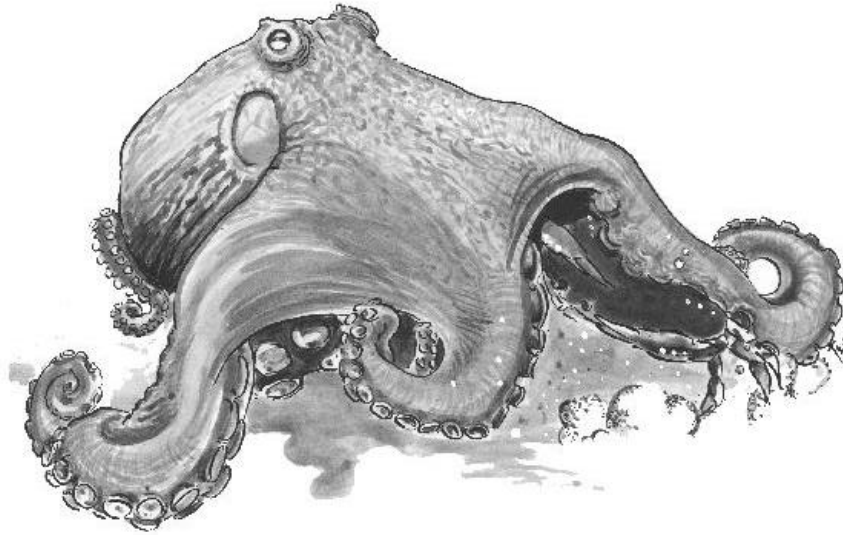


Settling a Class Action (or How to Wrestle an Octopus)



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Introduction

*Octopuses learn to solve problems by trial-and-error and experience.*¹

Class actions provide a remarkable means of resolving mass tort claims.² Aggregation of such claims into a class action brought by one or more representative plaintiffs is designed to achieve three policy goals. First, increased access to justice: individuals or entities³ whose injuries would

¹ Mote Marine Laboratory, Florida, <http://www.marinelab.sarasota.fl.us>. Octopuses belong to the class *Cephalopoda*, which includes the squid, octopus and nautilus. The word *cephalopod* means “head-footed,” and the creatures are so named because their arms surround their head.

² In Canada, three provinces have class action legislation: Quebec (*An Act Respecting the Class Action*, SQ 1978, c. 8, now Book IX of the Code of Civil Procedure, hereinafter “QCCP”); Ontario (*Class Proceedings Act*, 1992, SO 1992, c. 6, hereinafter “OCPA”); and British Columbia (*Class Proceedings Act*, RSBC 1996, c. 50, hereinafter “BCCPA”). The legislation, with related statutes and regulations, is collected in Ward K. Branch, *Class Actions in Canada* (looseleaf) (Aurora: Canada Law Book, 1996). The Federal Court of Canada intends to adopt an enhanced rule for class proceedings that draws heavily on this legislation: see *Class Proceedings in the Federal Court of Canada: A Discussion Paper* (Federal Court of Canada Rules Committee, June 9, 2000). The modern US federal class action rule was enacted in 1966: see Rule 23, promulgated at 383 US 1029. Most states also have class action legislation, many of them having adopted Rule 23 *mutatis mutandis*. For an exhaustive review of US class actions law, see Herbert B. Newberg and Alba Conte, *Newberg on Class Actions*, 3d ed. (Colorado Springs: McGraw-Hill, 1992).

³ In Quebec, only natural persons can start or participate in class actions: see QCCP Art. 999(c); no such restriction applies in Ontario or British Columbia.

normally not justify litigation can obtain a cost-effective remedy. Second, judicial economy: the class action reduces the court's burden of having to deal with large numbers of claims, as well as the risk of reaching inconsistent decisions. Third, behavioural change: the threat of a large damage award — sometimes on top of a large criminal penalty — can act as an incentive to potential defendants to internalize the social costs of their activities, including the costs of wrongful behaviour that would otherwise be spread among a diffuse class. Yet with all these putative benefits, class actions are controversial, and much of the controversy has to do with class settlements.⁴

Criticism has been levelled at both “sweetheart” and “blackmail” settlements. In the former, class counsel allegedly settle meritorious claims for much less than they are worth.⁵ In the latter, class counsel allegedly bring claims having little merit but extract settlements for much more than the

⁴ There is a vast literature and vociferous debate in the US on this topic. See, in part, *Newberg on Class Actions*, above, note 2; *Mass Torts and Class Action Lawsuits*: Hearing Before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary, House of Representatives, 105th Congress, Second Session, March 5, 1998, Serial No. 141 (Washington, DC: US Government Printing Office); *Class Action Watch*, Vol 1, No. 1 (Federalist Society for Law & Public Policy Studies, 1999); *Class Action Study* (Rand Institute for Civil Justice, 1997).

⁵ See *ibid* and Bruce Hay, *Asymmetric Rewards: Why Class Actions (May) Settle for Too Little*, 48 *Hastings LJ* 479 (1997) (asserting that the danger of a sub-optimal settlement can be substantially alleviated through appropriate judicial regulation of class counsel's fee); and *Note — Class Backwards: Does the Fairness, Adequacy and Reasonableness of a Negotiated Class Action Settlement Really Have Any Effect on Approval?: General Motors v. Bloyed*, 16 *SW 2d* 949 (Tex 1996), 28 *Texas Tech L Rev* 159 (1997) (criticizing in-kind, that is, non-cash, settlements that result in windfall profits for defendants and insufficient compensation for plaintiffs).

claims are worth.⁶ Both types of settlements create potential for lawyer abuse: in the former, at the expense of the plaintiff's class; in the latter, at the expense of defendants averse to the cost, risk or timing of litigating a complex action.

