
Class Actions as Alternative Dispute Resolution

John C. Kleefeld

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>
Commentary

Citation Information

Kleefeld, John C.. "Class Actions as Alternative Dispute Resolution." *Osgoode Hall Law Journal* 39.4 (2001) : 817-841.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol39/iss4/3>

This Commentary is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

Class Actions as Alternative Dispute Resolution

Abstract

This article situates the action in ADR theory by viewing it as a hybrid process that draws on both the command and consensus portions of a rational dispute resolution continuum. Class action legislation does this in a number of ways, the most important being the scope it gives to courts to approve or disapprove class settlements that have been privately negotiated by defence and class counsel. The rationale is to protect the interests of absent class members and ensure that the legislative goals of class actions-access to justice, judicial economy and behaviour modification-are well served. Class actions can thereby render moot some of the private/public debate over settlement by taking disputes out of the purely private realm and placing them in the quasi-public realm. However, this places courts in an unaccustomed role and calls for the need for more empirical research on settlement quality to help judges evaluate negotiated outcomes. A recently completed study by the Rand Institute for Civil Justice is suggested as a model for fulfilling this research need in Canada. The article's focus is comparative and Canadian, drawing on legislation and case law in Quebec, Ontario and British Columbia.

CLASS ACTIONS AS ALTERNATIVE DISPUTE RESOLUTION[©]

BY JOHN C. KLEEFELD*

This article situates the class action in ADR theory by viewing it as a hybrid process that draws on both the command and consensus portions of a rational dispute resolution continuum. Class action legislation does this in a number of ways, the most important being the scope it gives to courts to approve or disapprove class settlements that have been privately negotiated by defence and class counsel. The rationale is to protect the interests of absent class members and ensure that the legislative goals of class actions—access to justice, judicial economy and behaviour modification—are well served. Class actions can thereby render moot some of the private/public debate over settlement by taking disputes out of the purely private realm and placing them in the quasi-public realm. However, this places courts in an unaccustomed role and calls for the need for more empirical research on settlement quality to help judges evaluate negotiated outcomes. A recently completed study by the Rand Institute for Civil Justice is suggested as a model for fulfilling this research need in Canada. The article's focus is comparative and Canadian, drawing on legislation and case law in Quebec, Ontario and British Columbia.

Cet article situe le recours collectif dans la théorie des modes des règlements des conflits en le considérant comme étant un processus hybride qui fait appel à la fois aux aspects d'exigences et de consensus qui existent sur le continuum du règlement rationnel des conflits. Les textes législatifs traitant des recours collectifs accomplissent ceci de plusieurs façons, notamment par le biais de la compétence qu'ont les tribunaux d'adopter ou de refuser les transactions négociées dans le cadre de la sphère privée par les avocats de défense et les avocats des membres du groupe. Ceci a comme raison d'être la protection des intérêts des membres absents du groupe et la réalisation des objectifs législatifs des recours collectifs - soit l'accès à la justice, l'économie des ressources judiciaires et la modification du comportement. Les recours collectifs pouvant donc nullifier certains aspects du débat en matière de transactions négociées en transplantant la résolution de ces différends de la sphère purement privée à la sphère quasi-publique. Toutefois, ceci place les tribunaux dans un rôle inhabituel et démontre que des recherches empiriques en matière de la qualité des transactions négociées sont essentielles afin d'assister les juges dans leurs évaluations des transactions. L'auteur suggère qu'une étude récente menée par le Rand Institute for Civil Justice pourrait servir de modèle pour des études futures au Canada. Cet article est à la fois comparatif et canadien et se réfère aux lois et arrêts en provenance du Québec, de l'Ontario et de la Colombie-Britannique.

I.	INTRODUCTION	818
II.	THE ADR CONTEXT: DISPUTING ALONG A COMMAND-CONSENSUS SPECTRUM	818
III.	CLASS CONSCIOUSNESS: A CASE OF LEMONS PROVIDES CRITICAL MASS	823
IV.	BEYOND PROCEDURE: GIVING WITH THE LEFT	829

© 2001, J.C. Kleefeld.

* Of the British Columbia Bar. This article evolved from a paper prepared for the part-time LL.M Program in ADR at Osgoode Hall Law School of York University and subsequently presented at the annual conference of the Canadian Law and Society Association in Quebec City, May 2001. It is dedicated to Dr. Julie Macfarlane, whose enthusiasm and critical insight has been a constant source of encouragement.

V.	THE JUDICIAL ROLE IN APPROVING SETTLEMENTS: REINVENTING SOLOMON	833
VI.	DOLLARS AND SENSITIVITY: TOWARDS A CALCULUS OF CLASS DISPUTING	837
VII.	CONCLUDING REMARKS	840

Oftentimes our business has been rather to quarry and hew for some builder of the future than to leave a finished building.¹

I. INTRODUCTION

The class action is society's modern tool for formulating, crystallizing, and resolving large-scale civil disputes. It uniquely combines elements of legislated dispute processing, individual incentive, and judicial discretion over key aspects of the process—including the discretion to grant or withhold approval of settlements that can affect the rights and remedies of hundreds or thousands of citizens. The class action thereby presents a distinct alternative to traditional litigation that makes it apt for studying in an Alternative Dispute Resolution (ADR) framework. Despite the voluminous literature on class actions and even greater volume of ADR scholarship, relatively little has been said about the confluence of the two methods. Any attempt to make such a link raises questions, if not eyebrows. What is it about the class action that makes it an “alternative” and to what, precisely, is it an alternative? What are the promises and potential of class actions and how well are they fulfilled in practice? When is a class action preferable to another procedure for resolving mass disputes and when is it not? These are the essential questions considered in this article. The answers, tentative as they are, may go some way to finding a greater niche for class actions within the world of ADR; and in the process, help ADR continue to redefine and reinvent itself.

II. THE ADR CONTEXT: DISPUTING ALONG A COMMAND-CONSENSUS SPECTRUM

At its most basic level, ADR theory and practice contrasts a world in which disputes are processed by “rights talk” with a world of disputing based on party interests. The latter, implicitly or explicitly, is seen as the

¹ Sir F. Pollock & F.W. Maitland, *The History of English Law*, 2d ed. (Cambridge: University Press, 1952) excerpt from preface to first edition.

alternative to the former. The paradigm for "rights talk" is adjudication, typically in a courtroom, but also includes arbitration.² The common attribute of litigation and arbitration is that someone impartial³ decides the dispute. The decision maker usually makes a determination by reference to a set of rights or duties, and by applying a body of rules or precedents. However, in both litigation and arbitration, the process may be subsumed under a notion that the judge or arbitrator can be guided simply by a generalized sense of fairness.⁴ The result is closure, at least on the specific dispute, if not on the conflict that gave rise to it.⁵ There is a clear winner and loser, more or less; though it is said: "go to law for a sheep and lose your cow."⁶

The paradigm for the world of party interests is negotiation. Preferably, ADR is principled, focused on interests⁷ rather than positions, and sometimes includes assistance from a neutral party, as in mediation.⁸ Depending on the mediator, the third party's role can be either purely facilitative or evaluative.⁹ Agreements, not decisions, are the sought-for

² In one view, arbitration is a form of ADR; in another, it is simply a form of adjudication, with all other processes being cast as alternatives, that is, alternatives to adjudication generally.

³ Contrast this with some systems, such as labour arbitration, which make deliberate use of "biased" representatives of the disputants, that is, panel members drawn from both labour and management.

⁴ For an arbitral award based solely on fairness, see *Assicurazioni Generali S.P.A. v. Sumree & Eric Group*, [1996] O.J. No. 4456 (Gen. Div.), online: QL (OJ), where the arbitrator applied custom of the trade by analogy to a novel situation; leave to appeal denied. In the judicial realm, see e.g. *Re McDonald* (1972), 1 O.R. 363 (H.C.), where the trustee in bankruptcy was not entitled to rely on a strict legal position as it would be inconsistent with natural justice to deprive the deceased's undischarged bankrupt estate of insurance monies by reason of his failure to repay nominal balance needed to complete his discharge.

