Court File No.05-CV-287556CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DAVID KIDD, ALEXANDER HARVEY, JEAN PAUL MARENTETTE, GARRY C. YIP, LOUIE NUSPL, SUSAN HENDERSON and LIN YEOMANS

Plaintiffs

- and –

THE CANADA LIFE ASSURANCE COMPANY, A.P. SYMONS, D. ALLEN LONEY and JAMES R. GRANT

Defendants

Proceeding under the *Class Proceedings Act, 1992*

BOOK OF AUTHORITIES OF THE PLAINTIFFS

(Motion for Approval of Revised Amendment to SSA, returnable January 10, 2014)

January 6, 2014

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Parsons v. Canadian Red Cross Society

PROCEEDING UNDER the Class Proceedings Act, 1992
Between
Dianna Louise Parsons, Michael Herbert Cruickshanks, David Tull, Martin Henry Griffen, Anna Kardish, Elsie Kotyk, Executrix of the Estate of Harry Kotyk, deceased and Elsie Kotyk, personally, plaintiffs, and
The Canadian Red Cross Society, Her Majesty the Queen in Right of Ontario and the Attorney General of Canada, defendants
And between
James Kreppner, Barry Isaac, Norman Landry, as Executor of the Estate of the late Serge Landry, Peter Felsing, Donald Milligan, Allan Gruhlke, Jim Love and Pauline Fournier, as Executrix of the Estate of the late Pierre Fournier, plaintiffs, and
The Canadian Red Cross Society, the Attorney General of Canada and Her Majesty the Queen in Right of Ontario, defendants

[1999] O.J. No. 3572

103 O.T.C. 161

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Court File Nos. 98-CV-141369 and 98-CV-146405

Ontario Superior Court of Justice

Winkler J.

Heard: August 19-21, 1999.
Judgment: September 22, 1999.

(133 paras.)

Practice -- Class proceedings -- Settlements -- Court approval.

Motion by various parties for approval of a settlement in two companion class proceedings commenced under the Class Proceedings Act. One plaintiff class was persons who were infected with hepatitis C from blood transfusions between January 1, 1986 and July 1, 1990. The other plaintiff class was persons

infected with hepatitis C from the taking of blood or blood products during the same time period. In both proceedings, there was also a family class consisting of family members of persons in the other main classes. The defendants in the two actions were the Canadian Red Cross Society, the Queen in Right of Ontario, and the Attorney General of Canada. The plaintiff classes were national in scope. As such, the other provincial and territorial governments except Quebec and British Columbia also moved to be included in the two actions as defendants, but only if the settlement was approved. The claims in these actions were founded on the decision by the CRCS and its government's overseers not to conduct testing of blood donations to the Canadian blood supply after a test for the hepatitis C virus became available and had been put into widespread use in the U.S. On this motion, the parties presented a comprehensive settlement package to the court. It consisted of a settlement agreement, a funding agreement, and plans for distribution of the settlement funds in the two actions. However, there were over 80 written objections to the settlement proposal from individuals afflicted with hepatitis C. The objections related to a number of issues, specifically, the adequacy of the total value of the settlement amount, the extent of compensation provided through the settlement, the sufficiency of the settlement fund to provide the proposed compensation, the reversion of any surplus, and the costs of administering the plans.

HELD: Motion dismissed. The settlement proposal was within the range of reasonableness having regard to the risks inherent in carrying the matter through to trial. The level of benefits ascribed within the settlement were acceptable having regard for the accessibility of the plan to successive claims in the event of a worsening of a class member's condition. This progressive approach outweighed any deficiencies which might have existed in the levels of benefits. However, there were two areas which required modification in order for the settlement to receive court approval. The first area related to access to the fund by opt-out claimants, specifically, the benefits provided from the fund for an opt-out claimant could not exceed those available to a similarly injured class member who remained in the class. The second area related to the surplus provisions of the settlement proposal.

Statutes, Regulations and Rules Cited:

Class Proceedings Act 1992, S.O. 1992, c. 6, ss. 5(2), 8(3), 29(2).

Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Counsel:

Harvey Strosberg, Q.C., Heather Rumble Peterson and Patricia Speight, for the plaintiffs.
Wendy Matheson and Jane Bailey, for the Canadian Red Cross Society.
Michèle Smith and R.F. Horak, for Her Majesty the Queen in Right of Ontario.
Ivan G. Whitehall, Q.C., Catherine Moore and J.C. Spencer, for the Attorney General of Canada.
Wilson McTavish, Q.C., Linda Waxman and Marian Jacko, for the Office of the Children's Lawyer.
Laurie Redden, for the Office of the Public Guardian and Trustee.
Beth Symes, for the Thalassemia Foundation of Canada, Friend of the Court.
William P. Dermody, for the Intervenors, Hubert Fullarton and Tracey Goegan.
L. Craig Brown, for the Hepatitis C Society of Canada, Friend of the Court.
Pierre R. Lavigne, for Dominique Honhon, Friend of the Court.
Bruce Lemer, for Anita Endean, Friend of the Court.
Elizabeth M. Stewart, for the Provinces and Territories other than British Columbia and Quebec.
Bonnie A. Tough and David Robins, for the plaintiffs.
Janice E. Blackburn and James P. Thomson, for the Canadian Hemophilia Society, Friend of the Court.

WINKLER J.:--

Nature of the Motion

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

The Parties

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

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

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

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

6 The approval of the settlement before the court is supported by class counsel and the Ontario and Federal Crown defendants. In addition to these parties, the Provincial and Territorial governments who seek to be included if the settlement is approved, and the intervenors, the Canadian Hemophilia Society, the Office of the Children's Lawyer and the Office of the Public Guardian and Trustee made submissions in support of approval of the settlement. The Canadian Red Cross Society ("CRCS") appeared, but did not participate, all actions against it having been stayed by order of Mr. Justice Blair dated July 28, 1999, pursuant to a proceeding under the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36. The other intervenors and individual objectors voiced concerns about the settlement and variously requested that the court either reject the settlement or vary some of its terms in the interest of fairness.

Background

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

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

9 Over time the demand for blood grew and Canada turned to a universal health care system. Because of these developments, the CRCS requested financial assistance from the provincial and territorial governments. The governments, in turn, demanded greater oversight over expenditures. This led to the formation of the Canadian Blood Committee which was composed of representatives of the federal, provincial and territorial governments. The CBC became operational in the summer of 1982. Other than this overseer committee, there was no direct governmental regulation of the blood supply in Canada.

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

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

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

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

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

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

(a) transmission through the blood supply if HCV infected donors are unaware of their

infected condition and if there is no, or no effective, donor screening;
(b) an incubation period of 15 to 150 days;
(c) a long latency period during which a person infected may transmit the virus to others through blood and blood products, or sexually, or from mother to fetus; and
(d) no known cure.

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

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

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

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

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

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

22 Prior to the 1984 meeting however, Dr. Victor Feinman of Mount Sinai Hospital had already begun a study to determine the incidence of NANBH in those who had received blood transfusions. This study had a significant limitation in that it did not measure the effectiveness of surrogate testing. Although the limitation was known to the CRCS, the medical directors agreed at their meeting on March 29-30, 1984 to review Dr. Feinman's research to determine whether the proposed CRCS multi-centre study was still required. Ultimately, the CRCS did not conduct the multi-centre study.

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

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

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

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

The Claims

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

The Classes

27 The Ontario Transfused Class is described as:

(a) all persons who received blood collected by the CRCS contaminated with HCV during the Class Period and who are or were infected for the first time with HCV and who are:

(i) presently or formerly resident in Ontario and receive blood in Ontario and who are or were infected with post-transfusion HCV;
(ii) resident in Ontario and received blood in any other Province or Territory of Canada other than Quebec and who are or were infected with post-transfusion HCV;
(iii) resident elsewhere in Canada and received blood in Canada, other than in the Provinces of British Columbia and Quebec, and who are or were infected with post-transfusion HCV;
(iv) resident outside Canada and received blood in any Province or Territory of Canada, other than in the Province of Quebec, and who are or were infected with post-transfusion HCV; and
(v) resident anywhere and received blood in Canada and who are or were infected with post-transfusion HCV and who are not included as class members in the British Columbia Transfused Class Action or the Quebec Transfused Class

Action;

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

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

28 The Ontario Hemophiliac Class is described as:

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

(i) presently or formerly a resident in Ontario and received or took Blood in Ontario and who are or were infected with HCV;
(ii) resident in Ontario and received or took Blood in any other Province or Territory of Canada other than Quebec and who are or were infected with HCV;
(iii) resident elsewhere in Canada and received or took Blood in Canada other than in the Provinces of British Columbia and Quebec and who are or were infected with HCV;
(iv) resident outside Canada and received or took Blood in any Province or Territory in Canada, other than in the Province of Quebec, and who are or were infected with HCV; and
(v) resident anywhere and received or took Blood in Canada and who are not included as class members in the British Columbia Hemophiliac Class Action or the Quebec Hemophiliac Class Action;

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

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

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

(a) the Spouse, child, grandchild, parent, grandparent or sibling of an Ontario Transfused Class Member;
(b) the spouse of a child, grandchild, parent or grandparent of an Ontario Transfused Class Member;
(c) a former Spouse of an Ontario Transfused Class Member;
(d) a child or other lineal descendant of a grandchild of an Ontario Transfused Class Member;
(e) a person of the opposite sex to an Ontario Transfused Class Member who cohabitated for a period of at least one year with that Class Member immediately before his or her death;
(f) a person of the opposite sex to an Ontario Transfused Class Member who was cohabitating with that Class Member at the date of his or her death and to whom that

Class Member was providing support or was under a legal obligation to provide support on the date of his or her death; and

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

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

The Proposed Settlement

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

31 The Settlement Agreement creates the following two Plans:

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

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

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

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

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

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

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

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

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

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

(c) spouses and children secondarily-infected with HIV to a maximum of 240 who

qualify pursuant to the Program established by the Governments (which is not subject to Court approval);

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

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

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

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

Class Members Surviving as of January 1, 1999

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

37 The compensation ranges are described in the Agreement as "Levels". In addition to the payments for loss of amenities, class members with conditions described as being at compensation Level 3 or a higher compensation Level (4 or above), and whose HCV caused loss of income or inability to perform his or her household duties, will be entitled to compensation for loss of income or loss of services in the home.

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

(i) Level 1

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

(ii) Level 2

Qualification	Compensation
A polymerase chain reaction test (PCR) demonstrates that HCV is present in the blood of a class member.	Cumulative compensation of $30,000 which comprises the the $10,000 payment at level 1, plus a payment of $15,000 immediately and another $5000 when the court determines that the Fund is sufficient to do so, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(iii) Level 3

Qualification	Compensation
If a class member develops non-bridging fibrosis, or receives compensable drug therapy (i.e. Interferon or Ribavirin), or meets a protocol for HCV compensable treatment regardless of whether the treatment is taken, then the class member qualifies for Level 3 benefits.	Option 1 - $60,000 comprised of the level 1 and 2 payments plus an additional $30,000 Option 2 - $30,000 from the Level 1 and 2 benefits, and if the additional $30,000 from Option 1 is waived, compensation for loss of income or loss of income or loss of services in the home, subject to a threshold qualification.
	In addition, at this level, the class member is entitled to an additional $1000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reiumbursement for out-of-pocket expenses.

(iv) Level 4

Qualification	Compensation
If a class member develops bridging fibrosis, he or she qualifies as a Level 4 claimant	There is no further fixed payment beyond that of Level 3 at this level. In addition to those previously defined benefits, the claimant is entitled to compensation for loss of income or

	loss of services in the home, $1000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reiumbursement for out-of-pocket expenses.

(v) Level 5

Qualification	Compensation
A class member who develops (a) cirrhosis; (b) unresponsive porphyria cutanea tarda which is causing significant disfigurement and disability; (c) unresponsive thrombocytopenia (low platelets) which result in certain other conditions; or (d) glomerulonephritis not requiring dialysis, he or she qualifies as a Level 5 claimant.	$125,000 which consists of the prior $60,000, if the claimant elected Option 1 at Level 3, plus an additional $65,0000 plus the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(vi) Level 6

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

39 There are some significant "holdbacks" of compensation at certain levels. As set out in the table above, a claimant who is entitled to the $20,000 compensation payment at level 2 will initially be paid $15,000 while $5,000 will be held back in the Fund. If satisfied that there is sufficient money in the Fund, the Courts may then declare that the holdback shall be removed in accordance with Section 10.01 (1)(i) of the Agreement and Section 7.03 of the Plans. Claimants with monies held back will then

receive the holdback amount with interest at the prime rate from the date they first became entitled to the payment at Level 2. In addition, any claimant that qualifies for income replacement at Level 4 or higher will be subjected to a holdback of 30% of the compensation amount. This holdback may be removed, and the compensation restored, on the same terms as the Level 2 payment holdback.

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

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

Class Members Dying Before January 1, 1999

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

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

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

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

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

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

46 Failing agreement among the approved dependants on the allocation of loss of support between them, the Administrator will allocate loss of support based on the extent of support received by each of the dependants prior to the death of the HCV infected person.

Class Members Cross-Infected with HIV.

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

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

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

The Family Class Claimants

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

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

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

20 hours per week.

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

(a) all compensation payments to claimants who live in Canada will be tax free;
(b) compensation payments will be indexed annually to protect against inflation;
(c) compensation payments other than payments for loss of income will not affect social benefits currently being received by claimants;
(d) life insurance payments received by or on behalf of claimants will not be taken into account for any purposes whatsoever under the Plans; and
(e) no subrogation payments will be paid directly or indirectly.

The Funding Calculations

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

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

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

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

(a) the Hemophiliac cohort size is approximately 1645 persons
(b) 15 singularly infected and 340 co-infected members of this cohort have died prior to January 1, 1999; the 15 singularly infected and 15 of those co-infected will establish HCV as the cause of death and claim under the regular death provisions (but there is no $120,000 option in this plan); the remaining 325 co-infected will take the $72,000

option.

(c) a further 300 co-infected members are alive at January 1, 1999; of these, 80%, i.e. 240, will take the $50,000 option;

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

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

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

> A precise present value calculation would require a formula incorporating the gross rate of interest and the rate of inflation as separate parameters. However, virtually the same result will flow from a simpler formula where the future payments are discounted at a net rate equal to the excess of the gross rate of interest over the assumed rate of inflation. Eckler calculates the annual rate of growth of the Fund will be 3.4% per year on this basis. This is referred to as the "net discount rate".