Of course, both problems are not unique to class actions,⁷ and may well be overstated.⁸ Certainly, the charges of abuse are not nearly as vociferous in Canada as in the US. Yet the risk of a carefully negotiated settlement being maligned in the press or disapproved by the court is ever-present. Thus counsel for plaintiffs and defendants alike can benefit from each others' experience — much of it, as with octopuses, gained by trial and error — in resolving class actions.

We propose to treat the subject in four parts. Part I deals with the rationale for settling class actions, i.e., *why* settle? We consider the advantages and disadvantages of settlement, and, in particular, the factors that can make settlement of class actions different from settlement of other

⁶ See *Epstein v. First Marathon Inc.*, [2000] OJ No 452 (Ont SCJ) (QL) (castigating “strike suits . . . filed solely for their settlement value” and refusing to approve a proposed settlement); and Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Security Class Actions*, 43 *Stanford L Rev* 497 (1991) (empirical study concluding that a significant number of settlements are not voluntary in that trial is not a viable alternative, and are not accurate in that the strength of the case on the merits has little or nothing to do with the settlement amount).

⁷ See, e.g., John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 *Harvard Negotiation L Rev* 1 (1998) at 26 *et seq.*

⁸ Bruce Hay and David Rosenberg, “*Sweetheart*” and “*Blackmail*” Settlements in Class Actions: Reality and Remedy, 75 *Notre Dame L Rev* 1377 (noting that critics generally ground concerns on anecdotes, not empirical studies, and that concerns can be handled through appropriate judicial safeguards without resorting to the drastic remedy of reducing the availability of class actions).

litigation. Part II deals with timing of the settlement. Since the question of *when* a class action is settled is inextricably linked with the question of *who* benefits from the settlement, we examine this latter issue together with the timing issue. Part III deals with the *how* of settlement, that is, how some of the more common deals are structured and how counsel get them approved by the court. Part IV considers the question of *where* the settlement takes place, given that not all provinces have class action legislation, and the provinces that do treat the question of non-resident class members differently. In each of the four parts of the paper, we wrestle with the questions from two perspectives, i.e., the plaintiff and the defendant. Which creates the eight tentacles of the octopus, a complex and slippery animal — and our metaphor for the class action.

Part I: Why Settle?

*No grasp is like the sudden strain of the Cephaloptera. It is with the sucking apparatus that it attacks. The victim is oppressed by a vacuum drawing at numberless points; it is not a clawing or a biting, but an indescribable scarification. . . . The talons of the wild beast enter your flesh; but with the Cephaloptera it is you who enter into the creature.*⁹

Class actions settle for some of the same reasons that other actions do. The main reason, of course, is to avoid the risk and expense of trial. That reason is accentuated in class actions because the stakes are typically higher than in other litigation. From the representative plaintiff's

⁹ Victor Hugo, *Toilers of the Sea*, Valjean Edition, vol. 7 (New York-London: The Co-operative Publication Society) (first published in 1866 as *Les Traivailleurs de la Mer*) at 323.

perspective, defeat at the common issues trial¹⁰ means that the claims of potentially thousands of class members will disappear. From the defendant's point of view, certification, and the potential for defeat on the common issues, means exposure to huge damage awards, including, in some cases, punitive damages. A large publicly-traded corporate defendant will also need to show the pending action as a material risk in its financial statements, which can affect its share value and its ability to obtain financing. Couple this with the large investment in costs and disbursements that accompany this type of litigation it is easy to see why settlement is in the interests of both parties.¹¹ The courts favour appropriate settlements too, for the above reasons and because they reduce the burden on the judicial system.¹² Thus it is not surprising that a great number of class actions settle before trial. For example, as of 1999, settlements or partial settlements had been achieved in eight of the fourteen cases certified under the *BC Class Proceedings Act*.

¹⁰ While a class action is brought in the name of a representative plaintiff, the trial is on issues of law or fact common to the class. See QCCP Art. 1003; OCPA s. 5; BCCPA s. 4. In tort cases, liability, or the key aspects of liability such as the duty and standard of care and whether the defendant breached it, will typically be certified for determination at the common issue trial.

¹¹ See, e.g., Peter Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L Rev 941; David Klein, "Class Action Settlements" in materials prepared for a CLE seminar, *Class Actions* (Vancouver: Continuing Legal Education Society, May 5, 2000) at 3.3.01; and *Castano v. American Tobacco Co.*, 84 F 3d 734 (5th Circ 1996).

¹² *Dabbs v. Sun Life Assurance Co. of Canada* (1997), 35 OR (3d) 269 (Gen Div) (intervention application), 35 OR (3d) 708 (conflict allegation), leave to appeal dismissed 36 OR (3d) 770, (February 11, 1998), 96-CT-022862 (Gen Div) (costs on conflict motion); (February 24, 1998), (Gen Div) (procedure for settlement hearing), (1998) 40 OR (3d) 429 (Gen Div) (certification and settlement approval), motion to quash appeal by class member granted (1998), 41 OR (3d) 97 (CA), leave to appeal refused [1998] SCCA No 372.

One of the considerations in settling civil cases — especially from the perspective of repeat players (typically, corporate and institutional defendants) — is the ability to keep the outcome of litigation confidential.¹³ However, that consideration plays little or no role in class action settlements, which require court approval.¹⁴ The settlement will be subjected to judicial and public scrutiny.¹⁵ This aspect of the court’s oversight takes class action settlements out of the purely private realm and places them in the *quasi*-public realm.¹⁶ The unavoidably public nature of the process creates some counterweight to the desire to settle. Some defendants may determine that they must fight rather than settle in order to avoid airing their “dirty laundry” in public or to project confidence to the investment or business community. However, the public’s memory is short and, as such, most defendants perceive substantial value in assessing their litigation risks and then putting the issues behind them through settlement. The ability to “shut

¹³ On the strategic concerns of repeat litigants, see, e.g., Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Soc’y Rev* 95 (1974).

¹⁴ See QCCP Arts. 1016 and 1025; OCPA s. 29(2); BCCPA s. 35. But see discussion below of pre-certification settlements under the British Columbia legislation.

