the Fund. The opt out provision could have had this effect where an opt out claimant received 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 have occurred where the opt out claimant receives an award similar to his or her entitlement under the settlement in quantum but without regard for the time phased payment structure of the settlement for remuneration of class members who do not opt out.

Winkler J. stated the following at paragraph 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.

Even though Winkler J.’s language may imply that the Court in *Parsons* was imposing settlement terms on the parties, this was clearly not the case as he went on to state at paragraphs 131-132:

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... 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.

Even though the court does not have the power to impose a settlement on the parties, it must be understood that the court may have a decisive role to play in shaping a settlement. Indeed, the settlement process may involve several attendances before a supervising or mediating judge to test various concepts before they are incorporated into a settlement which is presented to the court (ideally, to another judge) for approval.

Recommendation and Experience of Counsel

The weight accorded to the recommendation of counsel is dependent on a variety of factors, including length of involvement in the litigation, competence, experience in the

²⁰ Supra note 11 at paragraph 10.

²¹ Supra note 13.

CLASS ACTION

particular type of litigation, and the amount of discovery completed.²²

In *Dabbs (O.J. No. 2811)*,²³ Sharpe J. made reference to factors which persuaded him to accord weight to plaintiff counsel's recommendation of the settlement despite the fact that "it is obvious that class counsel have a significant interest in having the settlement approved":

- Class counsel is experienced.
- Class counsel is of "high repute."
- Class counsel's reputation for integrity and diligent effort on behalf of their clients are on the line.
- There was a team of class counsel from three provinces.
- Class counsel also sought advice of counsel from the U.S. who have experience in this area of the law.

At the risk of appearing immodest, it is necessary that counsel include, in the settlement material, information upon which the court can make findings regarding the competence and experience of class counsel.

Future Expense and Likely Duration of Litigation

In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.²⁴

Recommendations of Settlement by Neutral Parties, if Any

Neutral parties include independent experts²⁵ and government agencies. In many cases, pension surplus disputes for example, the approval of a regulator to the implementation of the settlement may be necessary and should form a condition of the settlement.

Number of Objectors and Nature of Objections

Some U.S. courts have taken the position that one indication of the fairness of a settlement is the lack of objections. However, such an inference should not be controlling in settlements where the majority of class members are not personally before the court and likely possess insufficient knowledge of all relevant factors to evaluate the fairness of the settlement.²⁶

In *Parsons*,²⁷ Winkler J. distinguished concerns that are the proper subject matter for objections, from those that are not (at paragraph 77):

I note that some of the submissions ... 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.

The following provide a non-exhaustive list of concerns that Winkler J. considered appropriate to found an objection:

- The adequacy of the total value of the settlement amount.
- The extent of compensation provided through the settlement.
- The sufficiency of the settlement Fund to provide the proposed compensation.
- The reversion of any surplus.

While class action legislation clearly sets broad social goals, the decision of Winkler J. is important in affirming that class actions are in essence vehicles for resolving specific disputes between specific parties.

²² Newberg, supra note 12 at paragraph 11.47.

²³ Supra note 10 at paragraph 32.

²⁴ Newberg, supra note 12 at paragraph 11.50.

²⁵ *Direct Cartage Ltd. v. London Life Insurance Co.*, [2001] O.J. No. 4073 (Sup. Ct.).

²⁶ Newberg, supra note 12 at paragraph 11.48.

²⁷ Supra note 13.

The Presence of Good Faith and the Absence of Collusion

Given that class actions tend to be “lawyer driven” litigation and given the incentives which plainly exist in many cases for plaintiff’s counsel and defendants to settle class actions at or prior to the certification stage, the requirements of good faith and absence of collusion should never be taken lightly. The issue is most likely to arise with reference to the compensation which will be payable to plaintiff’s counsel if the settlement is approved. At a minimum, it is submitted that there should be no discussion of any payment to plaintiff’s counsel in the nature of a “premium,” “multiplier” or “percentage” until after all financial terms relating to the members of the plaintiff class have been settled. It is submitted that, in most cases, the payment of a counsel fee on a straight time basis as part of the overall settlement discussion should not present the same problem. Such discussions of payment of the plaintiffs’ “party and party” costs by the defendant are a normal part of the settlement of all litigation and are to be distinguished from discussions as to the contingency aspect of the fee.

However, there may be cases where even discussions as to costs on an hourly rate basis are inadvisable before a settlement of the substantive claims has been reached. For example, such discussions may be unwise if it is apparent that there may be a serious issue regarding the amount of time or disbursements which class counsel claims to have spent. In any case, any settlement should be expressly subject to court review and approval on all issues regarding professional fees and disbursements.