⁵ To the extent a difference exists, disputing is probably the narrower concept; conflict, the broader. Disputes may be one-off or symptomatic of structural conflict. Conversely, specific disputes, when multiplied, unresolved, or escalated, transform to deeper, long-term conflict. On conflict and its transformation, see e.g. J.Z. Rubin, D.G. Pruitt and S.H. Kim, *Social Conflict: Escalation, Stalemate, and Settlement*, 2d ed. (New York: McGraw-Hill, 1994).

⁶ R. Fergusson, *The Facts on File Dictionary of Proverbs* (New York: Facts on File, 1933).

⁷ See R. Fisher, W. Ury & B. Patton, *Getting to Yes: Negotiating Agreement Without Giving In*, 2d ed. (New York: Penguin Books, 1991).

⁸ See e.g. J. Macfarlane, "The Mediation Alternative" in J. Macfarlane, ed., *Resolving Disputes: The Mediation Alternative* (Toronto: Emond Montgomery, 1997).

⁹ See L. Riskin, "Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed" (1996) 1 Harv. Negotiation L. Rev. 7.

result. Although typically “most cases settle,”¹⁰ there is no guarantee of closure. If all goes well, the agreement may even be a wise one,¹¹ with the parties expanding the pie through integrative bargaining¹² and achieving a win-win outcome in place of the win-lose one that, so the theory goes, they would have obtained through adjudication.

Those who have thought much about disputing see the ingenuousness of this ADR *Weltanschauung*. Therefore we need to sketch in some refinements and add some experience to this approach.

The first refinement is that we are talking about *rational* dispute resolution processes, not irrational ones like chance,¹³ ordeal,¹⁴ or trial by battle.¹⁵ We discount irrational techniques as arbitrary and unmodern, sometimes forgetting that not long ago they were the chief means of resolving disputes and, to an extent, continue to exert their influence. One might well ask whether the oft-heard negotiating refrain—“let’s split the

¹⁰ See M. Galanter & M. Cahill, “‘Most Cases Settle’: Judicial Promotion and Regulation of Settlements” (1993-94) 46 *Stan. L. Rev.* 1339, showing, in part, that *why* this is so in any particular case eludes robust answers, and noting generally the difficulty of measuring settlement quality.

¹¹ Fisher & Ury, *supra* note 7.

¹² *Ibid.* See also the rich literature on bargaining and game theory, in particular, the more accessible treatment by R. D. Luce & H. Raiffa, *Games and Decisions: Introduction and Critical Review* (New York: Dover, 1989). At the risk of over-simplification, the basic idea is that positional negotiating is akin to a zero-sum distributive game, with payoffs structured so that one player’s loss is the other’s gain. Principled negotiation, by contrast, emulates a variable-sum integrative game in which payoffs vary because of the presence of multiple issues that players value differently, creating opportunities for mutual gain.

¹³ D.P. Emond, “Alternative Dispute Resolution: A Conceptual Overview” in D.P. Emond, ed., *Commercial Dispute Resolution: Alternatives to Litigation* (Aurora: Canada Law Book, 1989) 17. Professor Emond notes that probabilistic techniques such as the coin toss may be acceptable to disputants who are indifferent or uncertain about the preferred result, or where the dispute is small enough to be amenable to a fast method of deciding it.

¹⁴ Ordeal puts a spin on chance by incorporating a belief that the outcome reflects supernatural judgement, which always ensures that right triumphs. Ordeal by fire or water was once a common method of truth-finding and is still practised in one form or another in parts of the world. The practice of dunking a suspected miscreant was based on the notion that water, as the medium of baptism, would “receive” the innocent and “reject,” or buoy, the guilty. See Pollock & Maitland, *supra* note 1 at 598ff. See also *The New Encyclopaedia Britannica*, 15th ed., (Chicago: Encyclopaedia Britannica, 1997) s.v. “Ordeal”.

¹⁵ Trial by battle, a variant on ordeal, was judicially adopted in England in the 11th century, in part because ordeal by fire or water left too much to chance or clerical manipulation. A judge would order accuser and accused to duel under conditions as to place, time and arms, requiring them to deposit sureties for their appearance. The loser, if still alive after the battle, was dealt with according to law. England did not formally abolish the system until 1819. See Pollock and Maitland, *ibid.* See also *The New Encyclopaedia Britannica*, *ibid.*, s.v. “Duel.”

difference”—is little more than a variation on the coin toss; or whether the use of brute physical strength to resolve civil cases, including the use of professional fighters,¹⁶ has only been superseded by a modern correlative; financial strength and the use of professional advocates to overwhelm litigants whose resources are weaker than their claims.¹⁷ But we make and appreciate this distinction, at least in part because it renders dispute resolution more amenable to study, analyze and classify.

The second refinement is that we can better understand dispute resolution processes by situating them on a spectrum or continuum, rather than in one camp or another of a neat rights-interest dichotomy. The spectrum may have several axes,¹⁸ but one of the more useful models is the “command-consensus” axis that classifies processes by degree of party control and susceptibility to public scrutiny.

As depicted by Paul Emond,¹⁹ the spectrum’s leftmost end has a high degree of party control with few, if any, predetermined limits on procedure, participation, or outcome. It is consensual, private, and confidential. The private negotiation and settlement of most civil disputes falls in this category. Moving to the right on the spectrum are conciliation and mediation,²⁰ where at least some control, typically over process rather than outcome, is surrendered to another person. At this point the spectrum takes on a more public hue, particularly if the mediator is government-appointed or court-annexed. Further to the right lies the adjudicative processes, with their emphasis on decisions rather than agreements. Even here, spectra lie within the spectrum. Arbitration, for example, usually allows for much party control over who decides the case; court-based adjudication allows for relatively little control. Outcome confidentiality is typical in arbitration,²¹ but atypical in a court case.²² However, in both

¹⁶ See *The New Encyclopaedia Britannica*, *ibid.*

¹⁷ See Emond, *supra* note 13 at 17.

¹⁸ Examples include: speed, cost, flexibility, degree of legal precision, precedential value, and finality.

¹⁹ See Emond, *supra* note 13, in particular the graphical representation at 21.

²⁰ Conciliation is generally seen as more passive than mediation, with one definition of a conciliator being someone who “flattens the barriers” standing in the way of agreement by, for example, providing a neutral forum for negotiations and transmitting positions and concessions to and from the parties. A mediator, by contrast, tends to play a more active role by reframing positions to seek joint gains, and by achieving and keeping momentum in the negotiations. See Emond, *ibid.* at 19.

²¹ That is, typical when conducted pursuant to an arbitration agreement, where the agreement itself provides for confidentiality. No such limitation is written into arbitral texts such as the *Uniform Arbitration Act*, online: Uniform Law Conference of Canada Homepage <<http://www.ulcc.ca>>, which

processes, negotiation usually proceeds on a parallel track “in the shadow of the law,”²³ typically resulting in a settlement that is consensual and confidential. At the rightmost end of the spectrum, we move into the regulatory and administrative arena, with a high emphasis on public scrutiny and accountability. Then, ultimately, into rule-making by majority vote. At this stage, dispute processing is highly public, its contour shaped by the legislature, as in the case of workers’ compensation or no-fault automobile insurance regimes. Outcomes are driven by interests, yet can result in widespread abrogation of rights²⁴ or the creation of new rights and new causes of action.²⁵

These refinements reveal ADR as multi-hued, offering more than just an alternative to litigation.²⁶ One can choose one’s process like paints from a richly coloured palette; even mixing different colours to create new, hybrid processes. The aim of this flexible approach is to resolve disputes in the manner most appropriate to the parties or the dispute at hand.²⁷ Hence the moniker, preferred by some, of “appropriate dispute resolution,” though the emergent trend is to drop the “A” altogether and call it “DR.”²⁸ Moreover, the discipline of dispute resolution is shown as worthy of critical

serves as a model for domestic arbitration statutes.

²² On the relative merits of arbitration and litigation and some thoughts on melding the best features of each, see D. Jiang-Schuerger, “Perfect Arbitration = Arbitration + Litigation?” (1999) 4 *Harv. Negotiation L. Rev.* 231.