¹⁵ *Dabbs v. Sun Life Assurance Co. of Canada*, above, note 12.

¹⁶ Class action legislation thereby can address at least part of the argument raised by Owen Fiss in his seminal article, *Against Settlement*, 93 *Yale LJ* 1073 (1984) (viewing justice as a public good and contending that private settlements too often disadvantage marginalized groups and buy temporary peace instead of vindicating legal rights). See also David Luban, *Settlements and the Erosion of the Public Realm*, 83 *Geo LJ* 2619 (1995) (in part, questioning whether the public interest is addressed in court approval of class action settlements). But see, *contra*, Andrew McThenia and Thomas Shaffer, *For Reconciliation*, 94 *Yale LJ* 166 (1985) (arguing that settlement incorporates community values). In some jurisdictions, all private disputes are to an extent public property. In Texas and Florida, for example, all materials, including settlements, are open to the public.

down” the litigation through a settlement that binds the whole class provides a substantial benefit that can drive settlement discussions, especially if the defendant has already been subjected to individual actions and faces the prospect of more litigation in the future.

Part II: When to Settle

[Octopuses have] an ink gland . . . which often makes a black pigment that can be squirted out a little at a time and create a dark cloud in the water. This is used to cause confusion while fleeing from an attacker.¹⁷

Before Filing an Action

Settling a case before it is filed may give an individual plaintiff the fastest relief at the least cost. It may even be possible to bargain for a number of individual settlements at this stage. If the class size is relatively small, its members easily identifiable, and their damages readily quantifiable, settlement at this stage may be the most cost-effective approach for plaintiffs and defendants alike. Certain mass wrongful dismissal and consumer fraud claims, for example, may fit in this category. In most tort actions, though, there is insufficient information — or at least asymmetric information¹⁸ — about class size and composition or the extent of damages to be able to make a

¹⁷ Aquascope 2000, Tjärnö Marine Biological Laboratory, Strömstad, Sweden.

¹⁸ See Oren Young, *Bargaining: Formal Theories of Negotiation* (Chicago: University of Illinois Press, 1975) at 304-5 (positing that *lack* of information, not its presence, is a bargaining prerequisite, with full information being the limiting case where there is no more room for negotiation).

proper assessment of any settlement proposal at the pre-filing stage. Furthermore, in-house counsel may not take the threat of a proposed action seriously, and may be unwilling to negotiate until it is actually filed. Much will depend on the defendant's own assessment of its liability, its aversion to negative publicity flowing from the filing of a class action, and the extent to which it can rely on the settlement to foreclose further litigation. A defendant who is approached with a pre-filing proposal — “pay or we’ll sue” — may well consider setting up its own alternative claims handling process and deal directly with those affected by its activities, as discussed later in this paper.

After Filing but Before Certification

Defendants will often approach plaintiff's counsel shortly after the claim is filed to canvass whether the representative plaintiff would be willing to settle prior to certification. Obviously, this allows the defendant to avoid the aggregation effect of a class proceeding. It also tends to divide the interest of class counsel and the plaintiff, in that the individual offer may be attractive to the plaintiff, but could never hope to satisfy class counsel's work in the matter, nor meet the needs of proposed class members. The offer will often be coupled with a proposal to “make class counsel whole” by at least paying for time and disbursements to date.

Such an offer obviously presents a range of tactical and ethical quandaries. In BC it would be possible to accept and implement it without court approval, because the action does not become

a class proceeding until certified as such; before that, it is treated like any other action.¹⁹ In Ontario and Quebec, it is necessary to seek court approval.²⁰ That provides some judicial oversight to ensure that class counsel and class representatives do not succumb to abusive arrangements, and gives class counsel leverage to argue that any proposal to settle on an individual basis must meet some standard of fairness.

Having said that, the standard of review should be less strict than that which applies in the context of a classwide settlement — presumably, individual plaintiffs are entitled to look after their own interests. However, both defendant’s and plaintiff’s counsel would be well advised to ensure that absent members of the inchoate class will not otherwise be prejudiced by discontinuance of the action, and, in particular, that plaintiff’s counsel have not privately benefited at the expense or to the exclusion of the class.²¹ Creativity may be required: for example, a pre-certification settlement and discontinuance could stipulate that the defendant will make further payouts to other plaintiffs who turn up within a certain period of time after the settlement.

¹⁹ See BCCPA s. 35 (mandating court approval of settlements in a “class proceeding”) and s. 1 (defining “class proceeding” as a “proceeding certified as a class proceeding” pursuant to the Act). See also *Edmonds v. Acton Super-Save Gas Stations Ltd.*, [1996] BCJ No 2050 (SC) (QL).

²⁰ See note 14 above.

²¹ *Newberg on Class Actions*, above, note 2 at §11.13.

Defendants may implement their own claims process prior to class certification, which need not involve class counsel. This “settlement” will not be subject to judicial scrutiny. The process may or may not require claimants to execute releases excluding them from participating in the class. While this does not necessarily foreclose class litigation, the existence of such a program is a factor weighing against certification, because at a certification hearing, the court must decide whether a class proceeding is a “preferable procedure” for resolving the common issues.²² As such, a defendant has a tactical incentive to propose such a program, beyond the simple desire to “do the right thing” for class members.²³ While defendants are not prevented from making

²² See OCPA s. 5(1)(d); BCCPA ss. 4(1)(d) and 4(2)(d). The QCCP has no directly comparable requirement.