In *Gareipy*, discussions regarding compensation of class counsel which occurred after the main settlement terms were reached was found not to be problematic.²⁸ Other approaches are also possible. For example, in *Dabbs*, it was agreed that the issue of any premium above compensation on a straight time basis would be resolved by arbitration within a stated range of amounts. The lower end of the range corresponded to computation on a standard hourly rate basis.²⁹ The arbitration took place after the settlement was

approved and, in the result, class counsel was compensated at the lower end of the range.

Another approach is to reach no agreement regarding any premium payable to class counsel beyond compensation for time spent and to leave it to class counsel to seek approval for an appropriate amount of compensation payable out of the proceeds of settlement. In this scenario, the defendant would make no submissions at the hearing as to an appropriate premium. On the other hand, if a premium is to be paid by the defendant and not deducted from the proceeds of settlement which will be payable to class members, the defendant will clearly wish to have the right to make submissions.

U.S. decisions indicate that the courts respect the integrity of counsel and presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered.³⁰ Those courts typically look to ensure that the representative plaintiff is not settling for inadequate reasons, such as litigation fatigue or a “lucrative side deal,” and that the settlement is fair, reasonable and in the best interests of those affected.³¹

The final two factors for assessing the fairness of a settlement as enunciated in the *Parsons* case are also, indirectly, relevant on the issue of collusion and good faith.

The Degree and Nature of Communications by Counsel and the Representative Plaintiff With Class Members During the Litigation

This factor helps the court appreciate whether the concerns of the class have been adequately addressed by the settlement.³² Accordingly, in *Mondor v. Fisherman; CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*,³³ Cumming J. noted that there had been “effective communication with class members” though publication and mailings of the notice of the Settlement hearing. Cumming J. also acknowledged that the class counsel had communicated with the class members by operation of a website containing all pleadings, records and decisions and a

³⁰ Newberg, *supra* note 12 at paragraph 11.51.

³¹ Federal Judicial Centre, *Manual for Complex Litigation*, 3d ed. (West Publishing, 1995) at 239.

³² *Parsons*, *supra* note 13 per Winkler J.

³³ [2002] O.J. No. 1855 (Sup. Ct.) [hereinafter *Mondor*].

²⁸ *Supra* note 3 at paragraph 46, 59.

²⁹ (1998), 36 O.R. (3d) 770.

CLASS ACTION

toll-free telephone number with a recorded message.

The concerns of the court will be addressed to a substantial extent by the existence of a "steering committee" or other effective organization which represents class members and is available to provide class counsel with instructions and/or guidance. A substantive record of communications with such a body, both before and after the settlement is reached, as well as a detailed record of "town hall"-type meetings and call centre records of reactions of members may also be of great assistance in appropriate cases.

It is prudent to include within the settlement agreement specific details as to how the settlement will be communicated to the class and to the public. It is also advisable (if not actually required pursuant to section 20 of the Ontario Act³⁴) that the general form of such communications be approved by the Court in advance.

Information Conveying to the Court the Dynamics of, and the Positions Taken by the Parties During, the Negotiation

In *Parsons*, Winkler J. suggested that this factor "provide[s] 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 strengths."

In a recent case,³⁵ Cumming J. affirmed the presumption of fairness when a proposed settlement has been negotiated at arms length. He also cited American authority which is to the effect that a settlement which is the result of extensive negotiations by experienced counsel should be presumed to be fair.³⁶ In *Mondor*, the settlement negotiations took place through the auspices of the Court in that Mr. Justice Winkler supervised the negotiations over a period of several weeks.

There is no reason to believe that the courts will require a "blow-by-blow" recapitulation of the negotiations. The requirement of

such a narrative could be highly counterproductive to the successful negotiation of settlement in class action cases.

"Strike Suits"

It is important to bear in mind that the public policy behind class actions legislation encompasses three objectives: (a) access to justice; (b) judicial efficiency; and (c) behaviour modification.³⁷

Nevertheless, it is widely recognized that class actions may be abused, i.e., used for purposes which are consistent with none of these objectives but solely with the objective of extracting a monetary settlement from a defendant whose legitimate business activity is threatened by a spurious class action. This gives rise to the possibility that a court, in exercising its responsibility to promote the public policy objectives of class actions, may refuse to approve a settlement on the basis that it operates an injustice on the defendant rather than on the basis that it does not sufficiently compensate the plaintiffs.

Epstein v. First Marathon Inc.,³⁸ is the first lawsuit in Canada that has been judicially categorized as a "strike suit," Cumming J. defined this term as follows:

The term "strike action" or "strike suit" ... connotes the commencement and pursuit of a class proceeding where the merits of the claim are not apparent but the nature of the claim and targeted transaction is such that a sizeable settlement can be achieved with some degree of probability. The term suggests a class proceeding that is properly regarded as an abuse of process.³⁹

Similarly, in the U.S. case of *Re: General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation*,⁴⁰ the Court noted that:

Class actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the threat of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims' actual worth.