²³ The expression comes from R.H. Mnookin & L.Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88 *Yale L.J.* 950 referring to the ways in which court rules and procedures affect the bargaining that occurs between parties *outside* court.

²⁴ For example, workers’ compensation was once seen as radical because it took away tort law rights of workers and employers. In hindsight, the legislation can be viewed as a social compact in which workers gave up common law rights to sue employers for workplace accidents in exchange for relative certainty about their ability to claim and obtain benefits because of those accidents. Similarly, employers gave up common law defences such as contributory negligence in exchange for reducing their exposure for damages, the cost of the trade-off being an annual premium passed on to consumers in the price of the employers’ products.

²⁵ See e.g. *Privacy Act*, R.S.B.C. 1996, c. 373, creating a statutory tort, violation of privacy, actionable without proof of damage.

²⁶ See R.A.B. Bush, “Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments” (1989) 66 *Denv. U.L. Rev.* 335.

²⁷ See F. Sander & S.B. Goldberg, “Fitting the Forum to the Fuss: a User-Friendly Guide to Selecting an ADR Procedure” (1994) *Negotiation J.* 49.

²⁸ As does the first Canadian casebook on the subject. See J. Macfarlane, *Dispute Resolution: Readings and Case Studies* (Toronto: Emond Montgomery, 1999).

study in its own right, as well as a lens through which other disciplines can be examined.

III. CLASS CONSCIOUSNESS: A CASE OF LEMONS PROVIDES CRITICAL MASS

This is the context and the lens in which this article seeks to situate and study class actions. The three Canadian jurisdictions with class proceedings²⁹ legislation (Quebec, Ontario and British Columbia)³⁰ crafted the legislation to supplement, not supplant, ordinary litigation. They enacted the laws because the rules of court allowing representative actions³¹ were “totally inadequate” for resolving mass disputes in a consumer society. At least, so said the Supreme Court of Canada in *Naken v. General Motors of Canada Ltd.*³² when some 4500 Vauxhall Firenza owners sued General Motors (GM) for defects in their cars. The Firenza purportedly resembled a certain sour yellow fruit, with a litany of defects alleged in the brakes, steering, fuel line, transmission, and universal joints. The owners sought \$1000 each for excessive depreciation. The Ontario Court of Appeal thought the dispute could be tried on that basis, but on further appeal, Justice Estey accepted GM’s submission that individual hearings would be needed to determine the circumstances of each purchase and each owner’s entitlement to damages. The Court candidly acknowledged that the engineering and market evidence required to prove the case would be so costly as to mean, practically, the end to many claims; but it thought this

²⁹ The term “class proceedings” is broad enough to cover both actions and applications. However, as most proceedings are started by way of action, “class actions” is the more popular term.

³⁰ The key legislative provisions are as follows: in Quebec, *An Act Respecting the Class Action*, S.Q. 1978, c. 8, now Book IX of the *Code of Civil Procedure* [hereinafter Q.C.C.P.]; in Ontario, *Class Proceedings Act, 1992*, S.O. 1992, c. 6 [hereinafter O.C.P.A.]; and in British Columbia, *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [hereinafter B.C.C.P.A.]. The legislation, with related statutes, is collected in W.K. Branch, *Class Actions in Canada*, looseleaf (Aurora, Ont.: Canada Law Book, 2001) and in M.A. Eizenga et al., *Class Actions Law and Practice*, looseleaf (Markham, Ont.: Butterworths, 1999). See also the *Uniform Class Proceedings Act*, online: Uniform Law Conference of Canada Homepage <<http://www.ulcc.ca>> [hereinafter U.C.P.A.], adopted by the Uniform Law Conference of Canada. As this article was going to press, two other provinces, Saskatchewan and Newfoundland, had enacted class action statutes and were in the process of implementing them.

³¹ Each province has a rule derived from Rule 10 of the *Rules of Procedure*, a schedule to the *Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict., c.66. Rule 10 says “[w]here there are numerous parties having the same interest in one action, one or more ... may sue or be sued, or may be authorised by the Court to defend in such action, on behalf of or for the benefit of all parties so interested.”

³² (1983), 144 D.L.R. (3d) 385 (S.C.C.) [hereinafter *Naken*].

was a matter “more fittingly the subject of scrutiny in the legislative rather than the judicial chamber.”³³

The legislature took the hint and looked east and south for ideas. Quebec, after all, had legislation governing the *recours collectifs* since 1979,³⁴ and even a government agency to which claimants could apply for funding.³⁵ The modern U.S. federal class action rule, Rule 23,³⁶ had been in effect since 1966, and the content that judges had given it through interpretation offered a wealth of experience to draw on.³⁷ The Ontario Law Reform Commission (OLRC) had also been looking at mass disputes for a while, and published an exhaustive report at approximately the same time as the *Naken* decision was released.³⁸

The Commission concluded that class proceedings legislation would go a long way to fulfilling three key principles. The first principle was access to justice. By pooling claims, individuals and entities³⁹ whose injuries or losses would be too small to justify litigation could obtain cost-effective remedies. Secondly, they considered the principle of judicial economy. Class actions can reduce the court’s burden of having to deal with large numbers of claims, as well as the risk of reaching inconsistent decisions. Behaviour modification was the third principle considered. The threat of large damage awards can impel corporate and institutional defendants to internalize the social costs of their activities, including the costs of wrongful

³³ *Ibid.* at 407. The Supreme Court of Canada recently revisited the *Naken* decision in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534. The case had been brought in Alberta, a province without class action legislation, pursuant to the representative rules of Court. The question, as in *Naken*, was whether it could proceed in this way. The Court stated that in the absence of comprehensive legislation, courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them. The Court set out a number of criteria for engaging in this gap-filling exercise, and justified it on the basis that, since *Naken*, the importance of the class action as a procedural tool in modern litigation “has become manifest.”

³⁴ Q.C.C.P., *supra* note 30.

³⁵ Le fonds d’aide aux recours collectifs, established pursuant to *An Act Respecting the Class Action*, R.S.Q. c. R-2.1, ss. 5-45.

³⁶ Promulgated at 383 US 1029. Most states also allow class actions, some having adopted Rule 23 *mutatis mutandis*.

³⁷ For an exhaustive review of United States class action law, see H.B. Newberg & A. Conte, *Newberg on Class Actions*, 3d ed. (Rochester: Lawyer’s Cooperative, 1992).

³⁸ Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982) [hereinafter *OLRC Report*].

³⁹ In Quebec, only natural persons can start or take part in class actions. See Q.C.C.P., *supra* note 30, art. 999. No such restriction applies in Ontario or British Columbia.

behaviour that would otherwise be spread over a diffuse class.⁴³ The Commission acknowledged the arguments against class actions including floodgates, legalized blackmail, and manageability concerns. The Commission concluded that the empirical evidence showed little basis for worry and determined that overall, the benefits would outweigh the burdens.⁴¹

The three principles bear some comment, because each class action jurisdiction has drawn on them, both in drafting the legislation and in judicially interpreting it. The first principle, access to justice, shows that the class action can be seen as much as an alternative to *avoidance* as an alternative to traditional litigation.⁴² Undoubtedly, the stuff of some class actions—a bank's failure to clearly explain mortgage prepayment terms,⁴³ lost student class time due to a university faculty strike,⁴⁴ a municipality's neglect to eliminate ragweed⁴⁵—may, for many, never reach the status of a perceived injurious experience, or PIE, in ADR jargon.⁴⁶ For others, the injury may be named, a culprit blamed, but a claim never made⁴⁷ because its pursuit is likely to cost too much in relation to the expected relief. Avoidance is also not an unknown phenomenon in the management of our corporate and public institutions. Thus, a faulty product, a poor service, or an incorrect charge that systematically disfavours a member of the public goes uncorrected as long as not too much fuss is made about it.

Enter class counsel. By setting up a regime that rewards entrepreneurial lawyers on the basis of risks taken, an incentive is created

⁴⁰ For a more detailed exposition of the three policy objectives, see Volume 1 of the *OLRC Report*, *supra* note 38 at 117-146.