²³ See *Ziegler v. Sherston Resorts Inc.* (1996), 4 CPC (4th) 225, 30 OR (3d) 375 (Gen Div) (certification decision); further proceedings (unreported, April 21, 1997, 95-CQ-67351, Ont Gen Div) (costs), where one factor justifying rejection of the class action was an alternative administrative procedure available under Ontario’s *Rent Control Act*. See also *S.R..Gent (Canada) Inc. v. Ontario (Workplace Safety and Insurance Board)* (1999), 45 OR (3d) 106, 46 CCEL (2d) 273 (SCJ); *Auton (Guardian ad Litem of) v. British Columbia (Minister of Health)* (1999), 32 CPC (4th) 305, 12 Admin LR (3d) 261 (BCSC). Similarly, in *Halabi v. Becker Milk Co.* (1998), 16 CPC (4th) 56 (Ont Gen Div) (venue); (1998), 77 ACWS (3d) 493 (Ont Gen Div) [098/044/125-1p]; (1998), 38 CCEL (2d) 89 (Ont Gen Div) (summary judgment); (1998), 39 OR (3d) 153, 38 CCEL (2d) 89 (Gen Div) (summary judgment); (1998), 39 OR (3d) 153, 38 CCEL (2d) 80 (Gen Div) (certification), the court refused to certify an action for wages payable under the Ontario *Employment Standards Act*, since the Act contained its own code for recovery of these amounts. In *Mouhertos v. DeVry Canada Inc.* (1998), 41 OR (3d) 63 (Gen Div), the court noted the availability of Ontario’s simplified rules of procedure and the Small Claims Court in determining that individual actions were preferable. In rejecting certification in *Bittner v. Louisiana- Pacific Corp.* (1997), 43 BCLR (3d) 324 (SC), the court relied on the fact that the defendant had offered a settlement negotiated in the US class action to its Canadian customers. In *Chace v. Crane Canada* (1996), 26 BCLR (3d) 119, 32 CCLT (2d) 316, 5 CPC (4th) 292 (SC) (certification decision), aff’d 44 BCLR (3d) 264, 14 CPC (4th) 197; (unreported, June 24, 1999, Vancouver C957341) (settlement approval), the defendant also had a settlement program. But the court gave it little weight since it was only available to insurers and did not satisfy any deductible paid by class members. Similarly, in *L.(R.). v. British Columbia* (1998), 65 BCLR (3d) 382, 25 CPC

such an approach directly to proposed class members, there is authority in Ontario supporting an application by the plaintiffs for an order requiring that defendants advise potential class members of the existence of the class proceeding as part of the voluntary claims process.²⁴

The desire to settle prior to certification may flow not just from a defendant seeking to minimize its exposure, but also from counsel for the proposed class. After obtaining a certain level of discovery regarding the merits or class size, class counsel may determine that the strength of the case or the size of the class is such that certification is not warranted. So long as this belief is in good faith, the court should not seek to interfere with an individual settlement that reflects these concerns.

(4th) 186 (SC); (1999), 180 DLR (4th) 639 (BCCA), the court, in granting certification, noted the limitations to the existing voluntary government program, and the fact that many class members believed it was insufficient. In *Houle v. Televac Ltée* (unreported, May 7, 1991, Rouyn-Noranda 600-06000001-879, Que SC), the dominant factor weighting against certification of an illegal telephone charge class action was the availability of an administrative procedure allowing customers to make a complaint about individual charges within 45 days. The plaintiff had failed to make use of this procedure notwithstanding that she was aware of it. In *Brimner v. Via Rail Canada Inc.* (2000), 47 OR (3d) (Gen Div), the court ruled that on a certification motion, a court should consider whether a statutory compensation scheme or alternative dispute resolution procedure that would adequately compensate most of those who might be included in a class action is more preferable than a class action. The motions judge should decide whether the defendant has presented a definite alternative to resolving the common issues and, if so, whether that alternative is preferable to a class action. When the matter was remitted back to Brockschire J (see [2000] OJ No 2747 (QL) (Ont SCJ)), he applied this test to Via Rail's proposal to resolve the common issues arising out of a train derailment. Under the proposal, Via Rail would have paid each passenger \$1000 in exchange for a release. Passengers wanting more would have provided particulars of the claim, whereupon Via Rail would have attempted to settle with them. Failing settlement, the claims would have been resolved by binding arbitration at Via Rail's cost. Brockschire J found that this proposal was neither a definite alternative nor a preferable procedure to a class action.

²⁴ *Lewis v. Shell Canada Ltd.* (2000), 48 OR (3d) 612 (SC).

At Certification

The more common form of settlement is a classwide settlement occurring at the same time as certification. The so-called “settlement class” becomes the justification for certification, with class and defence counsel joining in a motion to certify the class and approve the settlement.

There are obvious advantages to both sides with a settlement certification. The defendant obtains a final *res judicata* resolution against all class members who do not opt out. The plaintiff obtains judgment without having to either contest certification or establish the merits of the case.

The problems that can make it difficult to achieve settlement at this time include lack of discovery and lack of accurate information about class size.

After Certification

Other things being equal, a defendant’s cost of settling will increase after certification is granted because one risk factor — the risk of certification — has been negated. In negotiation parlance, certification, and the accompanying prospect of a trial on the common issues, can dramatically change the defendant’s BATNA, its best alternative to a negotiated agreement.²⁵ As such, where a defendant is inclined to settle for whatever reason, it would be well advised to fully

²⁵ See Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In*, 2d ed. (New York: Penguin Books, 1991), c. 3.

canvass the possibilities in advance of certification, since the plaintiff will also be prepared to discount its claim to take into account the possibility of not obtaining certification.

Part III: How to Settle

*There are about 200 known species [of octopus]. They range in size from a few inches to 3.5m. Some species engage in complex mating displays.*²⁶

An infinite variety of structures can be used to implement a class settlement. The structure is limited only by the creativity of counsel. In certain commercial or consumer overcharge cases, the appropriate settlement structure will be obvious. The class members lost their money; as compensation they will receive a certain percentage of that sum from the defendants. The vast majority of cases though, are far more complex, and the necessary settlement structures will reflect that complexity. In this Part we review some of the structures used and the issues that arise.