³⁴ *Supra* note 5.

³⁵ *Mondor*, *supra* note 33.

³⁶ See *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 68 (1997) ("in general, a settlement arrived at after genuine arm's length bargaining may be presumed to be fair").

³⁷ *Kumar v. Sharp Business Forms Inc. (c.o.b Bell Cabel Ticket & Tag)*, [2001] O.J. No. 1729 (Sup. Ct.) at paragraph 42.

³⁸ [2000] O.J. No. 452 (Sup. Ct.).

³⁹ *Ibid.* at paragraph 41 (QL).

⁴⁰ 55 F. 3d 768 (3d Cir. 1995).

The *Epstein* case emerged against the backdrop of a friendly take-over bid by National Bank of First Marathon, the corporate defendant. Under the proposed arrangement, National Bank would purchase all the shares of First Marathon for approximately \$712 million and then merge the acquired corporation with a wholly owned subsidiary, Levesque Beaubien Geoffrion Inc.

A class action was commenced against First Marathon and its directors naming Stephen Epstein, a shareholder of First Marathon, as a representative plaintiff on behalf of all persons who owned non-voting shares on the date the merger was announced. The class action sought to have the deal set aside on the basis that the Management Information Circular had made inadequate disclosure to shareholders.⁴¹

Interestingly, at the shareholders meeting convened to approve the arrangement, none of the shareholders, with the exception of Mr. Epstein, raised any concerns about the proposed transaction. Nonetheless, just hours after the meeting, a settlement agreement was entered into between Epstein and First Marathon. Under the agreement, \$190,000 would be paid to Epstein's counsel for fees and disbursements; the action would be dismissed without costs; and the parties would keep the terms of the settlement confidential. The Settlement Agreement did not provide for any benefit to be conferred on any shareholder of First Marathon. It was apparent that the principals of First Marathon were willing to

settle the action simply to remove an impediment to the merger. Cumming J. made it clear that the courts will not hesitate to refuse a settlement entered into in this context:

In *Greenspun v. Bogan* ... in a passage cited with approval in *Dabbs*, supra, by Mr. Justice Sharpe, it was stated that "when one side is so obviously correct in its assertions of law and fact that it would be clearly unreasonable to require it to compromise in the extent of the settlement, ... to approve the settlement would be an abuse of discretion." It would be an abuse of judicial discretion in the instant case to approve of the compromise represented by the proposed settlement.⁴²

In the *Epstein* case, the settlement was actually brought before the Court for approval. This gave the Court an opportunity which it would not otherwise have had to express its disapproval of strike suits. As a practical matter, had Court approval not been sought, the issue would never have arisen. Although subsection 29(2) of the Ontario Act provides that a "settlement of a class proceeding is not binding unless approved by the court," in many strike suit situations the victimized defendant may only be interested in getting rid of the immediate lawsuit so that its transaction can proceed and will not be concerned about precluding further actions on behalf of the same class. The potential mischief from a public policy perspective is that settlement on this basis would only compensate class counsel for not proceeding with the action and result in or no benefit for the class. However, such a settlement, in the absence of court approval, is arguably a contravention of subsections 2(2) and (3) of the Ontario Act which requires a person who commences a class action to proceed with a motion to certify the action as a class proceeding. Given the fact that many class actions do not proceed to certification but are simply abandoned,⁴³ it may be presumed that this interpretation of subsection 2(2) of the Ontario Act as mandating a motion for certification in every action which is filed as a class action is not universally acknowledged.

⁴¹ It should be noted that if and when the civil action provisions of Bill 198 are enacted, the *Ontario Securities Act*, R.S.O. 1990, c. S.5, as amended, will be amended to provide for a right of action for persons who acquire or dispose of securities while there is a failure by the issuer to make timely disclosure of a material change. This right of action will arise whether or not there was actual reliance by the investor on the issuer having complied with its disclosure requirements. However, leave of the court will be necessary before such an action can proceed. Section 138.8(1) of Bill 198 provides that the court shall only grant leave where it is satisfied that: (a) the action is being brought in good faith; and (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff. Interestingly, this "reasonable possibility of success" or "preliminary merits" test is the same test that was proposed by the Ontario Law Reform Commission for the certification of class actions: Ontario Law Reform Commission, *Report on Class Actions* (1982).

⁴² *Supra* note 38 at paragraph 76.