⁴¹ *Ibid.* at 211-12.

⁴² See e.g. W.L.F. Felstiner, "Avoidance as Dispute Processing: An Elaboration" (1975) 9 *J. L. & Soc'y* 695.

⁴³ *Pfeiffer v. Pacific Coast Savings Credit Union*, (2000) 83 B.C.L.R. (3d) 147 (granting plaintiff summary judgment.)

⁴⁴ *Ciano v. York University*, [2000] O.J. No. 183 (Sup. Ct.) online: QL (OJ) (granting defendant summary judgment); [2000] O.J. No. 3482 (C.A.), online: QL (OJ) (dismissing appeal of summary judgment but allowing appeal on costs decision because plaintiff had raised a novel point of law).

⁴⁵ *Nadon v. Anjou (Ville)*, [1993] R.J.Q. 1133 (Qc. C.S.); [1994] R.J.Q. 1823 (granting certification); and [1995] A.Q. No. 500 (C.A. Qc.), online: QL (JQ).

⁴⁶ W.L.F. Felstiner, R.L. Abel & A. Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ..." (1981) 15 *L. & Soc. Rev.* 631 (identifying at least three stages of dispute transformation: *naming* the event as an injury or harm; *blaming* someone for causing it; and *claiming* compensation or restitution).

⁴⁷ *Ibid.*

to amalgamate claims and match a defendant's ability to make a substantial investment in the litigation. A class action, it has been said, is a mechanism for converting even "relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."⁴⁸ Thus, there was a recommendation to change the Ontario rules governing lawyers, permitting them to enter into court-approved contingency fee arrangements in class actions.⁴⁹ Other recommendations that also reflect the principle of access to justice, relating to funding and cost awards, have found their way, to a greater or lesser extent, into each of the legislative regimes.

The second principle of judicial economy is conspicuously in tension with the first. It is one thing to relieve courts of having to decide similar claims and experience the juridical awkwardness of reaching inconsistent results; it is quite another to open them to claims that might otherwise not have been litigated at all. Too much access can hinder, rather than promote, judicial economy.⁵⁰ To the extent that a court invokes the rubric of legislative intent when making its crucial decision—the decision of whether a proceeding should be certified as a class action—there is a choice of which principles to emphasize and where to strike the balance. As things have turned out, Canadian judges have chosen access as the key principle, using other rules of court⁵¹ and discretionary powers to guard against the misuse of judicial resources, rather than relying on judicial economy to foreclose class actions.⁵²

Behaviour modification is the most pronounced of the three principles in expressing the normative content that underlies what may seem, at first, to be a value-free set of rules for the efficient handling of class disputes. By making modification of wrongful behaviour a policy goal,

⁴⁸ *Mace v. Van Ru Credit Corp.*, 109 F.3d 338 (7th Cir. 1997) at 344.

⁴⁹ Subsequently enacted in O.C.P.A., *supra* note 30, ss. 32-33.

⁵⁰ See *e.g.* Newberg & Conte, *supra* note 37 (noting strain that class actions can put on court backlogs); and *Nadon v. Anjou*, *supra* note 45 (exemplifying glacial pace of some class actions).

⁵¹ The ordinary rules of civil procedure apply to a class action unless stated otherwise in the legislation or the procedural rules themselves, or modified by the court pursuant to its discretion in managing the proceedings. See O.C.P.A., *supra* note 30, ss. 12, 35; and B.C.C.P.A., *supra* note 30, ss. 12, 40. The same principle is implicit in Quebec, which has incorporated the statutory provisions directly into the *Code of Civil Procedure*.

⁵² Initially, Quebec courts took a strict approach to interpreting the new law, so few cases were certified as class actions. That has changed dramatically over the years. For commentary on the Quebec situation, see *e.g.* Branch, *supra* note 30 and the special issue of the Quebec Bar Association, (1999) 115 *Développements récents sur les recours collectifs* (Quebec: Yvons Blais, 1999). For annual statistics, see generally *Fonds d'aide aux recours collectifs, Rapport Annuel*.

legislators have gone beyond process fairness to also consider outcome fairness,⁵³ in particular, fairness to “the little guy.” This normative principle has been manifested with varying degrees of emphasis in different jurisdictions. One of the more transparent examples of the principle in action is found in Quebec, where a refusal to certify a proceeding as a class action can be appealed, while a decision to certify cannot.⁵⁴ In the class action context where “certification is everything,”⁵⁵ the effect on outcome is palpable.

The OLRC Report borrowed some ideas from neighbouring jurisdictions, rejected others, and proposed a bill that after a decade of intensive consultation and revision⁵⁶ became the law. British Columbia did not tarry long; two years after Ontario embraced class actions, it passed its own *Class Proceedings Act*.⁵⁷

The legislation can thus be seen as exemplifying the rightmost end of the ADR continuum: dispute processing by decree. In one form or another, individual claims can be aggregated into a single action by one or more representative plaintiffs for a hearing on issues common to a defined class,⁵⁸ the result of the hearing binding all who do not opt out of the class.⁵⁹ There is a process for certifying the case as a class action⁶⁰ and for giving

⁵³ See e.g. Bush, *supra* note 26; R.G. Bone, “Rethinking the ‘Day in Court’ Ideal and Nonparty Preclusion” (1992) 67 N.Y.U. L. Rev. 193 (explaining and distinguishing process-oriented and outcome-oriented theories).

⁵⁴ Q.C.C.P., *supra* note 30, art. 1010.

⁵⁵ See discussion below.

⁵⁶ Ontario, *Report of the Attorney General’s Advisory Committee on Class Action Reform*, (Toronto: Queen’s Printer, 1990).

⁵⁷ B.C.C.P.A., *supra* note 30.

⁵⁸ 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 Q.C.C.P., *supra* note 30, art. 1000; O.C.P.A., *supra* note 30, s. 5; and B.C.C.P.A., *supra* note 30, s. 4. For example, liability, or key aspects of it such as the existence of a duty of care and its breach, may be certified as common issues; damages may be left for individual hearings.

⁵⁹ Q.C.C.P., *supra* note 30, art. 2848; O.C.P.A., *supra* note 30, s. 27(2); and B.C.C.P.A., *supra* note 30, s. 26.

⁶⁰ Q.C.C.P., *supra* note 30, art. 1002; O.C.P.A., *supra* note 30, s. 2(2); and B.C.C.P.A., *supra* note 30, s. 2(2). The process is started by a motion, typically accompanied by the representative plaintiff’s affidavit and often by affidavits of counsel and experts.

notice to the class members if it is certified.⁶¹ Ontario, like Quebec, also provides funding for disbursements, but not legal fees.⁶² Ontario even allows a defendants' class proceeding, in which any party to a case can ask for certification and appointment of a representative defendant.⁶³ Proceedings are case-managed, that is, a single judge normally hears all motions. In Quebec and British Columbia, if the proceeding reaches the stage of a trial on the merits, it will also be heard by a single judge.⁶⁴

In deciding whether to certify, the court must consider certain criteria: if they are met, the legislation says the court *must* certify. The criteria in each province are similar:⁶⁵ (i) the pleadings must disclose a cause of action; (ii) there is an identifiable class of at least two persons (in Quebec, natural persons);⁶⁶ (iii) there are common, though not necessarily identical, issues; (iv) a class action is the preferable procedure for resolving those issues;⁶⁷ and (v) there is a representative plaintiff (in Ontario, plaintiff or defendant) who can fairly represent the class, has a plan for advancing the action, and has no conflict of interest with the class.⁶⁸ Significantly, courts in Ontario and British Columbia must *not* refuse to certify the action as a class proceeding solely because of certain enumerated criteria. Not surprisingly, the criteria are those the *Naken* court relied on to find the case

⁶¹ Q.C.C.P., *supra* note 30, arts. 1006, 1030; O.C.P.A., *supra* note 30, ss. 17-22; and B.C.C.P.A., *supra* note 30, ss. 19-24. If the case is not certified, it can continue as an individual action. There is also procedure for decertifying a class action if, as the action progresses, the court determines that is required.