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

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

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

The Thalassemia Victims

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

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

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

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

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

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

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

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

Law and Analysis

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

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

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

(Dabbs No. 1) at para. 9:

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

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

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

70 Sharpe J. stated in Dabbs v. Sun Life Assurance (1998), 40 O.R. (3d) 429 (Gen. Div.), aff'd 41 O.R. (3d) 97 (C.A.). leave to appeal to S.C.C. dismissed October 22, 1998, (Dabbs No. 2) at 440, that "reasonableness allows for a range of possible resolutions." I agree. The court must remain flexible when presented with settlement proposals for approval. However, the reasonableness of any settlement depends on the factual matrix of the proceeding. Hence, the "range of reasonableness" is not a static valuation with an arbitrary application to every class proceeding, but rather it is an objective standard which allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation.

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

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

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

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

73 However, the settlement approval exercise is not merely a mechanical seriatim application of each

of the factors listed above. These factors are, and should be, a guide in the process and no more. Indeed, in a particular case, it is likely that one or more of the factors will have greater significance than others and should accordingly be attributed greater weight in the overall approval process.

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

> A settlement of the kind under consideration here will affect a large number of individuals who are not before the court, and I am required to scrutinize the proposed settlement closely to ensure that it does not sell short the potential rights of those unrepresented parties. I agree with the thrust of Professor Watson's comments in "Is the Price Still Right? Class Proceedings in Ontario", a paper delivered at a CIAJ Conference in Toronto, October 1997, that class action settlements "must be seriously scrutinized by judges" and that they should be "viewed with some suspicion". On the other hand, all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection.

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

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

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

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

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

(a) the adequacy of the total value of the settlement amount;
(b) the extent of compensation provided through the settlement;
(c) the sufficiency of the settlement Fund to provide the proposed compensation;
(d) the reversion of any surplus;
(e) the costs of administering the Plans; and
(f) the claims process applicable to Thalassemia victims.

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

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

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

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

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

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

> Once infected with HCV, a person will either clear HCV after an acute stage of develop chronic HCV infection. At present, the medical literature establishes that approximately 20-25% of all persons infected clear HCV within approximately one year of infection. Those persons will still test positive for the antibody and will

probably do so for the rest of their lives, but will not test positive on a PCR test, nor will they experience any progressive liver disease due to HCV.

Persons who do not clear the virus after the acute stage of the illness have chronic HCV. They may or may not develop progressive liver disease due to HCV, depending on the course HCV takes in their body and whether treatment subsequently achieves a sustained remission. A sustained remission means that the virus is not detectable in the blood 6 months after treatment, the liver enzymes are normal, and that on a liver biopsy, if one were done, there would be no inflammation. Fibrosis in the liver is scar tissue caused by chronic inflammation, and as such is not reversible, and will remain even after therapy. It is also possible to spontaneously clear the virus after the acute phase of the illness but when this happens and why is not well understood. The number of patients spontaneously clearing the virus is small.

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

...

Inflammation and necrosis of liver cells results in scarring of liver tissue (fibrosis). Fibrosis also appears in various patterns in HCV patients .... Fibrosis can stay the same or increase over time, but does not decrease, because although the liver can regenerate cells, it cannot reverse scarring. On average it takes approximately 20 years from point of infection with Hepatitis C until cirrhosis develops, and so on a scale of 1 to 4 units the best estimate is that the rate of fibrosis progression is 0. 133 units per year.

...

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

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

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

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

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

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

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

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

86 The "once-and-for-all" lump sum award is the common form of compensation for damages in tort litigation. Although the award may be used to purchase annuities to provide a "structured" settlement,

the successful claimant receives one sum of money that is determined to be proper compensation for all past and future losses. Of necessity, there is a great deal of speculation involved in determining the future losses. There is also the danger that the claimant's future losses will prove to be much greater than are contemplated by the award of damages received because of unforeseen problems or an inaccurate calculation of the probability of future contingent events. Thus even though the claimant is successful at trial, in effect he or she bears the risk that there may be long term losses in excess of those anticipated. This risk is especially pronounced when dealing with a disease or medical condition with an uncertain prognosis or where the scientific knowledge is incomplete.

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

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

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

89 These objections mirror the submissions in support of the settlement, in that they are largely based on an analogy to a tort model compensation scheme. For the reasons already stated, this analogy is not appropriate because the proper application of the tort model of damages compensation would require an examination of each individual case. In the absence of an individualized examination, the reasonableness, or adequacy, of the settlement cannot be determined by a comparison to damages that would be obtained under the tort model. Rather the only basis on which the court can proceed in a review of this settlement is to consider whether the total amount of compensation available represents a reasonable settlement, and further, whether those monies are distributed fairly and reasonably among the class members.

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

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

92 In applying the relevant factors set out above to the global settlement figure proposed, I am of the view that the most significant consideration is the substantial litigation risk of continuing to trial with these actions. The CRCS is the primary defendant. It is now involved in protracted insolvency proceedings. Even if the court-ordered stay of litigation proceedings against it were to be lifted, it is unlikely that there would be any meaningful assets available to satisfy a judgment. Secondly, there is a real question as to the liability of the Crown defendants. Counsel for the plaintiffs candidly admit that there is a probability, which they estimate at 35%, that the Crown defendants would not be found liable

at trial. Counsel for the federal government places the odds on the Crown successfully defending the actions somewhat higher at 50%. I note that none of the opposing intervenors or objectors challenge these estimates. In addition to the high risk of failure at trial, given the plethora of complex legal issues involved in the proceedings, there can be no question that the litigation would be lengthy, protracted and expensive, with a final result, after all appeals are exhausted, unlikely until years into the future.

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

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

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

96 In principle, there is nothing egregious about the payment of settlement funds to non-class members. Section 26(6) of the CPA provides the court with the discretion to sanction or direct payments to non-class members. In effect, the opt out provision reflects the intention of the defendants to settle all present and future litigation. This objective is not contrary to the scheme of the CPA per se. See, for example, the reasons of Brenner J. in Sawatzky v. Societe Chirurgiale Instrumentarium Inc. [1999] B.C.J. No. 1814 (S.C.), adopted by this court in Bisignano v. La Corporation Instrumentarium Inc. (September 1, 1999, Court File No. 22404/96, unreported.)

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

98 In my view, where a defendant wishes to settle a class proceeding by providing a single Fund to deal with both the claims of the class members and the claims of individuals opting out of the

settlement, the payments out of the Fund must be made on an equitable basis amongst all of the claimants. Fairness does not require that each claimant receive equal amounts but what cannot be countenanced is a situation where an opt out claimant who is similarly situated to a class member receives a preferential payment.

99 The federal government argues that fairness ensues, even in the face of the different treatment, because the opt out claimant assumes the risk of individual litigation. I disagree. Because the defendants intend that all claims shall be satisfied from a single fund, individual litigation by a claimant opting out of the class pits that claimant against the members of the class. The opt out claimant stands to benefit from success because he or she may achieve an award in excess of the benefits provided under the settlement. This works to the detriment of the class members by the reducing the total amount of the settlement. More importantly however, the benefits to the class members will not increase as a result of unsuccessful opt out claimants.

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

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

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

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

104 Regardless of the submissions made with respect to comparable awards under the tort model, it is clear from the record that the compensatory, benefits assigned to claimants at different levels were largely influenced by the total of the monies available for allocation. As stated in the CASL study at p. 3:

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

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

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

107 I cannot accede to this submission. The Eckler report states that with the contemplated holdbacks of the lump sum at Level 2 and the income replacement at Level 4 and above, the Fund will have a surplus of $334,173,000. Admittedly, Eckler currently projects a deficit of $58,533,000 if the holdbacks are released.

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

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

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

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

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

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

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

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

112 Class counsel urged the court to consider the empirical evidence of the "take-up rate" demonstrated in the completed class proceeding, Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 25 O.R. (3d) 331 (Gen. Div.), leave to appeal dismissed (1995), 129 D.L.R. (4th) 110 (Ont. Div. Ct.), to support a conclusion that the Fund is sufficient. In Nantais, all of the class members were known and accordingly received actual notice of the settlement. Seventy-two percent of the class chose to make claims, or "take-up" the settlement. It was contended that this amounted to strong evidence that less than one hundred per cent of the classes in these proceedings would take up this settlement. I cannot accept the analogy. While I agree that it is unlikely that the entire estimated cohort will take up the settlement, it is apparent from the caveats expressed in the reports provided to the court that the estimate of the cohort size may be understated by a significant number. Accordingly, for practical purposes, a less than one hundred per cent take up rate could well be counter-balanced by a concurrent miscalculation of the cohort size.

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

114 Consequently, given the empirical evidence proffered by Dr. Anderson as to the asymptomatic potential of HCV infection, the conservative approach taken by Eckler in determining the likely claims against the Fund and the role of the courts in monitoring the ongoing distributions, I am of the view that the projected shortfall of $58,000.000 considered in the context of the size of the overall settlement, is within acceptable limits. I find on the evidence before me, that the Fund is sufficient to provide the benefits and, thus, in this respect, the settlement is reasonable.

115 I turn now to the area of concern raised by counsel for the intervenor the Hepatitis C Society of Canada (the "Society"), namely the provision that mandates reversion of the surplus of the Plans to the

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

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

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

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

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

120 Remainder provisions in trusts are not unusual. Further, I reiterate that it is, at this juncture, complete speculation as to whether a surplus, either ongoing or in a remainder amount, will exist in the Fund. However, accepting the submission of class counsel at face value, the reversion provision is anomalous in that it is neither in the best interests of the plaintiff classes nor in the interests of defendants. The period of administration of the Fund is 80 years. No party took issue with class counsel's submission that the defendants are not entitled under the current language to withdraw any surplus in the Fund until this period expires. Likewise, there is no basis within the settlement agreement upon which the class members could assert any entitlement to access any surplus during the term of the agreement. Thus, any surplus would remain tied up, benefitting neither party during the entire 80 year term of the settlement.

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

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

123 This is not to say that it is necessary, as the Society suggests, that in order to be in the best interests of the class members, any surplus must only be used to augment the benefits within the settlement agreement. There are a range of possible uses to which any surplus may be put so as to benefit the class as a whole without focusing on any particular class member or group of class members. This is in keeping with the CPA which provides in s. 26(4) that surplus funds may "be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members ...". On the other hand, in the proper circumstances, it may not be beyond the realm of reasonableness to allow the defendants access to a surplus within the Fund prior to the expiration of the 80 year period.

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

125 There was an expressed concern as to the potential for depletion of the Fund through excessive administrative costs. The court shares this concern. However, the need for efficient access to the plan benefits for the class members and the associated costs that this entails must also be recognized. This requires an ongoing balancing so as to keep administrative costs in line while at the same time providing a user friendly claims administration. The courts, in their supervisory role, will be vigilant in ensuring that the best interests of the class will be the predominant criterion.

Disposition

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

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

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

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

128 The global settlement submitted to the court for approval is within the range of reasonableness having regard for the risk inherent in carrying this matter through to trial. Moreover, the levels of benefits ascribed within the settlement are acceptable having regard for the accessibility of the plan to

successive claims in the event of a worsening of a class member's condition. This progressive approach outweighs any deficiencies which might exist in the levels of benefits.

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

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

131 The changes to the settlement required to obtain the approval of this court are not material in nature when viewed from the perspective of the defendants. Accepting the assumed value of $10,000,000 attributed to the opt outs by class counsel, a figure strongly supported by counsel for the defendants, the variation indicated is de minimis in the context of a $1.564 billion dollar settlement. The change required in respect of the surplus provision resolves the anomaly of tying up any surplus for the entire 80 year period of the administration of the settlement. In any event, given the projected $58,000,000 deficit, the question of a surplus is highly conjectural. The creation of the sub-class of thalassemia victims, in the context of the cohort size is equally de minimis. I am prepared to approve the settlement with these changes.

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

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

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

133a I am obliged to counsel, the parties and the intervenors and especially to the individual objectors who took the time to either file a written objection or appear in person at the hearings. [The Court did not number this paragraph. QL has assigned the number 133a.] WINKLER J.

cp/s/jjy/qljyw

TAB 2

Ontario Supreme Court
Dabbs v. Sun Life Assurance Co. of Canada
Date: 1998-07-03

Dabbs

and

Sun Life Assurance Company of Canada

Ontario Court (General Division), Sharpe J. July 3, 1998

Michael A. Eizenga, Michael J. Peerless and Charles M. Wright, for plaintiff.

H. Lorne Morphy and Patricia D.S. Jackson, for defendant.

Michael S. Deverett, for three objectors.

Gary R. Will and J. Douglas Barnett, for 11 objectors.

SHARPE J.:—

1. *Nature of Proceedings*

[1] This action is a proposed class proceeding pursuant to the *Class Proceedings Act, 1992,* S.O. 1992, c. 6. The claim arises from the sale of so-called "vanishing premium" life insurance policies. The plaintiff alleges that in marketing these policies, the defendant Sun Life Assurance Company of Canada ("Sun Life") and its agents represented to purchasers that dividends to policy holders would pay the required premiums within a specified number of years. Sales illustrations projected a "premium offset date" after which no further premiums would be required. In fact, in the plaintiff's case and in a large number of similar cases, dividends have been lower than projected and policy holders have been or will be required to pay premiums for a longer period than the projected premium offset date. The defendant Sun Life has made it clear that it denies the allegations of misrepresentation.

[2] Together with similar Quebec and British Columbia actions, this action was settled by written agreement, dated June 16, 1997. The settlement is subject to and conditional upon court approval in all three provinces. The settlement has been approved in Quebec and

British Columbia. On this motion, the plaintiff and defendant seek certification of the action as a class proceeding and approval of the settlement.

[3] Following my earlier ruling on the procedure to be followed on this motion, released February 24, 1998, further material was filed by the plaintiff and by certain of the objectors. The motion was then heard over three days in accordance with the terms set out in my procedural ruling. I am now in a position to rule on certification and the request for approval of the settlement.

2. *Certification*

[4] The test for certification is set out in the following terms in the *Class Proceedings Act,* s. 5:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (*a*) the pleadings or the notice of action discloses a cause of action;
>
> (*b*) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (*c*) the claims or defences of the class members raise common issues;
>
> (*d*) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (*e*) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[5] The defendant supports the motion for certification, but only on the condition that the settlement be approved at the same time. Subject to certain submissions relating to the subclass issue discussed below, the objectors focused their attention on the settlement and did not seriously contend that this was not a case for certification.

(a) *Cause of action*

[6] I am satisfied that the statement of claim discloses a cause of action. The plaintiff asserts claims on his own behalf and on behalf of a proposed class for alleged breach of contract and negligent misrepresentation arising out of the manner in which whole life participating insurance policies with a premium offset option were sold. The allegations in the action

primarily concern the use of sales illustrations, combined with oral and written representations made by the defendant and its agents with respect to the date upon which dividends would be sufficient to fully pay up the policies. While it is clear from the position it has taken on this motion that the defendant would deny these allegations if the action we to proceed, the plaintiff does plead a tenable cause of action.