⁴³ C. Wright and G. D. Watson, "Class Actions in Ontario and British Columbia 1993-2001: An Analysis of the First Eight Years of Class Actions in Canada's Common Law Provinces."

“Settlement Classes”

Another issue that has, so far, proved less controversial in Canada than in the United States is the issue of “settlement classes.” This is a term that is used to refer to class actions which are certified solely on the condition that a settlement is approved. If the settlement is not approved or if conditions to the settlement are not satisfied after court approval is granted, the certification order is rescinded without prejudice to the defendants right to oppose any further motion for certification.

It goes without saying, much as the purpose of a class action is to seek relief for a large and/or widely dispersed class of plaintiffs, a settling defendant will wish to know that any settlement will be binding on most if not all of the same class. Also, it is commonplace in normal actions for defendants to settle without admitting liability. Indeed, the option of settling without admission of liability must be regarded as one of the key factors promoting settlements in general.

In the class action context, releases in favour of the defendant can only be provided by the court. However, no order of the court can be binding on members of a class unless and until a class has come into legal existence as result of a certification order.⁴⁴ Indeed, a judgment of the court in a class action is only effective to the extent that the judgment determines common issues that are set out in the certification order or relate to claims, defences or relief referred to in the certification order.⁴⁵ Thus, the defendant will derive little benefit from a settlement unless the class action has been certified.

Furthermore, the coupling of a settlement with a conditional certification order offers the defendant a timely opportunity to ensure that the class and common issues are defined in a manner which will provide the maximum protection and value to the defendant in return for the settlement payment.

There are few Canadian cases in which the merits of settlement classes have been discussed. Although, in *Haney Iron Works Ltd. v. Manufacturers Life Insurance Co.*,⁴⁶ Brenner J. considered that the objective of

efficient judicial handling of class action cases is best achieved by affirming the right of a defendant to support an application for certification and settlement approval while at the same time preserving its right to contest certification in the event that the settlement is not approved.⁴⁷

One issue which arises in connection with settlement classes is whether the same test will be applied to certification as is applied in a non-settlement context. While the statutory test⁴⁸ remains the same, there are indications that the application of the tests will be relaxed so as to facilitate settlements. In the *Gariepy*⁴⁹ case, Mr. Justice Nordheimer stated as follows:

The first issue is whether this action should be certified as a class proceeding for the purposes of the proposed settlement. The requirements for certification in a settlement context are the same as they are in a litigation context and are set out in section 5 of the *Class Proceedings Act, 1992*. However, their application need not, in my view, be as rigorously applied in the settlement context as they should be in the litigation context, principally because the underlying concerns over the manageability of the ongoing proceeding are removed.

The *Gariepy* case is interesting in that the same judge had previously denied certification of the same action as it related to two other defendants. In the course of his decision approving the settlement class, Nordheimer J. provided some analysis as to how issues he had identified with respect to certification in the former case had been addressed by the terms of the settlement itself. Nevertheless, his overall approach suggests that the existence of the settlement relaxes the application of some of the statutory requirements. Also, it is fair to say that (as in *Gariepy*) a properly crafted settlement will address some of the statutory requirements for certification. For example, the requirement that a class proceeding be the “preferable procedure for the resolution of the

⁴⁴ Ontario Act, supra note 5 at s. 29(3).

⁴⁵ Ibid. at s. 27(3).

⁴⁶ [1998] B.C.J. No. 2936.

⁴⁷ See also *Menegon v. Philip Services Corp.*, [1999] O.J. No. 4080 (QL) (Sup. Ct.), wherein Blair J. certified a class for the purposes of settling an action against one defendant without prejudice to the rights of non-settling co-defendants to resist the certification application.

⁴⁸ Ontario Act, supra note 5 at s. 5.

⁴⁹ *Gariepy*, supra note 3 at paragraph 27.

common issues” may be satisfied by the very fact of the settlement. This is particularly so if, as in *Gariepy*, the settlement includes a detailed, fair and efficient procedure for processing individual claims.

An efficient process in this type of case is for a notice to be published, advising the class of the date when both the certification application and settlement will be considered by the court. The notice should provide the date by which objections should be delivered. Often, the notice is supplemented by information meetings and detailed information provided on the Internet. Upon certification and approval of the settlement, a further notice is delivered or published in a manner directed by the court specifying the manner in which class members can either opt out or recover.⁵⁰

The following concerns with respect to settlement classes, as noted in the U.S. case of *Re: General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation*,⁵¹ remain noteworthy:

- The possibility of pre-certification negotiation and settlement may encourage the filing of strike suits. Since settlement classes can involve a settlement achieved either before or after the filing of class claims, recognition of the settlement class device allows plaintiffs to file as class actions cases that counsel never intended to have certified, but instead only to settle.
- Class members may not be in a fair position at this early stage to evaluate whether or not the settlement represents a superior alternative to litigating. Further, the class members are presented with what looks like a *fait accompli*.
- The court performs its role as supervisor/protector without the benefit of a full adversarial briefing on the certification issues. Consequently, the judge cannot as effectively monitor for collusion and other abuses.
- The court may not be able to discharge fully its duty to protect the interests of the absent class members during the disposition of the action. As the class has not yet been defined, the court may lack the

information necessary to determine the identity of the absent class members and the likely extent of liability, damages, and expenses of preparing for trial.