⁶² *Law Society Act*, R.S.O. 1990, c. L-8, ss. 59.1-59.5 (establishing the Class Proceedings Fund and *Law Society Act*, Ontario Regulation 771/92 setting out application criteria, levies against awards and settlements, and administrative provisions).

⁶³ O.C.P.A., *supra* note 30, s. 4. Rule 23, *supra* note 36 has a similar provision. It is useful, for example, in patent cases, because the judgment on the patent's scope and validity binds all persons who have violated the patent.

⁶⁴ In Ontario, the case management judge can hear the common issues trial only if both parties agree: O.C.P.A., *supra* note 30, s. 34(3). Since, in a complex case, judicial economy is arguably furthered by having a single judge preside over the whole case, Ontario appears to have leaned in favour of access to justice (due process) with this provision.

⁶⁵ What follows is a rough summary of Q.C.C.P., *supra* note 30, arts. 1003, 1030; O.C.P.A., *supra* note 30, s. 5; and B.C.C.P.A., *supra* note 30, s. 4.

⁶⁶ *Supra* note 39.

⁶⁷ In Quebec, the criterion is that the composition of the group must make the traditional joinder rules "difficult or impracticable," arguably a stricter test. Q.C.C.P., *supra* note 30, art. 1003.

⁶⁸ If there is a conflict between the representative and the class members, the court may resolve it by creating subclasses with separate representatives.

unsuitable for a class action under traditional rules:⁶⁹ (i) damages requiring individual assessment; (ii) separate contracts involving different class members; (iii) remedies sought differing among class members; (iv) number of members or the identity of each unknown; and (v) existence of a subclass of members with claims or defences that raise common issues not shared by all class members.

Certification is typically highly contested. In negotiation parlance, certification and the accompanying prospect of a trial on the common issues, can dramatically change the defendant's best alternative to a negotiated agreement (BATNA).⁷⁰ For instance, in the "Hep C" litigation,⁷¹ the federal, provincial and territorial government defendants made no overtures toward compensating the victims of tainted blood products until class actions had been certified in British Columbia and Quebec and there was potential for certification of a national class as a result of the Ontario proceedings. However, some defendants welcome certification because of its *res judicata* effects, and may seek approval of a so-called "settlement class" to foreclose or end individual litigation.

IV. BEYOND PROCEDURE: GIVING WITH THE LEFT

If that were all there was to it—if the legislatures had done no more than mandate new court procedures—the topic would be rather boring, except, perhaps, to proceduralists. But there is a great deal more to consider. The special role given to the courts is one of the aspects that makes class actions attractive for study in an ADR context. The legislature may have removed judicial discretion with the right hand—for example, by stating that certification *must* follow on fulfilment of some fairly basic criteria—but it has more than compensated by giving with the left. Consider the requirement that a class action must be the *preferable* procedure for resolving common issues.⁷² In reality, this gives a judge no small amount of leeway. Thus, despite the proscription against refusing to certify merely or solely because of the *Naken* criteria, judges have said they may consider

⁶⁹ What follows is a summary of O.C.P.A., *supra* note 30, s. 6 and B.C.C.P.A., *supra* note 30, s. 7.

⁷⁰ See Fisher & Ury, *supra* note 7.

⁷¹ See *e.g.* note 115.

⁷² *Supra* note 65.

those criteria as part of deciding whether a class action is preferable.⁷³ The preferability touchstone also gives a defendant impetus to devise an alternative procedure and pitch it as preferable to a class action. For example, in a defective wood siding case in British Columbia,⁷⁴ the defendant manufacturer offered to set up a voluntary compensation scheme in Canada. The scheme was patterned on the terms of a settlement reached in the United States and included abandonment of several defences. The court saw this as a factor for refusing certification, which it did.

It might seem that a preference ranking of all the alternatives to a class action is a good thing, something akin to picking the most appropriate dispute resolution process. Indeed, the Divisional Court took this position in a case arising out of a Via Rail train accident in southwestern Ontario.⁷⁵ It said that judges hearing a certification motion must consider all definite alternative procedures put before them, not just court procedures. This view opens the door for creativity in devising dispute resolution processes.

But what are the implications for access to justice when a defendant's private compensation program is used to preempt a class action? Several, says Garry Watson, a long-time participant in and observer of the class action scene.⁷⁶ One implication is the loss of notice provisions and court supervision of claims administration. Another is the possibility, some would say likelihood, of class members having to accept less in damages than they would be entitled to at common law. Of course, good process design can meet both objections: defendants can propose their own means of notification, and in some cases, they might willingly refund the total amounts owing to consumers, especially where the amounts are easy to calculate, as with bank or utility overcharges.

More fundamental, however, is Watson's argument concerning the potential for casting a long-run chill over the willingness of class counsel to launch cases. Judges have acknowledged the litigation risk incurred by plaintiffs' lawyers when making decisions on class counsel fees, as they are

⁷³ There has been a debate on the correctness of the approach. See the summary and attempt at resolution in *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.).

⁷⁴ *Bittner v. Louisiana-Pacific Corp.* (1997), 43 B.C.L.R. (3d) 324 (Sup. Ct.).

⁷⁵ *Brimner v. Via Rail Canada Inc.* (2000), 47 O.R. (3d) 793 (Div. Ct.) (denying motion to compel plaintiffs to answer defendant's questions about plaintiffs' opinion on proposed alternative procedure); (2000), 50 O.R. (3d) 114 (Sup. Ct.) (approving certification) [hereinafter *Via Rail* cited to Sup. Ct.].

⁷⁶ G. Watson, "Annual Survey of Recent Developments in Civil Procedure," in *Ontario Civil Practice 2001* (Scarborough, Ont.: Carswell, 2000) at 2: Survey-13.

required to do under the legislation.⁷⁷ That mechanism, or incentive, is imperilled when a court denies certification on the basis that a defendant's dispute resolution scheme is preferable to a class action. Paradoxically, plaintiffs' lawyers may find that after logging much time, effort, and expense in bringing a class action, they are able to elicit a compensation offer for the class. The offer is typically one that was not forthcoming before the action began. However, the lawyers for the plaintiff risk going uncompensated themselves because the offer is made in the context of an alternative proposal to a class action. This scenario is not promising for access to justice. The answer, says Watson, is to make the defendant's scheme part of the framework for a settlement of the class action, which, as discussed below, is also subject to court approval.

In practice, these potential roadblocks to consumer redress have not yet manifested to any great extent. Canadian courts have generally leaned towards certification: the odds of a case being certified are roughly two to one in favour of certification.⁷⁸ Consider how the case management judge applied the Divisional Court's opinion in the *Via Rail* certification hearing. Via Rail had proposed a two-stage process as an alternative to a class action: (i) it would pay each passenger \$1,000 in exchange for a release; and (ii) passengers wanting more would provide claim particulars (including claims of family members) and efforts would be made to reach settlement, failing which the claims would be arbitrated, with Via Rail paying the costs.

On reviewing this proposal, Justice Brockenshire concluded that it was not a *definite* alternative, as specified by the Divisional Court. First, it was unclear to him how he could make an order that might require non-parties to attend arbitration, especially without giving them notice and an opportunity to be heard.⁷⁹ Second, the proposal provided no means for resolving potential conflicts between family members or between family

⁷⁷ O.C.P.A., *supra* note 30, s. 32(2); B.C.C.P.A., *supra* note 30, s. 33(2). Quebec has no specific provision dealing with fee approval, but the authority to do so comes through the assessment of statutory charges against a class award, one such charge being the fees of class counsel. See Q.C.C.P., *supra* note 30, art. 1035(2). The leading Canadian case on class counsel fees is *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (C.A.) [hereinafter *Gagne*].

⁷⁸ Calculations performed by the author are from tables in Branch, *supra* note 30 at APP-1 and Eizenga, *supra* note 30 at Tables.3. The percentages of certified cases (some of which may have been on consent) were as follows: Quebec, 59%; Ontario, 78%; British Columbia, 67%, for a simple average of 68%.