(b) *Identifiable class*

[7] The plaintiff proposes that the class be defined as follows:

> ...all owners of Class Policies purchased in Ontario, or who are resident in Ontario on April 30, 1997 and whose Class Policy(ies) were purchased outside Quebec or British Columbia.

[8] "Class Policy" is defined as

> ...any participating whole life policy issued by Sun Life in Canada between January 1, 1980 and December 31, 1995 which is in force as of April 30, 1997 (a "Current Class Policy") or which has become a Lapsed Policy between January 1, 1990 and April 30, 1997 (a "Lapsed Class Policy"), except those policies in respect of which the owners have released Sun Life from claims related to premium offset or to the sale of the policies.

[9] The proposed definition of the class does, I find, represent an identifiable class of two or more persons that would be represented by the representative plaintiff. It is common ground that there are approximately 141,000 members of the proposed class in Ontario and approximately 400,000 class members in Canada.

(c) *Common issue*

[10] I also find that the statement of claim does raise a common issue, namely the following:

> Did the use of illustrations and/or any representations, in writing or verbal, create an obligation on the part of Sun Life with respect to a specified offset date despite the terms of the policy itself and the terms of any illustration?

(d) *Preferable procedure*

[11] I find that a class proceeding is the preferable procedure for the resolution of the common issue. As already noted, there are approximately 141,000 class members in Ontario and approximately 400,000 class members in Canada. The litigation of these claims on an individual basis would be costly and time consuming. Indeed, if these claims had to be

litigated on an individual basis, few members of the class would be able to present their claims because of the costs, risks and delays involved. I have no doubt that a class proceeding is the most efficient manner to deal with these claims from the perspective of both the litigants and the court, and that a class proceeding will result in increased access to justice.

(e) *Representative plaintiff*

[12] Mr. Dabbs filed an affidavit on this motion and was cross-examined before me. Mr. Dabbs impressed me as being an honest and informed lay person with a genuine perception of having been misled by an agent as to the number of premiums he would have to pay. I am satisfied on the basis of all the evidence that he has made a sincere and genuine effort to represent the interests of the proposed class and that he has no conflict of interest with other members of the class. I find as well that the representative plaintiff has produced a proper plan for the resolution of this proceeding.

(f) *Subclass*

[13] Mr. Deverett submitted that certification should be denied on the ground that the agreement failed to provide for a subclass for those who have claims for "twisting", a practice whereby a policy holder is improperly induced by an agent to replace an existing policy with a new policy of less value to the policy holder. In my view, there is no evidence that would indicate that there has been a significant problem with "twisting" among Sun Life policy holders. Class counsel did not ignore the issue. The statement of claim contains an allegation that would deal with twisting. However, Mr. Ritchie testified that from class counsel's interviews with over 200 policy holders, there emerged no evidence of a systemic problem. In my view, in the absence of any evidence or reasonably supported belief that twisting may be a wide-spread problem among class members, there is no basis for denying certification on the ground that there is no subclass for "twisting". The right to opt out provides adequate protection to any class member who wishes to pursue a claim for "twisting".

3. *Terms of the Settlement*

[14] The settlement agreement is a document of some considerable complexity, but it will facilitate analysis to provide a simplified explanation of its main features.

(a) *Right to opt out*

[15] Under the terms of the settlement, all class members retain the right to opt out of the settlement and sue on their own behalf for whatever claim they wish to assert. The right to opt out arises at two stages. A class member may opt out immediately and have nothing to do with the settlement. There is also a right to opt out that arises in one area of the alternative claim resolution process, discussed in greater detail below.

(b) *Global benefits*

[16] The proposed settlement contains two types of benefits for class members. First are global benefits. These might be described as "no-proof" benefits. They are available to all class members without inquiry as to the nature of the representations that were made to the class member at the time he or she purchased the policy. All members of the class are automatically entitled to an annual dividend improvement of 50 basis points (1/2 per cent) higher than would otherwise apply for a period of three years. For a special category of policies known as "enhanced policies", there is a further benefit of a 25 per cent reduction in the cost of term insurance for the enhanced term of such policy.

[17] A member of the class may also elect the optional dividend benefit. This is also a "no-proof" benefit, available without inquiry as to the nature of the representations that were made to the class member at the time he or she purchased the policy. This benefit entitles the policy holder to an annual dividend interest rate that is 75 basis points (3/4 per cent) higher than would otherwise apply for the term of the policy. However, to obtain this benefit, the policy holder must waive the special maturity dividend. The special maturity dividend is not a right secured by any policy, but an enhancement the defendant has voluntarily provided to its policy holders. It represents an enhanced cash value or payment on death determined by the length of time the member has held the policy. To determine the relative values of the optional dividend benefit and the special maturity dividend the policy holder must give up, it is necessary to examine the policy holder's individual circumstances. The plaintiff and the defendant submit that in most cases, the value of the optional dividend benefit will greatly exceed the value of the special maturity dividend. I will return to the question of the value of the optional dividend benefit below.

(c) *Alternative claims resolution process*

[18] The second type of benefit is that available through the alternative claims resolution process ("ACRP"). The ACRP provides a mechanism whereby a policy holder presents evidence of the nature of the actual misrepresentation made at the time of sale of the policy. A class member who elects to submit an ACRP claim is, subject to an exception described below, not entitled to receive the "no-proof" benefits just described. The ACRP provides for submission of a claim on the basis of affidavit from the policy holder and certain documentary evidence.

[19] The settlement agreement contemplates that a policy holder who submits an ACRP claim will be placed in one of five categories. These are described in greater detail and with more precision in the agreement, but for present purposes, the following simplified definitions will suffice:

> *Category 1:* the member provides evidence showing that the defendant or its agent made a written representation that the policy would be fully paid-up after a specified number of premiums had been paid.
>
> *Category 2:* the member provides affidavit evidence that the defendant's agent made an oral representation that the policy would be fully paid-up after a specified number of premiums had been paid and the agent confirms that such representation was made.
>
> *Category 3:* the member provides affidavit evidence that the defendant's agent made an oral representation that the policy would be fully paid-up after a specified number of premiums had been paid but the agent neither confirms nor denies that such representation was made.
>
> *Category 4:* the member provides affidavit evidence that the defendant's agent made an oral representation that the policy would be fully paid-up after a specified number of premiums had been paid but the agent provides an affidavit denying that such representation was made.
>
> *Category 5:* the member provides affidavit evidence that the defendant's agent made an oral representation that the policy would be fully paid-up after a specified number of premiums had been paid and there is evidence that a written statement was provided at the time of sale which contradicts the member's version of the misrepresentation.

[20] The rights and benefits attaching to these classifications is as follows. Categories 1 and 2 claimants are entitled to the same premium offset entitlement that was represented to them. Category 3 claimants are entitled to a premium offset date which is half-way from the premium offset date represented at the time of sale to the premium offset date shown as applicable on the first policy anniversary date after March 1, 1997. Categories 4 and 5 claimants are entitled to no relief. However, Category 4 claimants have two options available after their claims have been classified as falling into Category 4. First, they have the right to

opt out of the settlement entirely, thereby preserving any common law action right they may have. Second, Category 4 claimants have the right to re-elect and take either of the "no-proof" benefits described above.

[21] The settlement agreement provides for a summary and mechanical process whereby claims are to be assessed and classified. The ACRP does not allow for *viva voce* evidence, nor does it permit a right to cross-examine and or include any right to make oral representations. The defendant Sun Life is required to establish a claims administration facility which bears primary responsibility for determining the claims. The claims administration facility is, however, subject to audit by class counsel and rejected claims are subject to review by a review panel consisting of a lawyer designated by Sun Life and a designated member of settlement class counsel. In the event of disagreement between the members of the review panel, there is further review by the "designate", defined as a retired judge or comparable individual.

[22] The agreement requires the parties to provide to the court for approval a list of statements which are to be considered to constitute clear and unqualified guarantees as contemplated for Categories 1 and 2 claims. To protect the integrity of the ACRP, the lists are filed with the court under seal, but I have reviewed them. I find that they represent a useful, fair and reasonable collection of the sort of statement that would meet the standard required under the agreement.

[23] Sun Life is also required to provide a toll-free telephone information line on which class members may make inquiries and obtain policy status information. Class counsel are required to monitor that "hot line" to ensure that appropriate information is given to class members. I note as well that class members who opt for the ACRP are entitled to access to the Sun Life file. Counsel for Sun Life stated to the court that before having to decide whether to accept the global benefits, elect the optional dividend benefit or pursue a claim under the alternative resolution process, a class member would be able to obtain from Sun Life a print-out setting out information as to the class member's policy that would include the value of the special maturity benefit.

(d) *Value of the optional dividend benefit*

[24] The value of the "optional dividend benefit" is of considerable significance. It is available to all policy holders on a "no-proof" basis and it provides the fall-back position available to those policy holders who swear that a misrepresentation was made but who are denied any relief under the ACRP when met with a sworn denial by the agent.

[25] I asked for farther evidence of the value of this benefit. The plaintiff answered this request with a further affidavit from an actuary who had been retained to provide an expert opinion on the overall worth of the settlement. It is apparent that the actuary's opinion is based upon background information with respect to policies, dividends and benefits provided by the defendant. While neither of the groups of objectors showed any concern about the value of the optional dividend benefit until I raised the point, both counsel submitted that there should be a more searching inquiry into the background information that had been provided to Mr. Huff. The defendant takes the position that this information is of a confidential nature and that if it were to be made a matter of public record, the defendant would suffer thereby. Upon Mr. Huff depositing with the registrar of the court copies of the material and information he had been provided by the defendant, I reserved my decision on the appropriate course to follow.

[26] My ruling on this point is that the question I asked has been answered by Mr. Huff's evidence and that without looking at the material provided by the defendant to Mr. Huff, I have been provided sufficient information to permit me to assess the fairness of this settlement. I reach this conclusion for the following reasons. First, Mr. Huff impressed me as a reliable witness who took his role as an independent expert seriously. He did not exaggerate or use the witness stand as a platform to advocate the cause of the party that retained him. His evidence was measured and balanced. He indicated that by its very nature, virtually all of the information he needed to formulate his opinion had to come from the defendant. There is simply no independent source for the number and types of policies, the rights attached to those policies and the formulae for calculation of benefits. To the extent possible, he was able to verify that the information provided by the defendant was internally consistent and the necessary actuarial calculations were tested.

[27] I was urged by the objectors represented by Mr. Deverett to question the reliability of data supplied by the defendant because of an adverse credibility finding made against a senior officer of the defendant by another judge of this court in another action. In my view, it

would be entirely inappropriate to accept such a submission. Each case falls to be decided on its own merits and on the evidence presented and the information at issue here is not the same as the evidence rejected in that other proceeding.

[28] I am satisfied that an honest and significant effort has been made to respond to the question I asked. Mr. Huff and his associates devoted over 100 hours of professional time, 50 hours of para-professional time and 30 hours of clerical time, the greater part of which was related to the verification of offset dates. No further review is required. I would add that inherent in the approval of a settlement is the need to assess issues on a less than complete factual record. To require proof of all relevant facts to the standard required at trial would defeat the very notion of a settlement where the parties ask the court to approve an arrangement reached on a less than perfect record.

[29] Mr. Huff's evidence is that over 90 per cent of policy holders would achieve offset reductions of between 30 per cent and 70 per cent through the optional dividend benefit. The weighted average reduction for policies he tested with meaningful offset reductions (*i.e.,* excluding those where the current offset was the same as that indicated at the time of issue) was 56 per cent. It is apparent that these are averages and that to assess the situation of any individual policy holder, it would be necessary to consider the particulars of that individual's situation. Mr. Huff confirmed that the examples provided by Sun Life in the question and answer booklet provided to class members are accurate.

(e) *Lapsed policies*

[30] The agreement also makes provision for lapsed policies. The holder of a lapsed policy who is able to provide evidence of insurability is entitled to a new policy similar to the lapsed policy with a 50 per cent reduction in the first annual premium. The holder of a lapsed policy may also apply under the ACRP. If the member's claim is classified as Category 1, 2 or 3, the policy may be reinstated without evidence of insurability upon payment of past due premiums, loans and interest.

4. *Analysis of the Proposed Settlement*

(a) *The standard for approval*

[31] In my previous ruling I indicated that the standard to be met by the parties seeking approval of the settlement is whether in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it. A settlement of the kind under consideration here will affect a large number of individuals who are not before the court, and I am required to scrutinize the proposed settlement closely to ensure that it does not sell short the potential rights of those unrepresented parties. I agree with the thrust of Professor Watson's comments in "Is the Price Still Right? Class Proceedings in Ontario", a paper delivered at a CIAJ Conference in Toronto, October 1997, that class action settlements "must be seriously scrutinized by judges" and that they should be "viewed with some suspicion". On the other hand, all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

[32] I have had the benefit of three full days of cross-examination of deponents on affidavits filed in support of the settlement and submissions by counsel representing the parties and the objectors. I have received answers to certain questions I posed to the parties. After considerations of the points that have been made both in favour of and against approval of the settlement, for the reasons that follow, I have reached the conclusion that this settlement should be approved.

(b) *Recommendation of class counsel*

[33] The fact that this settlement is strongly recommended by experienced class counsel is certainly a factor in its favour. The recommendation of class counsel is clearly not dispositive as it is obvious that class counsel have a significant financial interest in having the settlement approved. Still, the recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line. Moreover, in the case at bar, the settlement was not the result of a solo effort. As there were proceedings brought in British Columbia and Quebec as well, there was a team of class counsel from three different provinces. Moreover, class counsel also sought and obtained the advice of counsel from the United States who have experience in "vanishing premium" litigation.

(c) *Risks of proceeding to trial*

[34] While the plaintiff presents an arguable case, there is no doubt that there is a risk that if the case went to trial, the common issue would be resolved against the class. Misrepresentation is often difficult to prove. Here, the standard sales illustration which forms the basis of most claims contains an explicit waiver which the members of the class would have to overcome. While the specific terms vary, typical language is: "This illustration assumes a continuation of the current scale of dividends and Special Maturity Dividends (SMD). Dividends may be higher or lower; they will be based on Sun Life's interest, expense, and mortality experience." The policies themselves typically contain language indicating that the premium is payable throughout the term of the policy: "Total Premiums payable by owner due [month, day and year] and yearly thereafter while life insured lives." It is certainly possible that the defendant might persuade a court that such language provided class members with a clear statement that the dividends might or might not be sufficient to fulfil the hoped-for result of the illustration. In addition to the legal and factual risks are certain practical concerns. The case would be factually, legally and procedurally complex. It would almost certainly take several years to get to trial and to then exhaust appeals.