- Settlement classes create especially lucrative opportunities for putative class counsel to generate fees for themselves without any effective monitoring by class members who have not yet been apprised of the pending action.

For reasons such as these, where parties simultaneously seek class certification and settlement approval, some courts in the U.S. are even more scrupulous than usual when examining the fairness of the proposed settlement. As noted in the headnote of a recent case, “this heightened standard is designed to ensure that class counsel has demonstrated sustained advocacy throughout the course of the proceedings and has protected the interests of all class members.”⁵²

Although the concern expressed in some U.S. cases are valid, it must be stated that the approach laid out by Canadian courts for the approval of class action settlements, if vigorously applied, should uncover any abuses.

“Bar Orders” as a Term of Settlement

The purpose of a bar order is to cap the cost of settlement to the defendant by ensuring that it will not be subject to any further liability to third parties or co-defendants insofar as they relate to the settled claims of class members. The potential difficulty in achieving this objective is that the Ontario Act does not give the court any jurisdiction to alter the substantive rights of parties or non-parties to the class action in order to achieve the objectives of the legislation. Non-parties to the settlement often will have substantive rights to claim against the settling defendants for contribution and indemnity if the non-parties are subsequently found to be liable.

The first case to recognize the legitimacy of bar orders in Canadian law is *Ontario New Home Warranty v. Chevron Chemical Company et al.*⁵³ In the *Ontario New Home Warranty* case, Winkler J. found that the substantive rights of the non-settling parties were

⁵⁰ Branch, *supra* note 1 at paragraph 16.140.

⁵¹ *Supra* note 40.

⁵² See *Re: Inter-op Hip Prosthesis, Liability Litigation*, 204 F.R.D. 359 (N.D. Ohio 2001).

⁵³ [1999] O.J. No. 2245 (Sup. Ct.).

CLASS ACTION

addressed by the terms of the settlement agreement itself. He stated:

Here, the settling defendants have abandoned any claim for contribution and indemnity as against the non-settling defendants. In addition, the plaintiffs have chosen to seek damages only in the amount for which the non-settling defendants are "severally" liable.

In the result, the rights provided to the non-settling defendants under s. 1 of the *Negligence Act* form part and parcel of the settlement agreement. There will be no claim for contribution and indemnity as against them by the settling defendants. On the other hand, since they will only be required to pay damages in accordance with their own negligence and liability to the plaintiff, if any, they will have no claim for contribution and indemnity against the settling defendants in respect of any such payment.⁵⁴

The non-settling defendants also contended that the settlement would prejudice them on a procedural level in that they would not as readily be able to deal with issues of comparative fault if the settling defendants were absent from the proceedings. With respect to this issue, Mr. Justice Winkler stated:

The procedural objection raised by the non-settling defendants brings to bear the requirement of balancing the interests of the plaintiff class, on the one hand and the defendants, on the other, in a complex class proceeding. The objects of the *Class Proceedings Act* must be met without prejudice to either the plaintiff class or the defendants.

[...]

In consideration of the interests which must be balanced, it is my view that the procedural objections raised by the non-settling defendants can be addressed without a wholesale rejection of the proposed settlement agreement.

[...]

As I have stated above, these provisions do not occasion any substantive prejudice to the defendants. The procedural concerns may be adequately addressed through the terms on which the settlement is approved.⁵⁵

The concerns of the non-settling defendants regarding procedural fairness were, in effect, addressed by using the jurisdiction of the Court under section 13 of the Ontario Act to stay proceedings. Thus, the settlement was implemented not by a dismissal of the action against the settling defendants but by a stay of proceedings on terms which provided for documentary and oral examination for discovery of the settling defendants as well as the undertaking of the settling defendants to present witnesses for examination at trial. A similar approach, whereby the Court approved a settlement in which the plaintiff's class would be restricted to making only "several" claims against non-settling defendants, was approved in the *Garipey* case.

It must be stated that this approach, while viable in many cases where the objection of a defendant is to limit its financial exposure, will not provide comfort to a settling defendant whose primary objection is to avoid having its product or service dragged through lengthy, highly adversarial court proceedings.