⁷⁹ *Via Rail*, *supra* note 75 at 118. Implicit here is the notion that the court *could* have made such orders as part of a settlement agreement on certification, because that process contemplates giving notice to class members and inviting their participation in the approval process (see discussion below on objectors.)

members and the passenger representing them.⁸⁰ In the end, Justice Brockenshire concluded that certifying a class action was simpler and more straightforward. In another recent case, this time involving weight loss drugs,⁸¹ the courts have further curbed the ability of defendants to invoke the preferability argument by stressing that a preferable procedure really has two aspects: first, it must be a fair and efficient way of determining the common issues; second, it must advance the three policy objectives of the legislation.⁸² In other words, unless a defendant can show that its procedure will enhance access to justice, promote judicial economy, and go some way towards modifying its own alleged or admitted wrongful behaviour, the procedure will not likely be seen as preferable.

On a more general level, the legislation gives courts much discretion in managing the conduct of proceedings and frees them to employ simplified forms of proof and alternative remedies. For instance, the court may require the cost of notice to the class to be paid by the plaintiff or the defendant, or order that it be apportioned between them.⁸³ Given that costs of notifying a national class⁸⁴ can run into the hundreds of thousands of dollars, this aspect of class proceedings alone can influence the various decision points in bringing, prosecuting, defending, and settling a class action. In a similar vein, the court may, after determining the common issues, take various approaches to determine individual entitlement to relief, including referral to independent experts, individual damages hearings, or global awards apportioned according to some formula.⁸⁵ The legislation takes the innovative step of authorizing the court to "admit as evidence statistical information that would not otherwise be admissible as

⁸⁰ *Ibid.* at 119.

⁸¹ *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (Sup. Ct.) (granting certification) [hereinafter *Wilson*].

⁸² *Ibid.*, at 249-50.

⁸³ O.C.P.A., *supra* note 30, s. 22; B.C.C.P.A., *supra* note 30, s. 24. In Quebec, the cost of notice is a first charge on an award or settlement fund. See Q.C.C.P., *supra* note 30, art. 1035.

⁸⁴ Quebec and Ontario do not expressly deal with the concept of nation-wide or, for that matter, world-wide classes. Courts in both provinces have allowed them, with Ontario taking the most liberal approach, by authorizing them on an opt-out basis without any residency requirement, former or present. For treatment of the issue, including a discussion of the case law, see *Wilson*, *supra* note 81. British Columbia authorizes extra-provincial subclasses on an opt-in basis, but requires the subclass to have its own representative: See B.C.C.P.A., *supra* note 30, ss. 6(1), 6(2), 8(1)(g), 16(2), 16(4), and 16(5).

⁸⁵ Q.C.C.P., *supra* note 30, arts. 1030-40; O.C.P.A., *supra* note 30, ss. 24-26; and B.C.C.P.A., *supra* note 30, ss. 27-34.

evidence, including information derived from sampling⁸⁶ for the purposes of distributing an aggregate award. The evidence must be compiled in accordance with generally accepted statistical principles, and related provisions are designed to guard against statistical abuse and “junk science.” While, to some, such provisions may have a “surrealistic cast,”⁸⁷ the bottom line is that statistical methods are available to provide group relief where individual entitlements would be too difficult or expensive to ascertain. Courts can be expected to increasingly use those methods as their comfort with them grows.

V. THE JUDICIAL ROLE IN APPROVING SETTLEMENTS: REINVENTING SOLOMON

As already noted, a consideration in negotiating civil disputes is the ability to keep settlement outcomes confidential. But that consideration plays little or no role in class actions, because settlement, discontinuance, or abandonment of a class action must be approved by the court to ensure that the interests of absent class member are met.⁸⁸ This aspect of the court’s oversight and discretion is probably one of the most important features setting class actions apart from ordinary litigation. It makes the class action a distinctly hybrid process. Settlement talks are instigated by commencement of a class action, a legislated dispute resolution mechanism. The talks are conducted at the private, consensual end of the spectrum. But everyone must return to court—a shift back to the command end of the spectrum—to get a judge’s imprimatur on any negotiated agreement. The closest analogy is a settlement made on behalf of an infant or a person with a legal disability, the key difference being that a class settlement can affect the rights and remedies of thousands.

⁸⁶ O.C.P.A., *supra* note 30, s. 23(1); and B.C.C.P.A., *supra* note 30, s. 30(1).

⁸⁷ *In re Fibreboard Corp.*, 893 F.2d 706 at 710 (5th Cir. 1990) (rejecting trial court’s first attempt to collectively determine damages to a class of asbestos plaintiffs).

⁸⁸ Q.C.C.P., *supra* note 30, arts. 1016, 1025; O.C.P.A., *supra* note 30, s. 29; and B.C.C.P.A., *supra* note 30, s. 35. The B.C. statute, however, has a wrinkle that allows actions to be settled on an individual basis before certification, ostensibly without court approval. This arises from the term “class proceeding” in s. 35, in turn defined as “a proceeding certified as a class proceeding” (s. 1). See W.K. Branch and J.C. Kleefeld, “Settling a Class Action (or How to Wrestle an Octopus)” (Canadian Institute Conference on Litigating Toxic Torts and Other Mass Wrongs, 2000) (Toronto: Canadian Institute, 2000) at Tab XVI: 8-10. If a pre-certification settlement with the representative can shut down a class action without the need for court approval, is there not a risk that the legislation’s policy goals will go unfulfilled? Compare O.C.P.A., *supra* note 30, s. 29(1) referring to “a proceeding commenced under this Act and a proceeding certified as a class proceeding.”

Thus, when asking the question “an alternative to what?” the answer becomes, in part, an alternative to the public/private bifurcation of disputes that has long vexed ADR scholars. Owen Fiss kicked off the debate in a provocative article in the mid-1980s,⁸⁹ sounding a caution in response to what he heard as a siren call to ADR on the part of the judiciary. Professor Fiss saw justice as a public good. He thought private settlements often disadvantaged marginalized groups and bought temporary peace instead of vindicating legal rights.⁹⁰ While Fiss was chiefly concerned with public law decisions involving constitutional or human rights, even so-called private disputes have a public character—as anyone who has overheard a marital row will attest. *Ergo*, their settlement is coloured with a public interest.⁹¹

The legislative scheme thus has the potential to render moot some of the private/public debate by removing class settlements from the purely private realm and placing them in the quasi-public realm. Yet despite this potential, class actions have been criticized, with the harshest criticism aimed at settlements.⁹² Critics have targeted both “sweetheart” and “blackmail” deals. In the former, class counsel purportedly collude with defendants, settling meritorious claims for much less than their value.⁹³ In

⁸⁹ O.M. Fiss, “Against Settlement” (1984) 93 Yale L.J. 1073.

⁹⁰ See also D. Luban, “Settlements and the Erosion of the Public Realm” (1995) 83 Geo. L.J. 2619 (questioning whether the public interest is addressed in settlements, even in court approval of class action settlements). But see A. McThenia & T. Shaffer, “For Reconciliation” (1985) 94 Yale L.J. 166 (arguing that settlement incorporates community values).

⁹¹ Compare J. Frank’s critique: “If a man’s pocket is picked, the government brings a criminal suit, and accepts responsibility for its prosecution. If a man loses his life’s savings through a breach of contract, the government accepts no such responsibility. Shouldn’t the government perhaps assume some of the burden of enforcing what we call private rights?” J. Frank, *Courts on Trial* (Princeton: Princeton University Press, 1949) cited in E. London, ed., *The World of Law: The Law as Literature* (New York: Simon and Schuster, 1960) at 747.

⁹² There is a vast literature and vociferous debate in the United States on this topic. See e.g. Newberg & Conte, *supra* note 37; *Mass Torts and Class Action Lawsuits: Hearing Before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary*, United States House of Representatives, 105th Congress, Second Session, March 5, 1998, Serial No. 141 (Washington, DC: United States Government Printing Office); and D.R. Hensler *et al.*, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Santa Monica, Cal.: Rand Institute for Civil Justice, 2000) [hereinafter Rand Study]. The Rand Study comprises three years of empirical research on ten representative cases, all of which settled. It is essential reading for anyone interested in class action research, policy and legislative reform.