Pre-Certification Discovery

In order to establish that the settlement is appropriate, class counsel will often need to obtain some level of disclosure from the defendants. Only with some level of disclosure are class counsel able to assert an appropriate liability or quantum discount.

²⁶ National Aquarium in Baltimore, <http://www.aqua.org/animals/species/procto.html>; Microsoft Encarta, "Cephalopod."

Class Definition

The class definition is important; plaintiff's counsel will have already considered this and set out a proposed definition in the statement of claim. Defendants may wish to have this definition modified as part of the settlement. They may wish to expand the class to spread the *res judicata* benefits over a broader group. They may seek to include class members who do not yet know they have a problem, so-called future claimants. On the other hand, defendants may wish to exclude certain groups on the basis that their claims are too weak or too large to appropriately form part of the settlement. Again, these modifications to the class definition can pose difficult ethical and tactical issues for class counsel. Some, but by no means all, judges are aware of the issues. Mackenzie JA of the British Columbia Court of Appeal makes the following comment:

One of the problems lurking here, particularly in products liability cases, is that while the negligence of the defendant may have occurred in the past the damage may not happen until some date in the future and the limitation period will run from the date of the damage. Using the *Chace v Crane Canada* [citation omitted] case as an illustration, a defective tank manufactured in the 1980s might not crack until 2002. If the class is defined to include future claimants as well as present ones, then a claimant whose tank cracks in 2002 would find to his surprise that his claim was settled by a comprehensive settlement in 1999, and there is no money set aside for the settlement of his claim and he is out of luck. Whether future claims should be included or not depends on the circumstances of each case but in the *Crane* certification, for example, I limited the class to claimants who suffered damages as of a particular date, thereby excluding future claims. Counsel are unlikely to raise this issue if the judge does not. Both plaintiff and defence counsel have an interest in making the class as

large as possible — plaintiff’s counsel to maximize recovery, and defendant’s counsel to eliminate as many claims as possible.²⁷

Alternative Dispute Resolution Mechanisms

Class action lawyers are starting to make considerable use of the growing availability and sophistication of alternate dispute resolution facilities in Canada. Settlements in the insurance premium offset litigation in particular have been at the forefront of setting up such vehicles for resolution of claims.²⁸ The ADR mechanisms may use lawyers, judges, mediators, physicians, or other specialists necessary to properly consider the particular claims to be resolved.²⁹

Certain settlements have incorporated “no-fault” benefits that allow all class members to receive some lesser benefits without the need of pursuing the full ADR process. This allows class members to decide themselves whether the value (or strength) of their case justifies the effort required to receive additional benefits. From the defendant’s perspective, exposure can be lowered to the extent that class members do not pursue the benefits they are entitled to in favour

²⁷ Comment by Mackenzie JA in the Honourable Mr. Justice Frank Maczko’s *Class Proceedings Act: Annotated* (looseleaf) (Vancouver: Continuing Legal Education Society of BC, 2000) at 31. This text has a sample settlement order in Appendix 2.

²⁸ See *Dabbs v. Sun Life Assurance Co. of Canada*, above, note 12 (settlement providing that legal fees to plaintiff’s counsel would be set by binding arbitration).

²⁹ For example, in *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 OR (3d) 130 (SCJ), Kenneth Weinberg, a prominent American mediator, facilitated a settlement with three of the defendants that featured a bar order, subsequently granted by the court, preventing the non-settling ones from claiming over against the settling ones. See also the related decision in *Ontario New Home Warranty v. General Electric Co.* (unreported) (June 17, 1999) (Ont SCJ).

of the lesser amount. An approving court may question whether this meets the “modification of behaviour” goal in the legislation, and class counsel should be prepared to address it. Arguably, this issue should not create a bar to settlement, as long as there is adequate provision for notice of the settlement.

Benefit Schedules

Particularly in personal injury claims, it will usually be necessary to create certain categories in which each individual will be placed. This can be a difficult process, in that it inherently involves diminishing the individuality of the assessment leaving some people with too much compensation; others, with too little. However, the idea is that the class as a whole should benefit from such a schedule, since the decreased level of individual payment also has a benefit to class members in that they do not need to prove their cases with the same degree of particularity required in individual litigation.

Coupons and Rebates

In some cases involving consumer products or overcharges for consumer services, coupons or rebates may be appropriate. This is particularly so where the individual amounts at stake are quite small, where the numbers of consumers affected are large, and where the administrative cost of proving individual claims and making cash payouts could exceed the value of the claims.

However, such in-kind settlements are particularly subject to abuse, and have been criticized as giving little to consumers and creating windfalls for defendants.³⁰ They must be approached with caution.

Limited Fund Settlements

Sometimes the funds available to settle a case are very limited when compared to the defendant's financial exposure. For example, the defendant may be bankrupt, leaving only an insurance policy with a fixed policy limit available to satisfy the claims of members. In these cases, the parties tend to adopt a more simplified settlement form, given that each class member will be receiving such a small percentage of their recovery in any event. It may be that all class members are simply allocated a *pro rata* share of the total sum available based on some minimal level of proof of class membership.

Excess Fund Settlements

Many settlements require the defendant to put forward a set sum to satisfy claims, often deposited with a trustee. This raises the question as to what should be done with any amount remaining after the claims have been paid. One option is to distribute the funds *pro rata* across the eligible class. To the extent that there is a serious difference of views regarding the potential

³⁰ See, e.g., the case comment on *General Motors v. Bloyed*, above, note 5.

size of the class, it may be possible to bridge the gap by allowing the defendant to receive the benefit of the excess funds if the class size is closer to the defendant's estimate. The excess funds can also be distributed to worthy causes on a *cy-pres* basis. Defendants will also usually want to close off their exposure by establishing a date after which class members are no longer entitled to apply for settlement benefits.