Bar Orders have been recognized in other Canadian jurisdictions as well.⁵⁶ Bar Orders have also been available in U.S. cases for some time.⁵⁷

The recent case of *Attis v. Canada (Minister of Health)*⁵⁸ is also noteworthy. In that case, defendants who had previously settled a class action asserted that the class members were barred from bringing a subsequent claim against any other person with respect to the same factual circumstance giving rise to the initial settlement. This was submitted on the grounds, among others, that the settlement in question contained a "subject matter release." A subject matter release would have barred any subsequent claim from being made by the plaintiffs. Winkler J. could not accept that submission in light of several specific terms of the settlement agreement. Notably, the settlement contained a reservation of rights provisions which expressly preserved the rights of the plaintiffs to pursue other claims but limited the plaintiffs to pursuing claims for "several" obligations of

⁵⁶ See *Killough v. Canadian Red Cross Society*, [2001] B.C.J. No. 1481 (Sup. Ct.) (QL).

⁵⁷ See, for example, *Franklin v. Kaypro Corp.*, 884 F.2d 1222 (U.S. App. 9th Cir. 1989).

⁵⁸ [2003] O.J. No. 344 (Sup. Ct.) (Q.L.).

⁵⁴ *Ibid.* at paragraph 54-55.

⁵⁵ *Ibid.* at paragraph 69-75.

other defendants. Winkler J. did, however, enforce the terms of the settlement agreement by requiring the plaintiffs to amend their Statement of Claim in the new action in such a manner as to limit their claim to the “several” obligations of the defendant, i.e., to claims based on each defendant’s proportionate share of fault.

Objectors to a Proposed Settlement

The Ontario Act does not specifically address the rights of, or procedures in connection with, those persons who object to a proposed settlement. Neither does the Ontario Act speak to who can be an objector. With respect to this latter issue, in *Gariepy* it was held that a non-settling co-defendant does not have standing to object to the approval of a settlement agreement entered into between the representative plaintiff and another co-defendant on the basis that the settlement class members were not receiving enough under the settlement or analogous grounds. However, Nordheimer J. recognized that non-settling co-defendants are affected by bar orders and thus have standing to object to such terms.⁵⁹

In *Dabbs (O.J. 1598)*,⁶⁰ Sharpe J. made reference to a previous order of Winkler J. which sets out the procedure by which class members may object to the settlement (for example, by filing written objections by a specific date in advance of the hearing).

In *Dabbs (O.J. No. 1598)*, Sharpe J. discussed objectors’ rights under the following categories.⁶¹

Right to Adduce Evidence

Although objectors enjoy this right, any evidence adduced by objectors must be relevant to the points they have raised by way of objection and must be given in a timely fashion. For example, the evidence must be submitted by affidavit at least 30 days prior to the date set for the hearing of the motion.

Right to Discovery

Objectors do not have the right to conduct discovery since this would delay the process and defeat the purpose of settlement, that is, to avoid the cost and delay of a lengthy trial.

Right to Cross-examine

Limited cross-examination on affidavits filed in support of the motion for approval may be permitted under strict guidelines set down by the court. For example, the objector who wishes to cross-examine must file an outline of the matters to be cross-examined.

Costs

Objectors may be subject to adverse cost consequences if a motion is made that is “unnecessary” or causes undue delay or expense. In *Dabbs v. Sun Life Assurance Co. of Canada*,⁶² Winkler J. ordered substantial indemnity costs against objectors whose conduct “amounted to an attack on a settlement agreement through the ‘back door’ even though they were granted (and retain) the opportunity to participate in the hearing on the merits.” In that case, the objectors had alleged a conflict of interest on the part of class counsel since they had simultaneously negotiated a settlement and the issue of their own legal fees with the defendant. Winkler J. assessed costs in this manner because the objectors’ motion “cast aspersions on the integrity of class counsel”⁶³ and the allegations were found to be without merit.

Without in any way condoning the objectors’ attacks on the integrity of counsel, it should be pointed out that the *Dabbs* case was a case of first instance in Ontario as to the propriety of the class action settlement and the fee for class action counsel being negotiated at the same time. It was also the first case in which serious consideration was given to the role of objectors to settlements under the Ontario Act. Given that all outcomes in our system of civil practice are ultimately validated by an adversarial process and given that the settlement approval process is a necessary and statutorily mandated feature of any class action process, the question may be raised whether the assessment of costs on a substantial indemnity scale against individual objectors will have the effect of discouraging members of the class from coming forward to raise their concerns.

⁵⁹ Supra note 3 at paragraph 50 *et seq.*

⁶⁰ Supra note 11.