(d) *Fairness of the ACRP*

[35] The ACRP is at the core of this agreement. It plainly does not offer the procedural guarantees of a trial as there is no right to cross-examine, present oral evidence or to make oral submissions. On the other hand, there would be no point to the settlement if it did not provide for some form of summary resolution of claims. The provision of a cost-free process to claimants who would otherwise be forced to abandon their claims or bear the costs of litigation represents a significant benefit.

[36] In my view, there can be little doubt that the ACRP offers a fair and reasonable resolution of claims falling in Categories 1 and 2 which afford the claimant precisely the offset date that was represented. I would also find it difficult to question the fairness of the result of a Category 3 claim where the claimant is given halfway relief on the basis of nothing more that the claimant's own sworn statement that an oral representation was made. Similarly, I see no reason to question the fairness of a Category 5 claim where there is evidence that a written statement was provided at the time of sale which contradicts the claimant's version of the misrepresentation. It is only fair that there be some control on the extent to which a class

member can secure a benefit in the strength of his or her own affidavit. I note here that in answer to a question I posed, it was stated to the court that it was not intended that language of the explicit waiver in the standard sales illustration quoted above would be sufficient to bring the claim within Category 5.

[37] The contentious issue is the fairness of Category 4. Mr. Will focused his attention on this point and submitted that, in effect, the agent was given a veto over the rights of the policy holder. It was his submission that there should be some control or constraint on the extent to which agents could defeat a claim by simple denial. The right to confront and cross-examine the agent could be granted, or there could be a points system that would discount agent denials where the same agent denied more than one claim.

[38] In my view, there are a number of factors which have to be considered here. First is the fact that the agent must make the denial on oath. This means that the agent who lies is subject to the threat of perjury. Second, it is not apparent that all agents will perceive it to be in their interest to favour the interests of Sun Life over their clients. Third are the very significant options that remain to a class member whose claim is denied by the agent. The class member has, at that point, the right to opt out and sue the defendant with full knowledge of the case he or she will have to meet. In that sense, the class member loses nothing because of the settlement but gains advance discovery of the case to be met. The class member also has the very significant right to abandon the ACRP and elect the "no-proof" benefits which, as noted, will frequently result in achieving half-way relief. In my view, when considered in light of the balance of the settlement, it cannot be said that the situation of the Category 4 claimants renders this settlement unfair.

[39] It is my view, that considered as a whole, the ACRP does provide for an efficient and fair process.

(e) *Approval in British Columbia and Quebec*

[40] Another factor which favours approval of the settlement is that the same agreement has been approved by the courts of British Columbia and Quebec. In the companion case in British Columbia, *Romanchuck v. Sun Life Assurance Co. of Canada,* November 28, 1997, Brenner J. found that:

> ...the settlement is reasonable, fair and adequate. A considerable degree of creativity has been demonstrated by the parties in putting in place, among other things, a form of alternative dispute resolution to allow a cost effective method of resolving the claims in this case...

[41] In the Quebec case, *Podmore v. Sun Life Assurance Co. of Canada,* January 16, 1998, Tannenbaum J. of the Quebec Superior Court found that the agreement was *"raisonnable, équitable, approprié et dans le meilleur intérêt du groupe visé".*

(f) *Absence of statement of defence and discovery*

[42] This settlement was reached at a very early stage of the proceedings. No statement of defence was filed and there has been no discovery. The position of the defendant has not been put formally on the record and has been known to class counsel only through the settlement process. In my view, this is not a reason for refusing approval. It is clearly not the law that a settlement requiring court approval cannot be made at such an early stage of the proceedings. Moreover, I am satisfied that class counsel did adequately consider the position of the defendant. There is evidence before me that before recommending the settlement, class counsel interviewed hundreds of potential class members and a number of Sun Life agents. I am satisfied that a serious and diligent effort has been made to determine the facts. This is by no means the first "vanishing premium" case litigated in North America and class counsel took advice from others with experience in the area.

(g) *Exclusion of other possible claims*

[43] I have already dealt with the matter of "twisting" in relation to certification. It is unnecessary to add anything here except that the settlement preserves the right of any class member to opt out and pursue any such claim.

[44] Mr. Deverett also suggested that the failure of the Sun Life policies to perform as indicated in the standard sales illustration might be the fault of Sun Life itself as it has the unfettered right to determine the dividends that are to be paid. Again, I find that the evidence before me fails to show that there is any serious prospect that this is a potentially valid source for a claim by class members. Sun Life does business in a competitive market. The failure of life insurance policies of the kind at issue here to perform was not restricted to Sun Life. There was an industry-wide problem which has been linked to the collapse of the unusually

high interest rates of the 1980s and which produced a number of actions in North America against a long list of insurance companies.

[45] A related issue concerns the question of how Sun Life, a mutual insurance company, would pay for the benefits to be conferred upon the policy holders. While that issue was not dealt with in the agreement itself, Mr. Ritchie testified that an understanding was reached during the negotiation of the settlement that future dividend scales would not be affected. That understanding was confirmed by a letter to Mr. Ritchie dated August 29, 1997 from counsel for Sun Life stating:

> I confirm the information provided during the negotiation process.
>
> Sun Life has specified that future dividend scales will be determined as if the settlement had never taken place. No attempt to recoup the costs of the
>
> settlement will be made in any manner affecting the existing participating policy holders (including Class Members).

[46] That undertaking was confirmed by counsel for Sun Life before me at this hearing. In light of possible demutualization by Sun Life, a further letter from Sun Life's counsel to Mr. Ritchie dated May 1, 1998 repeats the above undertaking and states:

> Given the possibility of demutualization, Sun Life has instructed us to advise that the statements made earlier are still true, with the (obvious) clarification that the costs of the agreement may have an impact on the value of the company, which value will be distributed to all eligible policyholders in the event that demutualization proceeds.

[47] Another point made in relation to the prospect of other potential claims is that the terms of the release to be given to Sun Life under the agreement are broad. Sun Life and its agents are to be released "from any liability or damages for representations, omissions or other conduct... that occurred during the purchase or sale of any Settled Class Policy, or in connection with the offering of Global Benefits, the Optional Dividend Benefit, or other benefits or resolutions pursuant to the Agreement". A release in these terms consequent upon a settlement is not unusual or unexpected, and in any event, is subject to being interpreted in accordance with recognized legal principles. It is well established that a release must be interpreted with reference to the context in which it was drafted and that a release will not be construed as applying to facts not known to the claimant at the time the release was drafted: *London and South Western Rail Co. v. Blackmore* (1870), L.R. 4 H.L. 610. These principles, together with the right of any policy holder who now believes he or she has a claim against

Sun Life that is not embraced by the settlement to opt out, provide an adequate answer to this objection.

(h) *Analysis of the proposed settlement—Conclusion*

[48] I find that the plaintiff and the defendant have satisfied the burden of demonstrating that the proposed settlement is fair, reasonable and in the best interests of those affected by it. The global benefits afford significant relief to class members on a "no-proof" basis. The ACRP provides for a summary but fair disposition of claims advanced on the basis of representations that were made.

4. *Conclusion*

[49] For these reasons, there shall be an order for the relief requested in paras. (a) to (i) of the notice of motion appointing Paul Dabbs as a representative plaintiff, certifying this action as class proceeding, approving the proposed settlement and for the further related orders requested.

[50] In my February 24, 1998 ruling, I made reference to the issue of costs. Any party who wishes to claim costs shall serve and file a concise written brief within 20 days of the release of these reasons outlining the claim that is made and the basis for the claim. Reply submissions are to be made ten days thereafter. A date for a hearing of any such claims will be arranged. Failing any such submissions, there shall be no order as to costs of this motion.

[51] I will remain seized of this matter for the purpose of any further approvals that are required, including the approval of the arbitration award relating to the fees and disbursements of class counsel.

Order accordingly.

TAB 3

COURT FILE NO.: 00-CV-192059CP
DATE: 2006/12/15

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
CHARLES BAXTER, SR. and ELIJAH BAXTER et al.	**Kirk M. Baert** and **Celeste Poltak**, for the National Certification Committee
	L. Craig Brown, for the Baxter Plaintiffs
	Russell Raikes and **Mohamed Moussa**, for the Cloud Plaintiffs
	Jon Faulds, for the Alberta Plaintiffs
Plaintiffs	
- and -	
THE ATTORNEY GENERAL OF CANADA	**Paul Vickery** and **Catherine Coughlan**, for the Defendant
Defendant	
- and -	
THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA et al. (see APPENDIX A for a full list of Third Parties)	**John McKiggan** and **Arnold Pizzo McKiggan**, for the National Consortium
	S. John Page, for the Anglican Church Entities
Third Parties	**Rod Donlevy** and **Pierre Baribeau**, for the Catholic Entities

) **John Phillips**, for the Assembly of First
) Nations
)
) **Janice Payne**, for the Inuit Organizations
)
) **Peter Grant,** for the Unaffiliated Counsel
)
) **Anthony F. Merchant**, **Evatt Merchant**
) and **Jane Ann Summers,** for the Merchant
) Law Group
)
) **Susan M. Vella** and **Nathaniel Carnegie**,
) for certain objectors
)
) **Paulette Pummells**, for The New England
) Company
)
) **Randy Bennett** and **Jordan Nichols**,
) Court-Appointed Monitor
)
) **HEARD:** August 29, 30, & 31, 2006

Proceeding under the *Class Proceedings Act, 1992*

Winkler R.S.J.:

Overview

[1] The plaintiffs bring this motion, on consent, for a certification of the action as a class proceeding and approval of a proposed settlement including payment of class counsel fees. The action relates to claims arising throughout Canada as a result of the existence and operation of institutions known collectively as "Indian Residential Schools" ("IRS"). As is often the case on this type of motion, it is the position of the parties that in the event that the proposed settlement is not approved by the court, the consent to certification is a nullity and the parties will continue with litigation in the normal course. The proposed settlement before the court also includes terms relating to the payment of fees for lawyers other than class counsel. These lawyers have been advancing claims in individual litigation. It is proposed that this individual litigation will be terminated and the claims encompassed by the settlement. These payments are a departure from the norm and arise mainly as a result of the extensive litigation that has already been commenced in relation to the underlying class claims. In that respect, counsel for both plaintiffs and defendants anticipate that the settlement, if approved, will largely end all existing litigation relating to IRS. This is explained in more detail below.

[2] For over 100 years, Canada pursued a policy of requiring the attendance of Aboriginal children at residential schools, which were largely operated by religious organizations under the supervision of the federal government. The children were required to reside at these institutions, in isolation from their families and communities, for varying periods of time. This policy was finally terminated in 1996 with the closing of the last of the residential schools and has now been widely acknowledged as a seriously flawed failure. In its attempts to address the damage inflicted by, or as a result of, this long-standing policy, the settlement is intended to offer a measure of closure for the former residents of the schools and their families.

[3] The flaws and failures of the policy and its implementation are at the root of the allegations of harm suffered by the class members. Upon review by the Royal Commission on Aboriginal Peoples, it was found that the children were removed from their families and communities to serve the purpose of carrying out a "concerted campaign to obliterate" the "habits and associations" of "Aboriginal languages, traditions and beliefs," in order to accomplish "a radical re-socialization" aimed at instilling the children instead with the values of Euro-centric civilization. The proposed settlement represents an effort to provide a measure of closure and, accordingly, has incorporated elements which provide both compensation to individuals and broader relief intended to address the harm suffered by the Aboriginal community at large.

[4] The parties are proposing a Canada-wide settlement, with approval orders being sought in this court and the superior courts of eight other provinces and territories. They have asked the courts to depart from the normal practice and approve, as a term of the settlement, the combining of all outstanding litigation relating to the residential schools, into a single class action which will effectively be filed in each jurisdiction in Canada if approval of the settlement is granted. As a result of this approach, the class of former residents, identified as the "Survivor" class in the record, is estimated to number almost 79,000 persons. This national class is generally described as "All persons who resided at an IRS in Canada between January 1, 1920, and December 31, 1997, who were living as of May 30, 2005…".

[5] The national "Survivor" class will effectively be sub-classed for the purpose of determining which of the nine approving courts has jurisdiction over the claim of a specific class member. This will be accomplished by modifying the general class description with an additional province of residence requirement. The Ontario court, in addition to the jurisdiction over the residents of Ontario, will also have jurisdiction over the claims of the current residents of those provinces where approval has not been formally sought, specifically, New Brunswick, Newfoundland and Labrador, Nova Scotia and Prince Edward Island, as well as over the claims of those persons no longer resident in Canada. In addition, the class in *Cloud v. Canada* (2004), 73 O.R. (3d) 401 (C.A.), which is currently the only certified action in respect of the residential schools litigation, will be included in the proposed settlement.

[6] In addition, under its terms, the settlement will only be effective if there is unanimous approval by the courts on "substantially the same terms and conditions".

[7] Under the proposed settlement, all members of the Survivor class will receive a cash payment, with the amount varying according to the length of time each individual spent as a student in the residential schools system. This class-wide compensatory payment, which is referred to as the Common Experience Payment ("CEP"), is one of five key elements of the settlement before the court. In addition, there is an Independent Assessment Process ("IAP"), which will facilitate the expedited resolution of claims for serious physical abuse, sexual assaults and other abuse resulting in serious psychological injury. The foregoing elements are aimed at personal compensation for the students who attended the schools. The other three elements of the settlement are designed to provide more general, indirect benefits to the former students and their families. These elements are the establishment of a Truth and Reconciliation Commission, with a mandate to make a public and permanent record of the legacy of the schools, in conjunction with the earmarking of a significant portion of the settlement fund for healing and commemoration programs.

[8] In my view, the proposed compensation components of the settlement are fair and reasonable, if they are delivered in an expeditious manner consistent with the intention expressed in the settlement. However, I have concerns that there are aspects of the planned administration and implementation of the settlement that may have a deleterious impact on the benefit of the settlement to the class members. I am approving the settlement, subject to those concerns being satisfactorily addressed. My reasons follow.

The Role of the Court

[9] Whenever a proposed settlement comes before the court for approval in circumstances where the subject matter clearly has broader social and political implications, it is useful to review the court's role and, by extension, the proper limits of its jurisdiction. The court must review the settlement on established legal principles, to determine whether it is fair, reasonable and in the best interests of the class as a whole. As stated in *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.), at para. 77:

> ...it must be remembered that these matters have come before the court framed as class action lawsuits. The parties have chosen to settle the issues on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the classes as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review of the settlement.