⁹³ See *ibid.*; B. Hay, “Asymmetric Rewards: Why Class Actions (May) Settle for Too Little” (1997) 48 Hastings L.J. 479 (asserting that danger of suboptimal settlements can be greatly reduced by appropriate judicial regulation of class counsel fees); and “Note—Class Backwards: Does the Fairness,

the latter, they allegedly bring claims with little merit yet extract settlements for more than the claims are worth.⁹⁴ Both types of settlements create the danger of abuse by lawyers: in sweetheart deals, at the expense of the class; in blackmail suits, at the expense of defendants averse to the cost, risk or timing of litigation. Of course, both problems are hardly unique to class actions and may be overstated.⁹⁵ But the danger exists, and the intent is clearly to minimize it by subjecting settlements to scrutiny in the public forum of the courts.

Are courts up to the task? In an adversarial system, effective dispute resolution is premised on the concept of zealous partisans advocating their best opposing arguments to the judge, who in turn picks the most persuasive ones, or perhaps more accurately, the ones that best accord with the judge's view of the facts, the law, and the application of one to the other. Whatever the merits of that concept, it is absent when a high-stakes, intensively negotiated settlement is jointly presented to the court for approval. Would Solomon have been as wise had the two harlots simply presented him with a settlement agreement on how to divide the contested baby?⁹⁶ One suspects he would have needed some assistance.

Class action legislation, however, provides little assistance to valuing settlements. Quebec and Ontario set out information that must be provided on the approval application, such as the method and cost of distributing funds to class members; amounts to be paid as costs or fees; any levy owing to a government funding agency; and, if a balance is likely to

Adequacy and Reasonableness of a Negotiated Class Action Settlement Really Have Any Effect on Approval? *General Motors v. Blayed* 916 S.W. 2d 949 (Tex. 1996)" (1997) 23 Tex. Tech. L. Rev. 159 ([hereinafter Case Comment] criticizing in-kind, that is, non-cash, settlements that result in windfall profits for defendants and insufficient compensation for plaintiffs).

⁹⁴ See *Epstein v. First Marathon Inc.* (2000), 2 B.L.R. (3d) 30 (Ont. Sup. Ct.) (castigating "strike suits ... filed solely for their settlement value" and refusing to approve either a proposed settlement or counsel fee); and J.C. Alexander, "Do the Merits Matter? A Study of Settlements in Security Class Actions" (1991) 43 Stan. L. Rev. 497 (empirical study concluding that a significant number of settlements in securities cases, alleging such things as prospectus misrepresentations, 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).

⁹⁵ See B.L. Hay & D. Rosenberg, "Sweetheart and Blackmail Settlements in Class Actions: Reality and Remedy" (2000) 75 Notre Dame L. Rev. 1377 (noting that critics generally base concerns on egregious anecdotes, not empirical studies, and concluding that concerns can be handled through judicial safeguards without resorting to the drastic remedy of reducing availability of class actions). For empirical analysis reaching the same general conclusion, see Rand Study, *supra* note 92.

⁹⁶ *The Holy Bible* (New York: World Publishing Company, 1960) at 1 Kings 3:16-23. *Quaere* whether Solomon's order to cut baby in half, knowing full well that the true mother would protest and thereby reveal herself, was an interest-based or a rights-based solution.

remain after class members' claims are satisfied, how it will be distributed.⁹⁷ Beyond this, the information requirement is basically left to the courts' discretion. A Canadian judge who has culled the case law has found no less than sixteen factors that should be considered and eighteen types of information that should be provided,⁹⁸ all to satisfy a fairly elastic test, namely, that the settlement must be fair, reasonable, and in the best interest of the class as a whole.⁹⁹

One way for courts to get more information about settlement quality is to give a surrogate adversarial role to objectors—class members who dislike a proposed settlement and are willing to work up a case as to why they dislike it and how it could be improved.¹⁰⁰ The concept is probably a good one, though in Canada, few objectors ever come forward, perhaps out of apathy, or perhaps because Canadian settlements are generally good. In the leading Canadian case on the role of objectors,¹⁰¹ one of several “vanishing premium” actions against life insurance companies, the plaintiffs alleged that the life insurance company or its sales agents promised that investment returns from policyholder premiums would, after a number of years, pay for the premiums. The alleged promises did not materialize. The parties reached a settlement after ten months of negotiations and presented it to the court for approval. Fourteen objectors out of a very large class were given extensive participation rights, but their input does not seem to have been very helpful. After listening to three days of objector cross-examination on affidavits filed in support of the settlement, the court approved the agreement, concluding that while class action settlements should be “viewed with some suspicion,”¹⁰² all settlements are “a product of compromise ... [f]airness is not a standard of perfection.”¹⁰³ Among

⁹⁷ *Rules of Practice of Superior Court of Quebec in Civil Matters*, R.S.Q., c. C-25, r. 63; *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R.12.05, as am. by O.Reg. 457/01.

⁹⁸ See Honourable Mr. Justice Frank Maczko, *Class Proceedings Act: Annotated looseleaf* (Vancouver: Continuing Legal Education Society of B.C., 2000) at 82-85.

⁹⁹ *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] 40 O.R. (3d) 429 (Gen Div) (certification and settlement approval) [hereinafter *Dabbs*].

¹⁰⁰ Authority to do so derives from O.C.P.A., *supra* note 30, s. 14 and B.C.C.P.A., *supra* note 30, s.15, permitting class members to take part in the proceeding on terms the court considers appropriate. See also Q.C.C.P., *supra* note 30, arts. 1017-18.

¹⁰¹ *Dabbs*, *supra* note 99.

¹⁰² G. Watson, “Is the Price Still Right? Class Proceedings in Ontario” (C.I.A.J. conference, Toronto, October, 1997) quoted in *ibid.* at 440.

¹⁰³ *Dabbs*, *supra* note 99 at 440.

other things, the court considered the high reputation of class counsel who had negotiated the agreement; the agreement's use of opt-out clauses and a sophisticated alternative claims approval process for different categories of class members that varied with the cogency of the proof available;¹⁰⁴ and the fact that British Columbia and Quebec courts had approved essentially the same agreement.¹⁰⁵ But Justice Sharpe, as he then was, also took an active role in the settlement hearing, questioning expert witnesses and counsel for both parties to be satisfied that class interests were being protected. Not all judges may be so inclined to assume an unaccustomed role; certainly, all could benefit from more empirical research on settlement quality, particular "intraspecies"¹⁰⁶ comparisons of class settlements. In this regard, a Canadian counterpart to the Rand Study's in-depth review of ten American class actions¹⁰⁷ would be a valuable tool that, hopefully, will make it onto the research agenda in the near future.

VI. DOLLARS AND SENSITIVITY: TOWARDS A CALCULUS OF CLASS DISPUTING

No discussion of a dispute resolution mechanism would be complete without reference to the total societal costs incurred in relation to total societal benefits achieved. This approach would compare the net social benefits derived from different mechanisms to form conclusions about the advantages of one method over another. Class actions could thereby be compared to avoidance, traditional litigation, and other forms of ADR.

¹⁰⁴ For example, if a class member could point to an agent's written representation about how fast the premium would "vanish," the insurance company would honour that representation. An oral representation would have to be proved by affidavit, with the agent confirming the representation, for a class member to also get full compensation. The compensation descended from there into three further categories of proof, which, as the court recognized, was an innovative way to incorporate the notion of litigation risk into a settlement agreement.

¹⁰⁵ See *Romanchuk v. Sun Life Assurance Company of Canada* (28 November 1997), Vancouver C964248 (B.C.S.C.) and *Podmore v. Sun Life du Canada, cie d'assurance-vie*, [1998] A.Q. No.89 (C.S.) online: QL (JQ). Does the fact of an agreement's approval in one province tell us much about whether it should be approved in another? One would hope that not too much weight would be put on this factor, lest it promote a 'rush to settlement' in the jurisdiction perceived to be most favourably disposed to bringing a complex case to conclusion.