⁶¹ *Ibid.* at paragraph 22-27.

⁶² (1998), 38 O.R. (3d) 781 at 784.

⁶³ *Ibid.* at 784.

CLASS ACTION

With reference to objectors in the United States, some commentators have concluded that the opportunity given to class members to object to a settlement may be more apparent than real. They state that:

Class members who might object to a proposed settlement generally do not have a sufficient stake in the outcome to make it worthwhile to incur the expenses of presenting an objection, expenses they cannot expect to recover.⁶⁴

The “general rule” in the United States is that objectors are not entitled to an award of costs and fees paid in presenting their objections – although courts may award fees to objectors who can show that their participation resulted in a tangible benefit to the class members through an improvement in the terms of the settlement.⁶⁵ In Ontario, however, this concern is not as significant since, if successful in defeating the settlement as proposed, the objectors would normally recover costs on at least a partial indemnity basis whether or not a more favourable settlement is subsequently brought forward.

In the U.S. case of *Norman v. McKee*,⁶⁶ the Court stated that the “absence or silence of investors [who were the potential class members] does not relieve the judge of his duty and, in fact, adds to his responsibility.” The vast majority of cases appear to regard objectors as little more than another factor for consideration. It was stated in *Flinn v. FMC Corp.*⁶⁷ that opposition by a large number of members does not necessarily prove that the settlement is unfair or unreasonable.

However, disagreement as to the desirability of the settlement among the representative plaintiffs themselves can be fatal.⁶⁸

⁶⁴ G.A. Davidson & D.J. Adler, “The Dynamics of the Class Action Settlement Process in the United States” in W.G. Horton & G. Wegen, eds., *Litigation Issues in the Distribution of Securities: An International Perspective* (Cambridge: Kluwer Law International, 1997).

⁶⁵ *Ibid.*

⁶⁶ 290 F. Supp. 29 (N.D. Cal. 1968).

⁶⁷ 528 F.2d 1169 (4th Cir. W. Va. 1975).

⁶⁸ *Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 832 (9th Cir. 1976).

Right of Appeal

In a recent case of the Supreme Court of the United States, *Devlin v. Scardelletti et al.*,⁶⁹ it was held that a class member who objected during the settlement hearing had a right to appeal the decision to approve the settlement despite not having intervened at the trial level. In a subsequent case, *Ballard et al v. Advance America*,⁷⁰ the Supreme Court of Arkansas reached the opposite conclusion. The difference in result is best understood in the context of the different procedural rules in question. In *Devlin*, a case applying the Federal Rules of Civil Procedure, the petitioner did not have the ability to opt out of the class.⁷¹ However, in *Ballard* the appellants had the opportunity to opt out of the class, but instead elected to object to the settlement thereby accepting the risk of being bound by it if the Court approved the settlement over their objections. Accordingly, in *Ballard* it would have been unfair for an objector to frustrate the legitimate interests of the rest of the class when there existed sufficient procedural mechanisms for him to opt out of the settlement. In *Devlin*, on the other hand, the non-named class member’s limited ability to avoid becoming subject to the settlement made it fair that he have standing to appeal.

Unlike Rule 23(b)(1) of the Federal Rules of Civil Procedure, section 9 of the Ontario Act provides that any member of a class may opt out of the class. It is therefore not surprising that an objector in Ontario does not have standing to appeal a settlement approval in the absence of utilizing their right to intervene as a party pursuant to section 14 of the Ontario Act.⁷²

Opt-Outs and Settlements

As noted earlier,⁷³ once the proceeding is certified, members of the class are presumed to be in the proceeding and bound by the

⁶⁹ (2002), 536 U.S. 1.

⁷⁰ (2002), 349 Ark. 545.

⁷¹ Under U.S. Federal Rules of Civil Procedure non-named class members do not have a statutory right to opt out of the class where certification is awarded pursuant to Rule 23(b)(1).

⁷² See *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 3622 (C.A.); *Direct Cartage Ltd v. London Life Insurance Co.*, [1998] O.J. No. 3622 (C.A.).

⁷³ *Supra* notes 6 and 7.

court's determination, unless they take active steps to "opt-out." Paragraph 8(1)(f) of the Ontario Act provides that a certification order must specify the manner in which class members may opt out of the class proceeding and a date after which class members may not opt out.

If a settlement is reached prior to certification, the opt-out date will fall sometime after certification and court approval of the settlement. In this scenario, potential class members will have the benefit of knowing what their entitlement under the settlement will be prior to making the decision whether or not to opt-out.