Acting for Class Members on Individual Claims

Class counsel need to determine under what circumstances will they agree to act for class members after the terms of the settlement are approved. Will they agree to act for all members at no additional charge beyond the approved fee? Will they be able to refuse to act for particular persons whom class counsel think are not properly members of the class? These issues need to be considered before a settlement is submitted for approval and incorporated into the agreement.

Notice

Although not specifically required by the Ontario and BC Acts, notice of an impending application to certify a settlement class is often provided to the class. This notice will usually include some basic description of the settlement, as well as a means of accessing the more complete settlement documentation. In Quebec, notice is mandatory.³¹

³¹ QCCP Art. 1025

Approval

The Acts require court approval of a settlement or a discontinuance of a class action.³² The court must be satisfied that in all the circumstances the settlement is fair, reasonable and in the best interest of the class as a whole. The burden of establishing the reasonableness of the settlement rests with the parties proposing the settlement.³³ Given this burden, it is necessary to offer positive evidence supporting the reasonableness of the settlement.³⁴ Affidavit evidence is normally presented by both sides setting out the basis for the settlement. Class counsel need to specify any perceived risks associated with a continued pursuit of the merits. It is not necessary to provide evidence sufficient to decide the merits of the issue, but the court must possess adequate information to elevate its decision above mere conjecture.³⁵ Quebec sets out additional information that must be provided on the application for approval, including: the proposed method of distribution of the settlement funds to class members; the amount that will be paid as costs or fees; and how any balance remaining after class members' claims will be distributed.³⁶ This same information should be included in the motion to approve in Ontario and BC.

³² See note 14 above.

³³ *Dabbs v. Sun Life Assurance Co. of Canada*, above, note 12.

³⁴ *Ibid.*

³⁵ *Ontario New Home Warranty Program v. General Electric Co.*, above, note 29.

³⁶ *Quebec Rules of Practice: Superior Court*, Art. 60.

In cases where the case is being certified at the same time as approval is being sought for a settlement, the court first needs to confirm that the matter is properly certifiable as a class action. It is important that the court consider this issue even though the parties before it will each be supporting certification and the settlement, given that the rights of absent class members will be affected.

Whether it is proper to lower the threshold for certification to account for a proposed settlement was considered by the US Supreme Court in *Georgine v. Amchem Products Inc.*³⁷ Prior to this decision, there had been substantial controversy regarding this issue in the American jurisprudence.³⁸ The *Georgine* court held that, while the fact that a settlement was proposed could be considered in terms of avoiding trial manageability concerns that would otherwise arise, the certification requirements must be met. In particular, the court said that the class must have sufficient unity to ensure that class members can be fairly bound by the actions of the class representative. The court was also concerned that representative plaintiffs not be bargaining from a position of weakness. If that were the case, the court believed that adequacy of any settlement negotiated by the representative plaintiff would be called into question. In the result in *Georgine*, the court refused to certify a personal injury asbestos class for the purposes of

³⁷ 83 F 3d 610 (3d Cir 1996), aff'd 117 S Ct 2231 (1997).

³⁸ *Manual for Complex Litigation* at p. 238; *Agent Orange Prod Liab Litig (Re)*, 818 F 2d 145 (2d Cir 1989), cert denied 484 US 1004; *A.H. Robins Co., Inc., (Re)* 880 F 2d 709, cert denied 493 US 959; *General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation (Re)*, 55 F 3d 768 (3d Cir), cert denied 116 S Ct 88 (1995).

settlement. A number of proposed settlements in the United States have since been rejected by US courts applying the *Georgine* analysis.³⁹

The US Supreme Court's approach to the effect of a proposed settlement is quite restrictive. Settlement not only reduces trial manageability concerns but, if defences are waived as part of the settlement, also reduces the need for each class member to advance his or her claim on an individual basis. Therefore, the balance between the individual and the common issues is also altered. In other words, there may well be an increase in the access to justice available through the settlement, a factor which should also be considered when making the approval decision, especially since this is one of the express policy goals in the Canadian legislation. While the court must protect absent class members by ensuring that the requirements for certification are met, it

³⁹ *Barboza v. Ford Consumer Fin. Co.*, No. 94-12352 (D Mass); *Laughman v. Wells Fargo Leasing Corp.*, 1997 WL 567600 (ND Ill. Sept 2, 1997); *Clement v. American Honda Fin. Corp.*, 176 FRD 15 (D Conn 1997); *Ortiz v. Fibreboard Corp.*, No. 97-1704 (USSC June 23, 1999). In *Ortiz*, the US Supreme Court emphasized that the more relaxed approach to certification of a limited fund class action under Rule 23(b)(1)(B) does not apply where it is only the settlement itself that limits the funds available. The court must also be very careful to ensure that the allocation process in a settlement is sensitive to conflict issues between class members. This is particularly important given that class members have no power to opt out of Rule 23(b)(1)(B) class action settlements.

should consider the full impact of the settlement on the preferability analysis.⁴⁰ In *Dabbs*,⁴¹ the court certified a settlement class without addressing the impact of the settlement on the certification decision. The court did not expressly rely on any simplification created by the settlement in support of the decision to certify. The decision in *Haney Iron Works Ltd. v. Manufacturers Life Insurance Co.*⁴² provides some support for a modified approach to the certification inquiry in light of a proposed settlement. The court stated that where a settlement is proposed, the class need only establish whether there is a *prima facie* case for certification. If a *prima facie* case has been made out, the court should then move to consider the fairness of the settlement. The court also suggested that the interaction between certification and settlement should be considered at the settlement approval stage, by considering, as part of the general litigation risk, the possibility that the case might not be certified if opposed.

Assuming the case is an appropriate class action, the court must then consider the proposed settlement. While the Acts do not specify the test for approval, courts have held that the court must find that in all the circumstances the settlement is fair, reasonable and in the best interest of those affected by it. The settlement must be in the best interests of the class as a whole, not any

⁴⁰ Amendments to Rule 23 that would facilitate the certification of settlement class actions are being considered in the US: see Sara L. Croft and Karen A. Brancy, “Multi-Party Litigation in the United Kingdom and the United States” (April 1997) *For the Defence* 8.