¹⁰⁶ See Galanter & Cahill, *supra* note 10 (noting various ways of comparing settlement outcomes)

¹⁰⁷ Rand Study, *supra* note 92.

Would that it were so easy. Calculating the benefits and costs of just ten class actions has proved to be “enormously difficult”¹⁰⁸ if one considers the challenges of a societal evaluation. Aside from study design problems such as sampling, control groups, and multicollinearity of variables,¹⁰⁹ there is the basic problem of what to measure.¹¹⁰ At least with class actions, three explicit benchmarks have been provided to guide evaluators: access to justice, judicial economy, and behaviour modification. But as mentioned, access to justice can be defined in various ways, for instance, by process, outcome, or a mix of the two.¹¹¹ Similarly, judicial economy may be as roguish and uncertain a measure as the proverbial Chancellor’s foot.¹¹²

As to behaviour modification, a host of questions arises. For example, whose behaviour needs changing? It is widely thought that class actions are aimed at corporations; indeed, one sees the term behaviour modification itself modified into *corporate* behaviour modification. Yet one of the remarkable things about the Canadian class action experience is that government and institutional defendants have been prime targets. At least this is the situation in Canada, where the major defendants have been the federal and provincial governments, both in terms of repeat litigation and amount of relief sought.¹¹³ Even if we can readily ascertain whose behaviour needs changing, how can we tell whether a particular class action, or perhaps an accumulation of them, caused a change? And if we are able to make the causal link, how do we measure the impacts on social welfare? These are difficult questions, but we must try to answer them if we ever want to ascertain how well the class action experiment is working.

¹⁰⁸ *Ibid.* at 23.

¹⁰⁹ See e.g. Macfarlane, *supra* note 28 at 675ff. For example, consider the problems in controlling for legislative differences when evaluating certification costs in a cross-jurisdictional case.

¹¹⁰ See Macfarlane, *ibid.*; Galanter & Cahill, *supra* note 10.

¹¹¹ See *supra* note 53 and accompanying text.

¹¹² The reference is to John Selden’s description of equity in S.W. Singer, *The Table-Talk of John Selden with a Biographical Preface and Notes*, 3d ed. (London: John Russell Smith, 1860) at 49: “Equity is a Roguish thing. For Law we have a measure, know what to trust to; Equity is according the Conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. ’Tis all one as if they should make the Standard for the measure, we call a Foot; a Chancellor’s foot; what an uncertain Measure would this be? One Chancellor has a long Foot, another a short Foot, a Third an indifferent Foot: ’Tis the same thing in the Chancellor’s conscience.” For a critical examination of how this metaphor has been adopted in Canadian law, see D.R. Klinck & L. Mirella, “Tracing the Imprint of the Chancellor’s Foot in Contemporary Canadian Judicial Discourse”(1998) 13 *Can. J. L. & Soc’y* 63.

¹¹³ See Branch, *supra* note 30 at APP-1 and Eizenga, *supra* note 30 at Tables.3.

We can say a few things with certainty on the cost side. Class actions are expensive. Consider the big ticket item of class counsel fees. There is sensitivity on that point in the United States, where cries of “profiteering” are strident, regular, and occasionally accurate. It would be wrong to say that profiteering is widespread,¹¹⁴ but when plaintiffs’ lawyers earn nine million U.S. dollars for a settlement that gives each class member no more than a coupon of dubious value, class actions get bad press.¹¹⁵ Class counsel fees have also become a sensitive issue in Canada, after the approval of a 52.5 million dollar fee award following a pan-Canadian settlement of the “Hep C” class action.¹¹⁶ Of course, it should not be the absolute fee level that matters, but the level relative to the risks taken, work done, and results obtained.¹¹⁷ In that regard, the “Hep C” fees cannot be faulted: approving courts found that on any basis of comparison, class counsel fees were more than reasonable.¹¹⁸ The defendants’ legal fees rarely get press at all.¹¹⁹ Some idea of the substantial cost of defending class actions can be found in the Rand Study, where three of the defendants shared information on outside counsel costs. For those three defendants, the costs were 20 per cent, 40 per cent, and 100 per cent of class counsel fees, respectively.¹²⁰ If other transaction costs associated with class certification and settlement such as the costs of using expert witnesses, providing notice to class members, and the administration of individual claims were added to the class counsel fees,

¹¹⁴ See Rand Study, *supra* note 92 at 20-23 (noting considerable variation in attorney fee awards but finding them to be generally a “modest” share of negotiated settlements ranging from 5 to 50 per cent of total settlement value, but with majority amounting to less than one third of settlement value).

¹¹⁵ See Case Comment, *supra* note 93.

¹¹⁶ In Quebec, see *Honhon v. Canada (Procureur général)*, [1999] J.Q. No. 4370 (C.S.), online: (QL) (JQ), (settlement approval); [2000] J.Q. No. 3899 (C.S.), online: QL (JQ) (fee approval). In Ontario, see *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Sup. Ct.), online: QL (OJ), (settlement approval); [2000] 49 O.R. (3d) 281 (Sup. Ct.) (fee approval). In British Columbia, see *Endcan v. Canadian Red Cross Society*, [1999] 68 B.C.L.R. (3d) 350 (S.C.) (settlement approval); [2000] B.C.J. No. 1254 (S.C.), online: QL (BCJ) (fee approval).

¹¹⁷ See *Gagne*, *supra* note 77.

¹¹⁸ For instance, the total compensation for class members was around 1.5 billion dollars, putting the fee awards at approximately 2 per cent of the total recovery, an amount that compared very favourably with the 15-26 per cent range found in the other major Canadian fee approvals that the courts reviewed.

¹¹⁹ Unless, for example, the defendant is the government and must release the information pursuant to an access request or the political exigencies of the day.

¹²⁰ Rand Study, *supra* note 92 at 20, fn 9.

it is clear that processing disputes in the form of class actions carries a high price tag.

On the benefit side, it seems incontestable that class actions have enhanced access to justice, both in terms of process and outcome. The vanishing insurance premium cases exemplify this. Some 400,000 Sun Life policyholders across Canada achieved redress through a settlement that, roughly, took their individual circumstances into account. Among other things, the settlement's use of opting out provisions and an alternative claims resolution process—ADR *within* class proceedings, as it were—make it a model for how both rights and interests can be addressed within a class action framework.¹²¹ The case also achieved judicial economy: had even a fraction of the 400,000 policyholders named, blamed, and claimed through individual litigation, their cases would have clogged the court system for years. Whether anyone's behaviour was modified as a result of the class litigation would require us to pry into corporate boardrooms and kitchen table conversations between agents and their prospects. Truly, only time will tell.

VII. CONCLUDING REMARKS

At first blush, situating class actions within the world of ADR may seem an awkward thing to do, especially from a viewpoint in which litigation is the *other* and ADR, everything else. On closer inspection—and on taking a broader and more rigorous view of ADR that consistently, even naggingly, asks “an alternative to what?”—class actions fit rather well. By aggregating the common disputes of hundreds, thousands, or hundreds of thousands of persons, and by processing and resolving them in a forum that attempts to incorporate society's private and public values, class actions offer a unique alternative to tolerating wrongful behaviour and to litigating it in the traditional sense. Furthermore, finding a niche for something in any theoretical framework cannot help but have an effect on the framework itself. For class actions, the effect is probably greatest in the area of settlement—something that ADR is vitally concerned with. As suggested here, class settlements are ripe for a rich and detailed case study; the fact that they are in the public domain makes them unique. While this aspect of class actions responds to the private/public debate, it also raises the

¹²¹ There have recently been settlements with other life insurance companies that have built on the *Dabbs* model. Some are fighting certification or defending on the basis that they did not authorize their agents to make the alleged representations.

debate afresh. Why, after all, should a class settlement be public; a private one, not? And if individuals—not class actors—knew that they too would be subject to public scrutiny when settling a case, how might that transform individual disputes? But those are questions that will have to be left for builders of the future. This tentative exploration, this tinkering and quarrying and hewing, will have achieved some modest success if it leaves a few bricks, perhaps the rudiments of a foundation, for those builders.