Defence counsel negotiating a settlement will need to carefully consider the impact of notification and opt-out procedures on the ultimate cost of the settlement to the defendant. In *Mangan v. Inco Ltd.*,⁷⁴ the defendant objected to a notice sent out by plaintiffs' counsel after a settlement was reached. The notice was not in a form approved by defence counsel or the Court and arguably created a risk that unmeritorious claims would be submitted. In that case, Poupore J. held that the Ontario Act forbids class counsels' "unilateral efforts to give 'notice'"⁷⁵ to potential class members prior to court approval of the notice. As a practical matter, the prejudice caused by an overly zealous unilateral form of notice (in terms of encouraging spurious individual claims to be brought forward to take advantage of the settlement) could be difficult to undo. Obviously, there is less of a concern from a defendant's perspective if the settlement is for a fixed amount and the defendant retains no right to any undistributed surplus.

Defence counsel may wish, in the terms of any settlement, to guard against an excessive level of opt-outs which could have the effect of substantially reducing the benefits of the settlement for the defendant. Settlements will normally be conditional upon opt-outs not exceeding a specified level.

Competing Factors in Assessing the Fairness and Adequacy of a Settlement

When class counsel is acting on a contingency fee basis, "he or she is quite understandably interested in settling the case or may

even be under pressure from partners to settle the case."⁷⁶ It is sometimes suggested that this may give rise to a perceived conflict of interest. However, it is common in non-class action cases for plaintiffs' counsel to have an expectation that fees will be paid out of a settlement. Contingency fees and attendant premiums are now permitted even in non-class action cases in all Canadian provinces, subject to court supervision. Nevertheless, it is the concern with the binding effect of the settlement on absent parties, that has given rise to the subsection 29(2) requirement for court approval of all settlements – that is, to ensure that settlements are fair and reasonable.

Having entered into a settlement agreement, it is obvious that both plaintiff's and defendant's counsel will speak in favour of the settlement. The question then becomes: "who will speak to the contrary?"⁷⁷

While the court is independent of the parties, it may have its own reasons for wanting to see a class action resolved. For example, courts are quite properly motivated to see timely relief granted in appropriate cases and to avoid the prospect of long trials.⁷⁸ Such considerations should not, however, unduly cloud an assessment of the real benefits of the settlement for the parties. Furthermore, since a judge who has assisted in putting together a settlement may be reluctant to disapprove it, it is probably a good practice for such a judge to refer the resulting settlements to another judge for approval.⁷⁹

It should also be noted that as in other non-class action situations in which settlements will bind parties who lack legal capacity (such as children or discretionary or future contingent beneficiaries), the interest of those parties will be independently represented in approval proceedings by the Public Trustee or the Children's Lawyer. It should also be anticipated that, in an appropriate case, the court

⁷⁶ G.D. Watson, "The administration of justice in commercial disputes – Is the Price still Right?", Paper presented to the Canadian Institute for the Administration of Justice, (15-18, October 1997) at 36.

⁷⁷ *Ibid.*

⁷⁸ *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 at 230; G.D. Puckett, "Peering into a Black Box: Discovery and Adequate Attorney Representation for Class Action Settlements," (1999) 77 *Tex. L. Rev.* 1271.

⁷⁹ S.A. Spiegel, "Settling Class Actions," (1994) 62 *U. Cin. L. Rev.* 1565.

⁷⁴ (1998), 38 O.R. (3d) 703 (Gen. Div.).

⁷⁵ *Ibid.* at 715.

CLASS ACTION

may wish to appoint independent counsel to assess and make submissions with respect to the proposed settlement or some specific issues, perhaps on behalf of a particular category of class members.

The appointment by the court of independent counsel to represent parties who are not before the court is not uncommon in insolvency proceedings and such appointments are often initiated by the court. However, the appointment of independent counsel should not, it is submitted, be viewed as a universal necessity or panacea in class proceedings.

The appointment or possible appointment of independent counsel whose role is to present an after-the-fact critique of any settlement which is reached will present an added layer of cost and uncertainty which could serve as a disincentive to settlement discussions. There is also the possibility that defendants will want "to hold something in reserve" to allow for a second round of negotiations with independent

counsel. Another contrasting concern is that if the appointment of independent counsel to assess a class action settlement were to become a matter of routine, given the limited number of counsel who would likely be qualified to perform the function, the procedure could become somewhat incestuous over time.

Therefore, it would perhaps be prudent if the appointment of independent counsel occurred only in appropriate cases where, for example, a matter of significant public interest is involved or a substantial number of objectors come forward or the court itself has reason to be concerned regarding the fairness of the settlement. In the final analysis, it must be stated that in most cases where such factors are not present, the only effective protection against abuse is the professionalism of the lawyers involved in the process and the vigilance of the courts. Absent these elements, any protective measures are likely to be ineffective in any event.