[10] On a settlement approval motion, the court's review is not directed toward the merits of the action but rather is concerned with whether the settlement meets the criteria for court approval. Thus, in accordance with this approach, the record must explain in general terms the alleged wrongs and the factual background supporting the claims. This is consistent with the position that the settlement represents a compromise in which the defendants are not admitting liability but rather are joining with the plaintiffs in presenting the compromise to the court as a

fair resolution of the outstanding issues. Consequently, on a motion of this nature supported by a record of this type, it is not appropriate for the court to make findings of fact on the merits of the litigation from which the settlement emanates. Instead, the court must examine the settlement in the context of the record before it. That examination includes a review of the allegations underlying the claims, the defences advanced in response and any objections to the settlement, to determine whether the settlement is "fair, reasonable and in the best interests of the class as a whole".

[11] From the evidence of the objectors who spoke at the hearing, based both on personal experience and in relation to the experiences of family members, it was clear that the effects of the residential school legacy were lasting and profound. Unfortunately, a motion for certification and approval of a compromise settlement is an inadequate forum for dealing with the underlying issues. Indeed, the very essence of the proposed settlement is to provide proceedings designed specifically for that purpose. The fact that the court is not reviewing in detail the history of residential schools in Canada or the individual histories of former residents is not to in any way diminish the significance of either the history or the impact on the individuals.

[12] In like fashion, the fact that the court is not making findings on the merits of the litigation on this motion ought not to be taken to mean that the approval process is a mere formality, or in the vernacular, a "rubber stamping" by the court. The court has an obligation under the *Class Proceedings Act* ("CPA") to protect the interests of the absent class members, both in determining whether the settlement meets the test for approval and in ensuring that the administration and implementation of the settlement are done in a manner that delivers the promised benefits to the class members. In seeking the approval of the court, the plaintiffs and defendants essentially seek the benefits of having the court sanction the settlement. Such approval cannot be divorced from the obligation it entails. Once the court is engaged, it cannot abdicate its responsibilities under the CPA.

The Settlement

[13] The residential schools are the subject of approximately 15,000 ongoing claims at present. Some of these claims are being advanced in traditional court litigation and some through the government's existing alternative dispute resolution process. The litigation stream includes a number of class actions, including the present proceeding and the *Cloud v. Canada* action that was certified previously. In a bid to negotiate a global resolution to this litigation, Canada appointed the Honourable Frank Iacobucci as its chief negotiator on May 30, 2005. Multi-party negotiations ensued from June 2005 through to November 2005, when an Agreement in Principle was reached. The details of the settlement were finalized and approved by the federal cabinet on May 10, 2006. The negotiations involved representatives from native communities, church groups, the federal government and various legal counsel.

[14] In keeping with the objective of a global resolution, the settlement is pan-Canadian and meant to encompass all outstanding litigation. There are five elements to the compensation it provides. Two elements provide individual compensation for the Survivor class members, while

the remaining three are initiatives designed to address broader historical and future concerns of the Survivor class members, their families and their communities at large.

[15] Individual compensation for the Survivor class members will be provided through the CEP and through access to an expedited IAP for certain serious claims.

[16] The CEP is based on verified attendance at one of the residential schools. Claimants will receive a base payment of $10,000 for attendance plus $3,000 for each additional year or part year of attendance. $1.9 billion will be allocated to a trust fund under the settlement for the purpose of making these payments. In the event that such amount is insufficient to pay all of the verified claims of the Survivor class members, Canada has agreed to supplement with the additional funding necessary to ensure full payment for all such claims. Another provision of the settlement deals with the prospect of a surplus in the original fund for the CEP. In the event that the verified claims do not exhaust the original $1.9 billion, additional compensation, up to $3000 per person, will be paid to the claimants if the surplus exceeds $40 million. Any additional surplus amount after those supplementary payments have been made will be transferred to aboriginal organizations for healing and education programs. Similarly, if the surplus at first instance is less than $40 million, there will be no additional individual compensation but rather, the entire amount will be transferred to aboriginal organizations.

[17] The CEP is intended to provide class-wide relief based on attendance alone at a residential school. The IAP, on the other hand, will be available to a more limited number of class members who are also advancing personal claims based on abuse suffered while resident at a school. In respect of those claims, additional compensation will be available where the class member establishes that he or she suffered serious physical abuse, sexual abuse or other abuse leading to serious psychological harm. Remedies available under this process include compensation for non-economic loss, i.e. pain and suffering, along with compensation for "loss of opportunity", future care and other consequential harm. Compensation for these claims will be capped at $275,000 plus a modest additional amount for future care. There is an additional provision for payments for actual income losses, where they are proven in accordance with the standards applicable to the process, up to a maximum of $250,000. The latter amount will be determined based on the same legal and factual analysis for such loss of income that is utilized in regular court proceedings. Canada will fund this program without any cumulative cap on the total amount of compensation to be paid.

[18] The individual compensation aspects of the settlement are complemented by the provision of funding for three initiatives that will provide broader community based benefits. The Aboriginal Healing Foundation will be given an initial endowment of $125 million "to support the objective of addressing the healing needs of Aboriginal People affected by the Legacy of Indian Residential Schools, including the intergenerational impacts, by supporting holistic and community-based healing to address needs of individuals, families and communities...". There will be a Truth and Reconciliation Commission established, with funding of $60 million "to contribute to truth, healing and reconciliation", through hearings and reports as necessary, with an objective of creating a permanent and public record of the "legacy

of the residential schools". Finally, an additional $20 million has been earmarked for commemorative projects.

[19] The individual compensation will not be diminished by the costs of administration of the programs. Canada has agreed to bear all internal administrative costs associated with the delivery of the CEP and IAP.

[20] The legal fees of class counsel are being paid directly by Canada, subject to approval by the courts. Such payments are over and above the amount of money available to be paid as compensation to the class members. In view of the extensive litigation already under way, there were also negotiations with individual claimant counsel which resulted in an agreement that such counsel would be paid directly by Canada, subject to a limit per case, on the understanding that claimants need make no further payment to those counsel with respect to the claim for, or receipt of, a CEP. However, claims made under the IAP will be subject to additional legal fees to be paid by the claimant. Canada has also agreed to pay successful claimants an amount equal to 15% of any award to partially defray those fees.

Law and Analysis

[21] As stated above, my concerns do not go to the compensation elements of the settlement. Although not perfect in every respect, or perhaps in any respect, perfection is not the standard by which the settlement must be measured. Settlements represent a compromise between the parties and it is to be expected that the result will not be entirely satisfactory to any party or class member. My concerns with respect to this settlement go to its administration, the actual legal fees that may be charged to the class members, the potential fettering of the jurisdiction of this court as a result of some of the terms and the scope of the class to be bound by the settlement.

The CPA Requirements

[22] The administrative concerns may be best explained in the context of a certification analysis. Whether a motion for certification is being conducted on a contested basis or on consent for the purposes of settlement, the criteria set out in s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, must be met. Briefly put, those requirements are (a) the existence of a cause of action, (b) shared by an identifiable class, (c) from which common issues of fact or law arise, (d) for which a class proceeding would be the preferable procedure for resolution and (e) for which there is a representative plaintiff who has produced a workable litigation plan and who can fairly and adequately represent the interests of the class members without conflict on the common issues.

[23] On this motion, it is clear that the criteria are met with respect to the existence of a cause of action, identifiable classes, common issues and representative plaintiffs without conflicts on the common issues who can adequately represent the class members. However, the preferable procedure criterion must also be satisfied. It is now trite law that for a class proceeding to be the "preferable procedure" for the resolution of the claims of a given class, it must represent a "fair, efficient and manageable" procedure that is "preferable" to any alternative method of resolving the claims.

[24] The manageability aspect of the preferable procedure criterion is often the point of contention on opposed certification motions. The plaintiffs assert that courts adopt a less rigorous standard with respect to consent certifications for settlement. I do not share this view. Settlements may mandate a different approach, but this is because the process of arriving at a settlement often leads to the parties adopting a claims procedure that alleviates some or all of the manageability concerns that arise in class actions with respect to the determination of individual claims. As stated by Nordheimer J. in *Gariepy v. Shell Oil Co.*, O.J. No. 4022 (S.C.J.), at para. 27:

> ...The requirements for certification in the settlement context are the same as they are in a litigation context and are set out in section 5 of the *Class Proceedings Act, 1992*. However, their application need not, in my view, be as rigorously applied in the settlement context as they should be in the litigation context, principally because the underlying concerns over the manageability of the ongoing proceeding are removed. (Emphasis added.)

[25] A similar view was expressed by the United States Supreme Court in *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997). The majority held, at p. 620, that "[c]onfronted with a request for settlement-only class certification, a ...court need not inquire whether the case, if tried, would present intractable management problems, ...for the proposal is that there be no trial."

In short, this means that while the certification test is not "relaxed" in the literal sense in the context of settlement, the test may be more easily satisfied in certain circumstances. However, the underlying assumption in both *Gariepy* and *Amchem* is that the administrative claims procedure will satisfy any manageability concerns, thereby leaving the case amenable to certification. However, the court must still examine the proposed claims procedure to ensure that it will indeed be a "manageable" process.

[26] In a contested certification motion, the court expects that the plaintiff moving for certification will be able to demonstrate that the action is manageable as a class proceeding, in part, through the provision of a workable litigation plan. It may be safely assumed that the defendant, in the traditions of the adversarial system, will bring any deficiencies in the plan to the attention of the court. This safeguard is not present where certification is sought on consent for the purpose of approving a settlement because the plaintiff and the defendant have a joint interest in seeing the settlement approved. Accordingly, the court must be vigilant in scrutinizing the settlement, and in particular, its claims resolution and distribution mechanism, to ensure that the interests of the absent class members who are being bound by the settlement will be adequately protected.

[27] In any event, the representative plaintiff and the defendant focus on the certification issues but this often provides a distorted perspective with respect to the individual claims. The representative plaintiff and the defendant may resolve the macro issues through a settlement but this most often represents the real start, rather than the end, of the litigation for the individual class member, especially in those cases, as here, where a key term of the settlement is merely access to a modified claims resolution procedure.

[28] The fact that a settlement may provide only a modified claims resolution procedure for the class members is not objectionable in and of itself. However, the court must be especially cautious to ensure that the whole of the process does in fact confer an actual benefit to the class members individually. Thus, the need for a "workable litigation plan", although it may be framed as a plan of administration, remains in full force.

[29] This is particularly so where the claims resolution procedure represents a primary benefit under the settlement, and leaves the individual entitlement to a deferred resolution, with its attendant costs, burdens and risks. In other words, it cannot be the case that the class members receive nothing more than the opportunity to litigate their claims in an extra-judicial process that offers no material advantages over normal course litigation. Otherwise, the class members are compromising their rights, and possibly the entirety of their claims, without receiving a corresponding benefit for having done so.

The Manageability of the Claims Procedures

[30] The court cannot make the determination as to whether a claims resolution procedure confers a benefit on class members in a vacuum. Typically, evidence is proffered regarding the claims procedure that must be followed in order for class members to obtain benefits under the settlement, along with an administration plan demonstrating that the resources are in place or will be in place to ensure that the benefits are delivered on a timely basis. This information is, in all material respects, the "litigation plan" which addresses the manageability concerns for the purposes of certification.

[31] In the present case, both the CEP and IAP components will require claims procedures. While the CEP may be relatively straightforward, the sheer volume of anticipated claims, at approximately 79,000, requires a careful consideration of the administrative plan, and the resources available to carry out that plan. The court must be assured that the class members will receive the promised benefits in a timely manner. Similar, if not stricter, scrutiny must be applied to the proposed IAP, in view of counsel's concessions that it will indeed be more complicated and more time-consuming than the CEP process and in consideration of the very serious issues it is meant to address for certain class members.

[32] As a starting point, it should be noted that the record before the court is not sufficient to make a determination that the proposed processes can be conducted in a "fair, efficient and manageable" manner. There was no administration plan filed. An affidavit sworn by Luc Dumont, the current Director General of Operations at the Office of Indian Residential Schools Resolution Canada, was proffered setting out some details of the number of personnel that would be assigned to administering the settlement. However, it did not contain sufficient detail to satisfy the court that the administration of the settlement will be efficiently and effectively carried out.

[33] This lack of information may have to do with the framing of the administration proposal in the settlement which only requires Canada to "commit sufficient resources" to ensure that a targeted number of claims can be processed on an annual basis. Some counsel conceded that this

amounts to asking the court to "take it on faith" that the settlement can be properly administered. With the CPA now in its second decade, this court has sufficient experience with the administration of settlements in large and complex class actions to recognize the dangers in this approach. Further, the absence of detailed information about the plan of administration does not meet the standard of disclosure required on a motion for approval of settlements. As stated in *McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 2474 (S.C.J.) at para. 19:

> The Court is obligated to carefully scrutinize proposed settlements in a class proceeding. Nonetheless, where settlement proposals are advanced on uncontested motions, in my view, there is a positive obligation on all parties and their counsel to provide full and frank disclosure of all material information to the Court.

The requirement for "full and frank disclosure" is manifest when the court is called upon to evaluate a settlement of this scope and magnitude and clearly extends to pertinent information about the proposed administration of the settlement.

[34] Moreover, I cannot accede to the submission of counsel for the Assembly of First Nations ("AFN") that, notwithstanding the currently unsatisfactory administration plan, the court should simply take a "wait and see" approach to the settlement administration because of the flexibility under the CPA to address deficiencies at a later point. The flexibility of the CPA may be properly utilized to address the inevitable but unforeseeable issues that may arise in the course of complex litigation or the administration of a settlement. On the other hand, it would be an abdication of the court's role under the CPA to fail to address foreseeable deficiencies at this stage. As this court noted in *McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 567 (S.C.J.) at para. 19:

> Settlement approval in class proceedings cannot be granted on a speculative basis. As stated above, the court has a duty to safeguard the interests of absent class members, especially where those class members are being asked to surrender rights in return for a settlement which is not reflective of the damages suffered on a case by case basis. The court cannot perform its duty in the absence of evidence. As stated by Sharpe J. in *Dabbs* at paragraph 15:
>
> > ... the court cannot exercise its function without evidence. The court is entitled to insist on sufficient evidence to permit the judge to exercise an objective impartial and independent assessment of the fairness of the settlement in all the circumstances.