⁴¹ Above, note 12.

⁴² (1998), 169 DLR (4th) 565 (BCSC); (unreported, June 2, 1999, BCSC) (fee approval).

particular member. Settlement approval should not lead the court to dissect the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness.⁴³ In *Dabbs*, the court stated that the following factors were useful in assessing a settlement's reasonableness:

- (1) likelihood of recovery or 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;
- (8) the presence of good faith and the absence of collusion.

In *Parsons*,⁴⁴ the court suggested two other factors: (i) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation; and (ii) information about the dynamics of negotiations and the positions taken by the parties.

The court stated that it could not consider social or political factors; its jurisdiction is restricted

⁴³ *Dabbs v. Sun Life Assurance Co. of Canada*, above, note 12; *Ontario New Home Warranty Program v. General Electric Co.*, above, note 35; *Parsons v. Canadian Red Cross Society* (unreported, June 25, 1998, 98-CV-141369, Ont Gen Div); (1999), 91 ACWS (3d) 351 (Ont SCJ) [099/274/015-59pp.] (settlement approval); *Sawatsky v. Société Chirurgicale Instrumentation Inc.* (1999), 71 BCLR (3d) 51 (SC) (settlement approval); *Honhon v. Procureur Général du Canada*, [1999] JQ No 4370 (Que SC) (settlement approval).

⁴⁴ Above, note 43.

to legal considerations. The *Dabbs* court approved the proposed settlement after considering the above factors, stating:

I agree . . . 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 Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and the costs of litigation.

While the court cannot rewrite a settlement, it can indicate areas of concern.⁴⁵ In *Parsons* and the companion BC action, the court’s approval was subject to the parties agreeing to certain modifications.⁴⁶ The courts suggested that the need for such a unique disposition flowed from the fact that the proceedings were “novel and unusually complex,” and that the settlement agreement itself contemplated that court approval could incorporate certain non-material changes.

⁴⁵ *Parsons v. The Canadian Red Cross Society*, above, note 43; *Harrington v. Dow Corning* (1999), 29 CPC (4th) 14 (BCSC) (approval of Dow settlement); *Sawatsky Société v. Chirurgicale Instrumentation Inc.*, above, note 41; *Haney Iron Works Ltd. v. Manufacturers Life Insurance Co.*, above, note 41. But see *Pelletier v. Baxter Healthcare Corp.* (unreported, April 16, 1998, Montreal 500-06-000005-9555, Que. SC); (unreported, January 12, 1999, Que SC) where, after approving the settlement, the court extended the time agreed by the parties for the filing of claims.

⁴⁶ *Parsons v. Canadian Red Cross Society*, above, note 43; *Endean v. Canadian Red Cross Society*, (1999), 68 BCLR (3d) 350 (SC) (settlement approval).

Objectors

Class members may wish to come forward to give their views as to why the settlement should not be accepted. The usual practice in Canada has been to make some provision for class members to make such submissions, either in writing or at the time of the certification hearing. In *Dabbs*, the court created a procedure for hearing these submissions. However, the Ontario Court of Appeal made it clear that objectors do not gain the status of parties, with accompanying appeal rights.⁴⁷ Objectors should also know that costs awards may be made against them where their submissions are “unfocused” or “unmeritorious.”⁴⁸

Fee Negotiation and Approval

In *Dabbs*, an allegation was raised that class counsel were in a conflict of interest where they negotiated both settlement and counsel fees. The court rejected this concern, stating:

In my view, simultaneous negotiation of fees and settlements will not necessarily create a conflict of interest for class counsel, and the ability of the defendant to consider its total exposure to both damages and fees may encourage settlement. The contrary will unquestionably discourage settlement.

⁴⁷ *Dabbs*, above, note 12. Had the objector applied to intervene in the action, the result may have differed.

⁴⁸ *Dabbs*, above, note 12, [1998] OJ No 6191 (QL) (CA) (November 9, 1998).

Where class counsel is going to deduct the fee from the settlement award, it is preferable that the application to approve the proposed fee take place at the same time as the settlement approval, since this allows the court to assess what funds will remain for the actual benefit of class members.⁴⁹

Part IV: Where to Settle

*The common octopus . . . is widely distributed in tropical and temperate seas.*⁵⁰

In BC, it is possible to certify a national class, but residents outside BC must have their own subclass representative, and they must specifically opt into the BC proceeding.⁵¹ In Ontario, trial level courts have certified several national classes on an opt-out basis.⁵² In Quebec, there has

⁴⁹ See eg., *Killough v. The Canadian Red Cross Society*, (November 13, 2000) (Doc. Vancouver C976108) (Smith J's memorandum directions to counsel for fee approval).

⁵⁰ Encyclopaedia Britannica, "Octopus."

⁵¹ BCCPA, ss. 8,16; *Harrington v. Dow Corning Corp*, 2000 BCCA 605.

⁵² The most recent and thoughtful judicial analysis of the issues can be found in *Wilson v. Servier*, [2000] OJ No 3392 (QL) (Ont SCJ) (certification decision). See also: *Nantais v. Telectronics* 25 OR (3d) 331, leave to appeal dismissed 25 OR 347 (Div Ct); *Carom v. Bre-X Minerals Ltd.* (1998), 43 OR (3d) 441 (Gen Div); *Menegon v. Philip Services Corp.* (1999), 11 CBR (4th) 262 (Ont SCJ); *909787 Ontario Ltd. v. Bulk Barn Foods Ltd.* (1999), 87 ACWS (3d) 268 (Ont Gen Div) [099/106/056-10pp.] (application to strike); (1999), 90 ACWS (3d) 352 (Ont SCJ) [099/229/002-15pp.] (certification), leave to appeal to Div Ct granted 91 ACWS (3d) 714 [099/298/026-12pp.]; *Webb v. K-Mart Canada Ltd.* (unreported, November 6 1998, 98-GD-43927, Ont SCJ) (scope of examinations); (1999), 45 OR (3d) 425, 46 CCEL (2d) 293 (SCJ) (reference procedure), leave to appeal refused, 45 OR (3d) 638n (class members in all provinces except BC and Quebec); [2000] OJ No 1454 (SCJ) (notice, ADR panel, variation of order in relation to claims over \$25,000). The Webb court stated that the lack of comparable class action