[35] The court must protect the interests of the absent class members. Taking a "fix it later" approach in respect of concerns that are both readily apparent and capable of being addressed now does not meet that obligation. The AFN submission harkens back to the mistaken assumption that there is a relaxed standard to be employed under the CPA in respect of certification where settlement approval is sought. The parties moving for approval of a settlement that entails the possibility that class members will have to engage in a further dispute resolution process must satisfy the court that the process, and indeed the settlement

administration in its totality, will be "fair, efficient and manageable". Where concerns are raised as to the structure and resources in place, or contemplated, to administer the settlement, the court cannot adopt a relaxed standard to the detriment of the proposed class members.

The Administrative Deficiencies

[36] I turn now to the specific deficiencies that must be addressed in the proposed administrative scheme. In my view they are neither insurmountable nor do they require any material change to the settlement agreement itself.

[37] I preface my comments with a caution that the court has a general concern whenever a defendant proposes to change roles and become the administrator of a settlement. There must be a clear line of demarcation between the defendant as litigant and the defendant as neutral administrator. Further, there must be an express recognition by the defendant proposed as administrator that the settlement is being implemented and administered in a court supervised process and not subject to the direction of the defendant either directly or indirectly. The difficulty in drawing the distinction, and adhering to the underlying concept, is the reason why the court must be especially circumspect when considering the approval of a defendant as administrator. The line is even more blurred in this case where Canada, as defendant, will still be an instructing respondent in respect of individual claims made under the IAP.

[38] The potential for conflict for Canada between its proposed role as administrator and its role as continuing litigant is the first issue that must be addressed. One of the goals of this settlement is to resolve all ongoing litigation related to the residential schools. The structure of the administration must be consistent with this aim and not such as to render itself subject to claims of bias and partiality based on apparent conflicts of interest. If such perception exists, it has the potential to taint even those areas where the neutrality is more enshrined such as the adjudication process. Accordingly, the administration of the plan must be neutral and independent of any concerns that Canada, as a party to the settlement, may otherwise have. In order to satisfactorily achieve this requisite separation, the administrative function must be completely isolated from the litigation function with an autonomous supervisor or supervisory board reporting ultimately to the courts. This separation will serve to protect the interests of the class members and insulate the government from unfounded conflict of interest claims. To effectively accomplish this separation and autonomy it is not necessary to alter the administrative scheme by replacing the proposed administration or by imposing a third party administrator on the settlement. Rather, the requisite independence and neutrality can be achieved by ensuring that the person, or persons, appointed by Canada with authority over the administration of the settlement shall ultimately report to and take direction, where necessary, from the courts and not from the government. By extension, such person, or persons, once appointed by the government and approved by the courts, is not subject to removal by the government without further approval from the courts. This is consistent with the approach taken in all class action administrations and there is no reason to depart from that approach in this instance.

[39] The autonomous supervisor or supervisory board envisioned by the court will have the authority necessary to direct the administration of the plan in accordance with its terms, to

communicate with the supervisory courts and to be responsible to those courts. Simply put, it cannot be the case that the "administrator", once directed by the courts to undertake a certain task, must seek the ultimate approval from Canada. The administration of the settlement will be under the direction of the courts and they will be the final authority. Otherwise, the neutrality and independence of the administrator will be suspect and the supervisory authority of the courts compromised.

[40] The foregoing are organizational issues that relate to what may be called the "executive oversight" role in the administration. There are other issues in relation to the operational framework for delivery of the benefits under the settlement, particularly with respect to the costs of administration.

[41] It is beyond dispute that the administration of this settlement will be expensive in absolute terms. In fact, there is evidence before the court that the current ADR process, upon which the IAP is based, was costing 3 times as much to administer as it was delivering in compensation in the early stages of operation. Since the IAP appears to be essentially the same plan as the ADR with minor modifications there are obvious concerns. The material before the court relating to the proposed settlement is devoid of specific cost analysis relating to its administration. Moreover, there were no submissions made by any party regarding contemplated changes in the administration that would serve to reduce costs.

[42] Absent any explanation, the current costs of the ADR program appear to be excessively disproportionate when considered against the typical costs of administering a class action settlement. This court has never approved a settlement where the costs of administration exceed the compensation available let alone where the cost excess is a factor of three. It is no answer, as was suggested in argument, that since Canada, as defendant, has committed to funding the administrative cost separately from the settlement funding, the court need not be concerned with the quantum of that cost. This proposition must be rejected for a number of reasons. First, it ignores the court's supervisory role in class actions. Secondly, it fails to recognize how the peculiar aspects of certain terms of this settlement relating to funding can impact unfairly on the class members, while at the same time leaving the courts powerless to provide a remedy. This is addressed in more detail below. Thirdly, it fails to recognize that this is not a settlement where the administration is being paid out of a fixed settlement fund. The administrative costs will be paid from the general revenues of the government. This leads to a certain precariousness in respect of the administration and leads to the prospect of the ongoing administration of the settlement becoming a political issue to the potential detriment of the class members.

[43] The settlement administration cost is typically estimated by the parties when they seek court approval for a settlement. This enables the court to evaluate whether the claims under the settlement will be processed and compensation delivered to the class members in a satisfactory manner. Here, the parties have departed from the normal course and propose only a "commitment to fund" approach to the administration, with no budget, no information relating to cost and no commitment to provide any greater level of information to the court in the future. Moreover, the non-disclosure is compounded by the fact that Canada intends, by the express terms of the settlement, to maintain a veto over additional administrative expenditures.

[44] This combination of inadequate information and absolute veto power over expenditures is unacceptable. The court cannot approve a settlement without adequate information to ensure that the class members' interests are being protected and that it will be able to maintain an effective ongoing supervisory role. As stated in *McCarthy* (No. 2474) at para. 21:

> ...a class proceeding by its very nature involves the issuance of orders or judgments that affect persons who are not before the Court. These absent class members are dependent on the Court to protect their interests. In order to do so, the Court must have all of the available information that has some bearing on the issues, whether favourable or unfavourable to the moving party.

[45] The scope of the problem with the combination of undisclosed costs and overriding government veto is revealed by simple extrapolation from the evidence that was provided. The IAP program is estimated to provide potential total compensation in the amount of $2 to $3 billion. If the current ADR process cost to compensation ratio of 3:1 is maintained, this means that administration costs of this program alone will be in the range of $6 to $9 billion, effectively dwarfing the benefits provided to the class. Should this scenario come to pass, the remedy may not be the expenditure of more dollars, but rather the re-allocation of funds to generate greater efficiencies or a more effective and expeditious administration. I caution that these numbers are based on limited data and conjecture by counsel. They do indicate, however, the possible magnitude of the problem and reveal the need for more precise information.

[46] I have not ignored the provision in the settlement providing an exception to the government veto in respect of its commitment to fund the IAP program to ensure that a minimum of 2500 claims are processed per year. While presented as a benchmark of performance, it is in fact an effective veto over any attempt to increase the number of claims processed over and above the 2500 per year target. The evidence is that the class members are elderly and dying at a rate of approximately 1000 per year. It is possible that efficiencies may be gleaned from the reallocation of funds without increasing expenditures. The structure of the settlement cannot be such as to preclude the administrator or the court in its supervisory role from considering options to improve the delivery of benefits.

[47] The principles engaged on this motion for settlement approval are twofold. First, the settlement must be fair, reasonable and in the best interests of the class as a whole. Secondly, the court must make its decision on a fully informed basis, bearing in mind that the court has an obligation to oversee the settlement until all of the benefits have been distributed to the class members.

[48] The IAP portion of the settlement is the area where the greatest administrative cost expenditure will occur. It is clear from Mr. Dumont's affidavit and the evidentiary record on the motion that the IAP is to be a continuation of the existing unilateral ADR program under a new name. As he states at paragraph 4:

> "Based on experience with the current ADR process, the additional resources required in order to meet the continuing obligations related to the current ADR

> process and to meet new obligations related to the implementation of the IAP will number approximately 445 persons." (Emphasis added.)

He further deposes that "the current ADR process will have 48 adjudicators as of October 31, 2006" and although he states that "adjudicators employed in the ADR process will not be automatically transferred to the IAP" he also notes that "the Criteria for the Selection of Adjudicators in the IAP is the same criteria used for selecting model A adjudicators in the ADR" and that therefore "planning has proceeded on the expectation that many ADR adjudicators will apply to be IAP adjudicators and will be successful in the procurement process."

[49] Mr. Dumont's evidence was offered based on his current experience with the ADR process. That may be the best guide available at the moment as to the requirements of the administration of the settlement. However, his evidence lacks any financial details as to the current or estimated costs of the administration. Further, as he states in para. 2. "the information provided in the affidavit is based on Canada's current planning assumptions, some of which will require further development, in co-operation with the other parties to the [settlement]". This pinpoints precisely the area of concern for the court. Mr. Dumont acknowledges that the administration plan is in a developmental stage. Nonetheless, under the terms of the proposed settlement, once approval is granted, the court is to have no role in approving any further developments in the implementation of the settlement without the acquiescence of Canada.

[50] The parties have put before the court an admittedly incomplete administration plan while at the same time attempting to foreclose the court's oversight role. This is unacceptable. As stated above, the role of the court in a class proceeding does not terminate at the point of settlement approval. It has an ongoing obligation to oversee the implementation of the settlement and to ensure that the interests of the class members are protected.

[51] I do not want the foregoing to be misunderstood as imparting a requirement that the court be the *de facto* administrator of the settlement. Rather, the court must be in a position to effectively evaluate the administration and the performance of the administrator and, further, be empowered to effect any changes that it finds necessary to ensure that the benefits promised under the settlement are being delivered. Any terms of the settlement that attempt to curtail this jurisdiction cannot be sanctioned by the court.

[52] In conclusion, this element of the settlement is problematic on two fronts. First, financial information sufficient to make an informed decision regarding the administration of the settlement, in particular the CEP program and the IAP, must be provided for the purposes of approval and thereafter on a periodic basis. Secondly, the provisions of the settlement relating to the ability of the court to exercise its ongoing jurisdiction over its administration must be consistent with the obligations of the court to the class members under the CPA. This will also require, as stated above, the appointment of an autonomous supervisor or supervisory board reporting ultimately to the court. In respect of this latter point, although I would not make it a condition of approval, I would strongly encourage that the administrator engage the assistance of a consultant experienced in the administration of complex class action settlements.

The Legal Fees

[53] The next issue to be addressed relates to the legal fees component of the settlement. The settlement agreement contemplates the payment of legal fees on two fronts. First, there will be payment for class counsel and certain unaligned "independent counsel" who have been representing claimants in individual actions. Secondly, the agreement has a provision regarding fees under the IAP in which Canada has undertaken to pay, in respect of any compensation awarded under the process, an additional 15% to assist the claimant with his or her legal fees in advancing the claim.

[54] The payment to class counsel and independent counsel is anticipated to be in the range of $85-$100 million, divided as follows: $40 million to the National Consortium, $25-40 million to the Merchant Law Group and approximately $20 million to the independent or unaffiliated counsel. I will address the basis for the range, as opposed to a fixed amount, for the fees of the Merchant Law Group later in these reasons.

[55] The basis for the fees being paid under the settlement differs amongst each of the groups. The counsel group identified as the National Consortium is comprised of 19 member law firms, practicing collectively in 8 provinces and 2 territories. Within the National Consortium some firms were advancing primarily class actions, some primarily individual actions and some were advancing both. As of May 30, 2005, the National Consortium represented, on a collective basis, 4826 named individual residential school survivors across the country. As part of the settlement, the National Consortium members agreed to waive any contingent fees on the CEP already incurred and to not charge fees to any future or prospective clients in respect of the CEP.

[56] Darcy Merkur, a partner with Thomson, Rogers, one of the member firms of the National Consortium, filed an affidavit in support of the legal fees. He states at para. 17:

> The $40 million, plus applicable taxes, payable by Canada to the National Consortium is intended to compensate Consortium members for the work they have done to November 20, 2005 and their agreement to waive their individual contingency retainer agreements by not charging fees to their clients on the CEP. It also compensates for their agreement not to charge fees on the CEP to any future or prospective clients, a substantial consideration given that there are an estimated 60,000 potential CEP clients who are not presently represented.

[57] Mr. Merkur deposes that he personally reviewed the dockets of the member firms of the National Consortium for the purpose of providing the federal representative with a summary during the negotiations. Based on his analysis of the information, as of October 15, 2005, the class action portion of the docketed time was categorized as follows in paragraph 132 of his affidavit:

Value of Lead Counsel's time in active class actions:	$3,952,533.75
Value of Consortium time in support of the *Baxter* Action:	$3,009,495.19

Value of Consortium time in support of the Alberta test cases:	$5,461,896.85
Value of Consortium time in other class actions:	$ 42,239.75
Value of Consortium time in other representative actions:	$1,101,147.48.

In addition, Mr. Merkur states that between October 15 and November 20, 2005, the class members docketed additional time valued at $708,660.00. The total amount of class counsel time for the National Consortium is approximately $14.6 million based on these figures. When compared against the $40 million dollars being sought, it represents a request for a multiplier of approximately 2.73.

[58] Mr. Iacobucci has also filed an affidavit in support of the settlement. In the section dealing with fees for the National Consortium, he deposes at para. 32:

> The National Consortium has prepared an affidavit describing the work done collectively by the National Consortium and each of its members, the proposed distributions of the $40 million payment to each of its members, and the rationales for the amounts of these payments. In accordance with the fees verification agreement between Canada and the National Consortium, I have reviewed the affidavit and agree that the payment of $40 million in legal fees, plus GST and PST of $3,213,048.99 and disbursements of $2,402,173.56 is fair and reasonable having regard to the substantial legal work, including significant class action work, undertaken by the National Consortium and its members over many years and the fact that National Consortium members, like others signing the agreement, have undertaken not to seek payment of any legal fees in respect of the Common Experience Payment.

[59] In his submissions on the fee issue, Mr. Baert, on behalf of the National Consortium, stated that the $40 million fee being sought by the consortium, and indeed the entire $100 million that might be paid to all of the "class" counsel groups, was justified on the basis of the CEP component alone notwithstanding any other benefits that were achieved for the class through the settlement.

[60] The settlement provides that the "class" fee will be paid in a lump sum within 60 days of the implementation date. It is not conditional on the take-up rate for the CEP nor is it tied to specific percentages of the CEP fund being utilized. Accordingly, while the total potential fee of $100 million represents less than 5% of the CEP fund, on the current estimates of 79,000 claimants, the percentage, as it relates to direct payments to the class members, could rise substantially depending on the number of claimants that come forward. Although any remainder in the CEP fund will not be returned to Canada in the event that there are less claimants than anticipated, the maximum increase to any claimant in the event of a surplus in the CEP fund is $3,000. The balance of the monies would be utilized for purposes of general benefit to the class.

[61] Premium fees are awarded in respect of class actions in recognition of the risk undertaken and result obtained for the class. The risk in this case was self-evident given the complexity of

the action, the uncertainty of success because of the novel causes of action asserted, the difficulties relating to damages assessments and the protracted litigation. Further, as this court recognized in *Parsons*, the fact that the parties engage in negotiations does not necessarily diminish the risk faced by class counsel. The elimination of the risk is only achieved once the court has approved the settlement.

[62] Looking only at the CEP component, there has been considerable success achieved for the class members. The evidence filed on the settlement indicates that this particular element was a serious bone of contention between the parties and the plaintiffs' insistence on compensation for the class members on this front coupled with the defendant's intransigent refusal to give ground was an effective barrier to engaging in meaningful negotiations for a significant period of time. Having held fast to the point, the plaintiffs and their counsel reaped a significant benefit for the class members.

[63] Those counsel who are regarded as "independent" in that they are neither members of the National Consortium or the Merchant Law Group but who are instead representing individual claimants will receive payments of fees under the settlement. These lawyers will receive payments of up to $4,000 for each retainer agreement or substantial solicitor-client relationship as of May 30, 2005. The rationale for this is set out in Mr. Iacobucci's affidavit at para. 26:

> Sections 13.05 and 13.06 of the Settlement Agreement establish the fundamental principle for the payment of legal fees under the Settlement Agreement, namely, each lawyer who had a retainer agreement or a substantial solicitor-client relationship (a "Retainer Agreement") with a former student as of May 30, 2005 will be paid for outstanding Work-in-Progress up to a cap of $4,000, so long as he or she does not charge any fees in respect of the Common Experience Payment. The requirement that a Retainer Agreement exist as of May 30, 2005 is intended to avoid providing a windfall to lawyers who "signed up" clients once my appointment and the existence of the settlement discussions was known.

[64] The fees to be paid to the "independent counsel" relate to individual retainers and the process contemplated will ensure their verification. There was an objection raised in respect of the $4000 cap per retainer for the independent counsel fees in respect of Work-in-Progress. It was argued that this provision serves to disadvantage those individual claimants whose counsel have already expended more than the cap amount in pursuit of their individual claims. The underlying assumption is that there will be counsel who will not agree to accept the $4000 in full settlement of their outstanding accounts and instead bring a claim for fees against any of their clients who file a claim for the CEP instead of opting out of the settlement.

[65] The "cap" objection was not addressed by any counsel moving, or supporting the motion, for settlement approval at the hearing. However, as a group, "independent counsel" were represented at the bargaining table and the proposal set out in the settlement was arrived at through negotiation. Given the number of independent counsel who appear to have accepted this proposal, the lack of information before the court as to the scope of any potential problem in this regard and the reality that no viable alternative was proposed, I cannot accede to this objection as

a basis for rejecting either the settlement as a whole or this term in particular. I have no concerns with either the proposed process for verification of the fees of the "independent counsel" or the amounts.

[66] As stated above, there was a range set out for the fees of the Merchant Law Group as opposed to a fixed number. In addition, a different verification process was followed. This too was addressed by Mr. Iacobucci in his affidavit. At para. 34 he states:

> The verification process agreed to with the Merchant Law Group is different from the verification process for the National Consortium because of the very serious concerns that I had and continue to have with respect to the Merchant Law Group fees. These concerns include:
>
> (a) uncertainty about the number of former residential school students that Merchant Law Group purports to represent;
>
> (b) lack of evidence or rationale to support the Merchant Law Group's claim that it had Work-in-Progress of approximately $80 million on its residential school files; and
>
> (c) an apparent discrepancy between the amount of class action work Merchant Law Group represented it had carried out and the amount of class action work it had actually done.

Mr. Iacobucci goes on to set out the proposed verification process in paragraph 35 of his affidavit. He states:

> The Merchant Law Group agreed to the following four-part verification process set out in the Merchant Fees Verification Agreement.
>
> (a) First, the Merchant Law Group's dockets, computer records of Work in Progress and any other evidence relevant to the Merchant Law Group's claim for legal fees will be made available for review and verification by a firm to be chosen by me.
>
> (b) Second, I will review the material from the verification process and consult with the Merchant Law Group to satisfy myself that the amount of legal fees to be paid to the Merchant Law Group is reasonable and equitable "taking into consideration the amounts and basis on which fees are being paid to other lawyers in respect of this settlement, including the payment of a 3 to 3.5 multiplier in respect of the time on class action files and the fact that the Merchant Law Group has incurred time on a combination of class action files and individual files.

> (c) Third, if I am not satisfied that the $40 million is a fair and reasonable amount in light of this test, the Merchant Law Group and I will make reasonable efforts to agree on another amount.
>
> (d) Fourth, if we cannot reach agreement, the amount of the fees shall be determined by Mr. Justice Ball or, if he is not available, another Justice of the Court of Queen's Bench in Saskatchewan.

[67] The fee verification process for the Merchant Law Group has been a source of contention and has generated a motion before Justice Ball in Saskatchewan. On that motion, Canada was seeking to enforce the terms of the agreement with the Merchant Law Group pursuant to the settlement. At the time, the parties had not moved before any court for approval of the settlement and Justice Ball dismissed the motion as premature. Now that the parties have moved for settlement approval, a motion in which the Merchant Law Group has participated, the issue is joined and no longer premature. Indeed, the verification process is a term of the settlement agreement.

[68] No argument of any force has been advanced as to why the contemplated fee verification process is not binding upon the Merchant Law Group. I am not persuaded by the argument that there are solicitor-client confidentiality considerations that prevail over the agreed process, especially in the context of a class action settlement where the benefit of engaging in the process will enure to the clients in that their legal fees, as verified, will be paid by the defendant. Further, I do not accept Mr. Merchant's argument that the current dispute between Canada and the Merchant Law Group relating to the fee verification process can hold up the entire settlement approval. In my view, the fee component of the settlement as it relates to the Merchant Law Group is the process agreed upon for arriving at the actual fee request. That process is clear from the agreement. Once an amount has been determined through this process, it will be assessed by the courts as to reasonableness on the same basis as are the fees of other "class" counsel. I see no reason to depart from the agreed process or to delay approval of the settlement on this basis.

[69] In my view the "class" portion of the legal fees are reasonable. That does not conclude the fee analysis, however.

[70] It is apparent from the record that the class counsel fees might only represent a portion of the total fees that will be payable on behalf of those class members who make claims under the IAP. The IAP is meant to address the more serious personal injury claims. It is almost certain that most claimants will require the assistance of counsel to advance their claims in this process. Under the terms of the settlement, Canada has agreed to pay an additional 15% on top of any compensation awarded under the IAP to help defray the legal costs of claimants. However, notwithstanding this, lawyers representing individual IAP claimants will be charging contingent fees in excess of 15% payable by Canada. The settlement does not prevent this practice nor does it restrict the amount of such contingent fees payable by the claimant. Indeed, the absence of any control mechanism on individual fee arrangements appears to have been a conscious choice in the drafting of the settlement. This is evident from Mr. Merkur's affidavit. He deposes at paragraph 18:

> The Settlement Agreement also recognizes that some counsel will be performing future work on behalf of individual clients who pursue further compensation through the [IAP] established by the Settlement Agreement. With respect to such future work, the Settlement Agreement takes a hand's off approach to whatever retainer agreements might exist between counsel and client. However, it does provide that Canada shall pay a further 15% of any IAP award to help defray lawyer's fees. This is a continuation of the approach taken by Canada under the IAP's predecessor, the Dispute Resolution process established in November, 2003. (Emphasis added.)

[71] During argument, Mr. Merchant advised the court that the Merchant Law Group would limit its contingent fees to an additional 15% of any IAP compensation award, for a total of 30% when added to the amount to be paid by Canada. Although this position regarding fees was eventually adopted by all counsel appearing at the hearing, this voluntary concession does not limit the fees that may be charged by other lawyers who may act for claimants under the IAP.

[72] It is estimated that the number of claimants under the IAP may reach 15,000. Mr. Merchant suggested that the total value of the settlement could be as much as $5 billion when all of the claims made under the IAP have been adjudicated. No other counsel challenged this number. Accordingly, when the value of the other benefits under the settlement are subtracted from this total, the IAP could generate over $2.5 billion in compensation. If this number is correct, it means that additional legal fees payable by Canada will total $375 million. Further, if the additional amount of fees charged by lawyers to individuals is held to another 15%, the total fees to counsel under the IAP alone would total $750 million. This is in addition to the "class" fee of $100 million for total legal fees of $875 million, if all contingent fee agreements are limited to 30%, which is not the case. Again, these numbers are based on limited data and conjecture by counsel.

[73] As stated above, the parties decided to take a "hand's off" approach with respect to the IAP contingent counsel fees. This position was urged upon the court as the proper approach. I cannot accede to this submission. During argument, I expressed a concern that in the event of issues arising between the IAP claimants and their respective counsel relating to fees, the claimant would have no effective recourse to challenge the reasonableness of any additional fees charged. Counsel responded that such claimants could follow the general procedures available in their province or territory of residence with respect to assessments of legal fees. In consideration of the evidence adduced in support of the counsel fee proposals, this appears to be an illusory remedy at best. As Mr. Merkur, addressing the difficulties counsel have in representing claimants in this case, deposes at paragraph 25 of his affidavit:

> Both Thomson, Rogers and Richard Courtis, our co-counsel, have toll free numbers that our client can call. In a typical week we will field some 50 calls from residential school survivors. We have found that many of our clients have literacy problems that make it extreme difficulty [sic] for them to fully understand our regular update correspondence, even when written with such limitations in mind. Our clients often call us for clarification of certain points set out in our

> letters and we spend much time doing this. Because of the geographic dispersion of our clients it is often difficult if not impossible to visit regularly with them in person. A further problem is miscommunication spread within the Aboriginal communities caused by false rumours about settlements and funds received.

Further, at paragraph 26 he deposes:

> Because of these challenges the process of making legal representations available to residential school claimants is more time consuming and difficult than with most other types of clients. Gathering information from clients in order to prepare pleadings and respond to motions, and meetings with clients in order to get ready for examinations for discovery and other litigation steps are more difficult than in conventional litigation.

[74] In the face of this evidence, it is difficult to accept that the claimants will be in a position to successfully navigate the legal system to ensure that their rights are protected in regard to the legal fees they might have to pay. Accordingly, the suggestion that such disputes or concerns should be left to ordinary course litigation to be resolved must be rejected.

[75] As a general principle, wherever a settlement incorporates a claims resolution procedure, the entirety of that procedure is to be conducted under the supervision of the court. This must of necessity include the relationship between counsel and clients engaged in the process, especially where the legal fees or part thereof are paid pursuant to the settlement. As stated above, the court must ensure that claimants obtain the expected benefits of the settlement.

[76] One of the purported benefits of the settlement is the fact that it presents a comprehensive scheme for dealing with all issues arising from the residential school program. In keeping with the general principle, claimants must have recourse within the administration of this settlement to challenge the reasonableness of the fees they are charged by counsel.

[77] In my view, the submissions of Mr. Merchant on the contingent fee issue may serve as a guide. Mr. Merchant made representations to the court that he spoke from personal experience in that he has been involved in a number of contested trials relating to the residential schools. Accordingly, it appears that his suggestion that an additional 15% was appropriate was based on that experience. Further, a fee of 30% on a contingent basis is a substantial retainer in any event.

[78] There must be a process to regulate fees charged by counsel under the IAP. All individual retainer agreements relating to the IAP must be provided to the adjudicator hearing the case after an award is rendered but before compensation is paid. All fees charged or to be charged to the individual claimant must be clearly set out. This means that any counsel participating in the process will be under an obligation to make full disclosure in respect of the fees charged, directly or indirectly to the claimant, including disbursements and taxes. The adjudicator will assess the reasonableness of the fee having regard to the complexity of the case, the result achieved, the intent of the settlement to provide successful claimants with reasonable compensation and the fact that an additional 15% of the compensation awarded will be paid by Canada. The adjudicator's decision as to fees may be subject to appeal to the Chief Adjudicator or his

designate in respect of errors in principle. Directions to pay to any person other than the claimant an amount in excess of the fees, including disbursements and any applicable taxes, determined to be reasonable by the Adjudicator will be considered void.

The Jurisdiction of the Courts

[79] I turn now to the jurisdiction of the supervisory courts. At the outset, it must be recognized that once the parties have sought the approval of the courts for the settlement, they have attorned to the jurisdiction of each of those courts. To the extent that the terms of the settlement attempt to restrict the ability of any of the approving courts' jurisdiction to deal with matters pertaining to the settlement, including its ongoing administration, such provisions are unacceptable. By the same token, I accept that in a multi-jurisdictional settlement such as this, a provision requiring unanimous approval by all of the supervising courts prior to a "material" amendment being made to the agreement is not an unreasonable provision. Such a requirement does not infringe on the jurisdiction of this or any other court in the context of this settlement. Joint approval of the settlement has been sought from all of the supervisory courts, on the understanding that the settlement will fail unless it is approved by all of the courts. Accordingly, it follows that if a material amendment were to be sought by the parties, such an amendment would also require unanimous approval by the courts.

[80] My concern goes to the provisions of the settlement that may impact on the ability of this and every other approving court to exercise its respective power over the implementation and administration of the settlement, as it affects the class members under its specific jurisdiction. This concern was raised with the parties and it was not alleviated by the submissions made in response. This court has had considerable experience with the administration of complex class proceeding settlements. The problems with logistical coordination on a timely basis alone, notwithstanding any other difficulties that may arise, renders any approach that requires unanimous approval of 9 courts unworkable in dealing with issues related to specific classes and class members. It is especially troubling where there is a class that has a large number of elderly members and time is of the essence in dealing with issues.

[81] I do not suggest that the parties need rewrite the agreement to deal with this issue. It is common in complex class actions that problems of this nature are dealt with by way of protocols prepared by the parties, in consultation with the courts, to ensure that the administration functions as intended. In my view, the jurisdictional concerns may be addressed by way of such a protocol, to be approved by all of the courts.

The Class Definitions

[82] Finally, I will deal with the issue arising from the proposed class definition as it relates to those who attended a residential school but died prior to May 30, 2005. The proposed settlement would exclude the estates of such persons from making claims under the CEP program or the IAP. It was argued that this provision was negotiated to ensure that the surviving members of the class benefited as much as possible from the direct compensation available. The incongruity of this argument is apparent in the submission that an estimated 1,000 class members have died

since May 30, 2005 and, given the large number of elderly people in the class, this number is increasing. There was open disagreement between class counsel as to whether the estates of those persons deceased prior to May 30, 2005, had a sustainable claim in any event. What is clear is that an arbitrary line has been drawn between class members in similar circumstances. Here, the estate of a person who died on May 29, 2005, is not entitled to make a claim whereas the estate of a person dying on May 30, 2005, is so entitled. Certain of the objectors characterized this arbitrary approach as being unfair.