been little judicial consideration of the issue, but what exists is mixed.⁵³ The debate over the appropriateness of national classes affects the decision-making both as to where to file actions and where to settle them. The tendency to date has been to seek approval in all three jurisdictions with class action legislation, with the Ontario component of the action purporting to bind those class members outside the jurisdiction. From the defence perspective, this method maximizes the coverage of the class action, even if it should come to pass that the courts

legislation elsewhere in Canada (except for BC and Quebec) was a telling argument for extending the reach of the Ontario legislation and that the local court is the appropriate forum to determine whether the extra-provincial plaintiffs should be bound by the results of the Ontario proceeding.

⁵³ In Quebec, as in Ontario, there is no statutory consideration of multi-jurisdictional issues. In *Masson v. Thompson* (unreported, January 29, 1992, Montreal 500-06-000005-914 (Que SC) (certification decision), aff'd [1993] RJQ 69 (CA); [1994] RJQ 1032 (SC) (jurisdiction over non-resident class members), aff'd [1995] RJQ 329, 67 QAC 75 (CA) (application to sever third party proceedings); [1997] RJQ 634 (SC) (decision on the merits in favour of the class), an action brought by employees of a bankrupt company, the Quebec Court of Appeal stated that the fact that some class members were outside Quebec did not invalidate the class action, nor did it prevent extraprovincial members from participating. The court relied on the number of factual connections to Quebec. Two earlier Quebec decisions express a reluctance to include extraprovincial class members. In a pension case, *Bourque v. Laboratoires Abbott Ltée* (unreported, April 9, 1998, Montreal 500-06-000021-966, Que SC), the court approved a national class, stating that the fact that there were pension plan members across the country showed the need to resolve the issue in one proceeding. The court noted that the relief sought - return of funds to the pension plan - would benefit all plan members in any event. In *Werner v. Saab-Scania AB*, [1980] CS 798 (Que SC), aff'd (unreported, February 19, 1982, Montreal 500-09-001005-800, Que CA), the court refused to amend the class to a proper scope given that the representative offered no information as to the size of the restricted class definition, the court in *obiter* suggested that it would be improper to certify a class of all vehicle purchasers in Canada. The court suggested that the class, if otherwise proper, should be limited to Quebec residents, residents outside Quebec whose cause of action arose in Quebec, or persons whose contracts were concluded in Quebec. In *Bolduc v. Compagnie Montreal Trust* (1989), 15 ACWS (3d) 214 (Que CA) [089/125/061-6pp.], leave to appeal to SCC ref'd 102 NR 397n., the court refused to certify a national class action on several grounds, including a concern about the need to apply the law of several jurisdictions and the inability to give extraprovincial class members an effective opt-out opportunity.

determine that opt-out national class actions are unconstitutional.⁵⁴ From class counsel's perspective, this will normally require cooperation or alliances with counsel in other jurisdictions to satisfy this desire for certainty on the part of defendants.

Conclusion

These strange animals, Science, in accordance with its habit of excessive caution even in the face of facts, at first rejects as fabulous; then she decides to observe them; then she dissects, classifies, catalogues, and labels; . . . They enter then into her nomenclature . . . she divides them into great, medium, and small kinds. . . . She regards them from the point of view of their construction, and calls them Cephaloptera; counts their antennae, and calls them Octopedes. This done, she leaves them. Where science drops them, philosophy takes them up.

Philosophy in her turn studies these creatures. She goes both less far and further. She does not dissect, but meditates. Where the scalpel has laboured, she plunges the hypothesis. She seeks the final cause. Eternal perplexity of the thinker. The creatures disturb his ideas of the Creator. They are hideous surprises. . . . It is as if night itself assumed the forms of animals. But for what good? With what object? Thus we come again to the eternal questioning.⁵⁵

We started with scientific tidbits, fancifully likening settlement of a class action to wrestling an octopus. We conclude by observing that, while class actions may at times seem as daunting as Hugo's classic tale of Gilliatt's battle with the devil-fish, they are no longer the "hideous surprises" they may once have seemed, at least from a defendant's perspective. In a small bow to philosophy, we talked about the policy goals of class action legislation and the *why* of

⁵⁴ The settlement class was approved by courts in Ontario, BC and Quebec. *Romanchuk v. Sun Life Assurance Co. of Canada* (unreported, November 28, 1997) Vancouver Registry C964248 (BCSC); *Podmore v. Sun Life du Canada* (unreported, January 16, 1988, Montreal 500-06-000015-962, Que CA); *Dabbs v. Sun Life Assurance Co. of Canada*, above, note 12.

⁵⁵ Hugo, *Toilers of the Sea*, note 9 at 323-4.

settlement, pointing to the fact that defence and class counsel each have strong motivations to settle. The challenge is for each to find the common ground from which they can jointly wrestle the beast and bring it under control. We spent most of our discussion on the *how* of settlement, a topic of special interest to practitioners. And we noted that this question is linked to the issues of when to settle, who benefits from settlement, and in which jurisdictions. The theme linking these issues is the requirement for court approval. That factor, intertwined with the motives of the various players in the action, makes the settlement of class actions a vital and intellectually engaging topic. We think that resourceful and well-informed counsel — for both the class and the defence — are capable of resolving the many issues we have raised and, like Gilliatt, can succeed in wrestling class actions to appropriate settlements that achieve satisfaction for all parties.