[83] A key point about this arbitrary distinction is that the estates of those persons who died prior to the May 30, 2005, deadline will not receive CEP or IAP compensation. Nonetheless, it is still the intention to have those estates bound by the settlement terms in that their claims will be extinguished by the general releases to be granted if the settlement is approved. While it is not uncommon, or necessarily objectionable, to draw distinctions between class members for the purposes of distributing compensation from a global fund, in those cases where a distinction is drawn, compensation is usually paid to claimants on both sides of the divide albeit in reduced amounts on one side.

[84] Where the intention is to bind potential class members without direct compensatory payment, the court must apply careful scrutiny to the provisions of the settlement seeking to effect that result. This analysis must be conducted on a case by case basis. Here, it was contended that the indirect benefits to the family members of the deceased class members, through the healing and commemoration initiatives, was a countervailing benefit given in exchange for the right being extinguished by the settlement. In addition, the estates of those class members whose direct claims are being extinguished may exercise their opt out rights in order to pursue their individual litigation. I agree with these submissions, but would add that the opt out notices must be drafted in a manner to make it clear that these rights are being extinguished under this settlement.

Conclusion

[85] In conclusion, subject to the correction of the deficiencies noted above, I would certify the action as a class proceeding as proposed and approve the settlement as being "fair, reasonable and in the best interests of the class as a whole". The changes that the court requires to the settlement are neither material nor substantial in the context of its scope and complexity. It would serve the interests of the proposed class to have these issues dealt with in an expeditious manner and to that end, I am prepared to grant the parties a reasonable period, not to exceed 60 days from the date of these reasons, to complete the required changes. I will make myself available on short notice to deal with any issues that may arise.

WINKLER R.S.J.

Released: December 15, 2006

APPENDIX A

THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE DIOCESE OF ATHABASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF CARIBOO, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE DIOCESE OF MOOSONEE, THE SYNOD OF THE DIOCESE OF WESTMINISTER, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE DIOCESE OF SASKATCHEWAN, THE SYNOD OF THE DIOCESE OF YUKON, THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE PRESBYTERIAN CHURCH IN CANADA, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH IN CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (also known as THE METHODIST MISSIONARY SOCIETY OF CANADA), THE CANADIAN CONFERENCE OF CATHOLIC BISHOPS, THE ROMAN CATHOLIC BISHOP OF THE DIOCESE OF CALGARY, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS, THE ROMAN CATHOLIC BISHOP OF THUNDER BAY, THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, THE ROMAN CATHOLIC BISHOP OF VICTORIA, THE ROMAN CATHOLIC BISHOP OF NELSON, THE CATHOLIC EPISCOPAL CORPORATION OF WHITEHORSE, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD – McLENNAN, THE CATHOLIC ARCHDIOCESE OF EDMONTON, LA DIOCESE DE SAINT-PAUL, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF MACKENZIE, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, THE ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE SAINT-BONIFACE, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF THE DIOCESE OF SAULT STE. MARIE, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, THE ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE MISSIONARY OBLATES OF MARY IMMACULATE – GRANDIN PROVINCELES PERES MONTFORTAINS (also known as THE COMPANY OF MARY), JESUIT FATHERS OF UPPER CANADA, THE MISSIONARY OBLATES OF

MARY IMMACULATE – PROVINCE OF ST. JOSEPH, LES MISSIONAIRES OBLATS DE MARIE IMMACULEE (also known as LES REVERENDS PERES OBLATS DE L'IMMACULEE CONCEPTION DE MARIE), THE OBLATES OF MARY IMMACULATE, ST. PETER'S PROVINCE, LES REVERENDS PERES OBLATS DE MARIE IMMACULEE DES TERRITOIRES DU NORD OUEST, LES MISSIONAIRES OBLATS DE MARIE IMMACULEE (PROVINCE U CANADA – EST), THE SISTERS OF SAINT ANNE, THE SISTERS OF INSTRUCTION OF THE CHILD JESUS (also known as THE SISTERS OF THE CHILD JESUS), THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, THE SISTERS OF CHARITY (GREY NUNS) OF ST. ALBERT (also known as THE SISTERS OF CHARITY (GREY NUNS) OF ST. ALBERTA), THE SISTERS OF CHARITY (GREY NUNS) OF THE NORTHWEST TERRITORIES, THE SISTERS OF CHARITY (GREY NUNS) OF MONTREAL (also known as LES SOEURS DE LA CHARITÉ (SOEURS GRISES) DE I'HÔPITAL GÉNÉRAL DE MONTREAL), THE GREY SISTERS NICOLET, THE GREY NUNS OF MANITOBA INC. (also known as LES SOEURS GRISES DU MANITOBA INC.), THE SISTERS OF ST. JOSEPH OF SAULT STE. MARIE, LES SOEURS DE SAINT-JOSEPH DE ST-HYACINTHE and INSTITUT DES SOEURS DE SAINT-JOSEPH DE SAINT-HYACINTHE LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE (also known as LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE) DE NICOLET AND THE SISTERS OF ASSUMPTION, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE L'ALBERTA, THE DAUGHTERS OF THE HEART OF MARY (also known as LA SOCIETE DES FILLES DU COEUR DE MARIE and THE DAUGHTERS OF THE IMMACULATE HEART OF MARY), MISSIONARY OBLATE SISTERS OF SAINT-BONIFACE (also known as MISSIONARY OBLATES OF THE SACRED HEART AND MARY IMMACULATE, or LES MISSIONAIRES OBLATS DE SAINT-BONIFACE), LES SOEURS DE LA CHARITE D'OTTAWA (SOEURS GRISES DE LA CROIX) (also known as SISTERS OF CHARITY OF OTTAWA - GREY NUNS OF THE CROSS), SISTERS OF THE HOLY NAMES OF JESUS AND MARY (also known as THE RELIGIOUS ORDER OF JESUS AND MARY and LES SOEURS DE JESUS-MARIE), THE SISTERS OF CHARITY OF ST. VINCENT DE PAUL OF HALIFAX (also known as THE SISTERS OF CHARITY OF HALIFAX), LES SOEURS DE NOTRE DAME AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, SISTERS OF THE PRESENTATION OF MARY (SOEURS DE LA PRESENTATION DE MARIE), THE BENEDICTINE SISTERS, INSTITUT DES SOEURS DU BON CONSEIL, IMPACT NORTH MINISTRIES, THE BAPTIST CHURCH IN CANADA

Third Parties

COURT FILE NO.: 00-CV-192059CP
DATE: 2006/12/15

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CHARLES BAXTER, SR. and ELIJAH BAXTER, et al.

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA

Defendant

- and -

THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA et al. (see APPENDIX A for a full list of Third Parties)

Third Parties

REASONS

W.K. Winkler, R.S.J.

Released: December 15, 2006

TAB 4

Indexed as:
Sparling v. Southam Inc.

Sparling v. Southam Inc. et al.; Kerrigan et al., Intervenors

[1988] O.J. No. 1745

66 O.R. (2d) 225

41 B.L.R. 22

12 A.C.W.S. (3d) 205

Action No. 23031/87

Ontario
High Court of Justice

Callaghan A.C.J.H.C.

October 27, 1988.

Counsel:

D.R. O'Connor, Q.C., and C.D. Bredt, for plaintiff.

J.F. Howard, Q.C., and N. Finkelstein, for defendant, Southam Inc.

D.J.M. Brown, Q.C., and J. O'Donnell, for defendant, Torstar Corp.

H.L. Morphy, Q.C., and S. Block, for defendant directors, George L. Crawford et al.

K.C. Cancellara, for intervenors, Philip Kerrigan et al.

P. Anisman, for objectors.

R.N. Robertson, Q.C., for objector, Imperial Life Assurance Company of Canada.

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1 **CALLAGHAN A.C.J.H.C.** (orally):-- This is a motion brought by the plaintiff, Frederick H. Sparling, the director appointed under s. 253 of the Canada Business Corporations Act, S.C. 1974-75-76, c. 33 (the "Act"), for an order pursuant to s. 235(2) of the Act, approving the settlement of this action.

2 This action was brought by the plaintiff pursuant to s. 234 of the Act, for a declaration that the actions of the defendants in entering into a share exchange agreement, a Southam family agreement and

a Southam shareholders' agreement without seeking the approval of the Southam shareholders were oppressive or unfairly prejudicial to, or unfairly disregarded the interests of the Southam shareholders.

3 The plaintiff's action was based upon a series of transactions that took place in 1985 which the individual directors believed to be a good business deal for Southam Inc. and which were taken to prevent a "predatory" take-over they were advised was likely imminent.

4 These transactions included:

(i) A Share Exchange Agreement between Southam Inc. and Torstar Corporation ("Torstar") implemented on August 26th, 1985;
(ii) A Voting Trust Agreement among members of the Southam Family Group put in place later in 1985; and
(iii) Certain related arrangements among the two corporations and the Southam Family Group including: a Torstar commitment to support the Southam slate of nominees for election to the Southam Board, and a "Standstill" Agreement prohibiting Torstar from acquiring additional Southam shares. These arrangements, like the Southam Family Agreement, would expire (unless extended by agreement) on August 26th, 1995.

As an exception to the standstill agreement, Torstar was permitted to acquire (and did acquire) an additional 5% of the outstanding shares of Southam Inc. on the market, but Torstar agreed, however, that if the voting trust among members of the Southam family group was put in place, then the Southam family group would be entitled to purchase one-half of the shares that Torstar acquired on the market from Torstar at Torstar's cost of acquisition plus carrying costs. After the Southam family agreement was put in place, the Southam family group did purchase 21/2% of the shares of Southam Inc. from Torstar.

5 The plaintiff requested a number of remedies including, inter alia, the following:

(i) a shareholders' meeting to consider ratification of the Share Exchange Agreement, and in the event that the shareholders chose not to ratify the Agreement, an order that the share exchange transaction be unwound; alternatively, the plaintiff asked that the defendant directors of Southam Inc. who approved the share exchange be required to make a payment to shareholders of Southam Inc. on the basis that the shareholders suffered a loss of value in their shares because of the share exchange and related transactions;
(ii) that Torstar be prohibited from accepting instructions to vote for the Southam slate of Southam Inc. directors;
(iii) that the defendant directors who approved the Share Exchange Agreement be required to account to Southam Inc. for the value of the option given by Torstar to the Southam Family Group with respect to one-half of the 5 percent interest in Southam Inc. acquired by Torstar in the market as permitted under the Standstill Agreement.

6 Seven persons on behalf of the defence and two on behalf of the plaintiff were examined in the course of pre-trial proceedings, and the trial was scheduled to begin on Tuesday, September 20, 1988. From the affidavit of the plaintiff filed, it appears that the plaintiff recognized the expense and the attendant uncertainties in the financial markets that would result from a trial and potential appeals, and that any remedy, given court processes and potential appeals, might not be achieved for some years. Accordingly, the plaintiff entered into a settlement with the defendants, which settlement is subject to court approval. The defendants throughout the pre- trial proceedings and presently take the position that they have a good defence to all the plaintiff's claims and that the share exchange agreement was entered

into in good faith and on reasonable grounds and was in the best interest of the corporation and all of its shareholders.

7 The terms of the proposed settlement can be summarized as follows:

(i) subject to any ongoing arrangement that may be approved at a Southam Inc. shareholders meeting, at which meeting Torstar would not vote its shares of Southam and parties to the Southam Family Agreement would not vote in accordance with the procedure in that Agreement, the Share Exchange Agreement, the Southam Family Agreement and the Southam Shareholders Agreement will terminate on June 30, 1990 (rather than August 26, 1995 being the date when they would otherwise terminate unless extended);

(ii) the obligation of Torstar to vote its shares of Southam Inc. in favour of the candidates for election to the Southam Board of Directors designated by the Board of Directors will terminate immediately;

(iii) certain rights of Torstar to purchase shares of Southam Inc. being sold by parties to the Southam Family Agreement and not purchased by other parties to that Agreement will be modified, effective immediately;

(iv) parties to the Southam Family Agreement will pay $1,250,000.00 to Southam Inc. within 60 days, without claiming any consideration or compensation therefor; and

(v) Southam Inc. and Torstar will pay $125,000.00 to defray the plaintiff's costs.

8 Further, it is agreed that the order approving the settlement, if issued, will state that it does not derogate from the rights of other potential claimants under s. 234 of the Act, or otherwise, with respect to the matters complained of in the statement of claim other than the corporate reorganization (rectification) and share option remedies. Further, as to any potential claimant who does not attend at the hearing to consider the settlement, there will be no derogation even with respect to the corporate reorganization (rectification) and share option remedies, if that claimant did not receive notice or if the notice was inadequate.

9 The plaintiff, the director appointed under the Act, believes the settlement to be fair and reasonable.

10 The objectors on this application are appearing pursuant to notices of intention to appear and are five existing shareholders of the defendant Southam Inc., four of whom held shares on August 26, 1985, and acquired further shares thereafter, and one of whom only acquired shares after that date.

11 The objectors, apart from the objector Imperial, ask the court to withhold approval of the proposed settlement. The main thrust of their submission, as I understand it, is that the plaintiff had a reasonable likelihood of success on the merits of this action in relation to the share exchange agreement. The objectors claim that the allegations in the plaintiff's statement of claim are supported by the examination for discovery of the defendants and that the share exchange agreement at trial would be set aside as not adequately protecting the interests of the Southam Inc. public shareholders.

12 I think I should note that at the outset of this motion I declined the invitation of counsel on behalf of the objectors to review the voluminous discoveries with him. I was satisfied that the concession of the objectors that the directors were acting bona fide and believed that the share exchange agreement in issue made good business sense rendered such a review unnecessary.

13 The concession, in my view, made it clear that the issue as to "primary purpose", would have been a live issue between the parties on the trial of this matter.

14 The objectors further claim that the proposed settlement would deprive the Southam Inc.

shareholders of personal rights of action, in that it precludes them from attacking the reorganization attendant upon the share exchange, and furthermore, it precludes any action with respect to the share option remedy which had been sought by the director in the main action.

15 There were subsidiary and collateral objections made with reference to the funds payable to the company by the defendants and in particular with reference to the benefits accruing to the shareholders from those funds as a result of proportional shareholdings. I note these objections and weigh them in the result.

16 Section 235(2) provides as follows:

> 235(2) An application made or an action brought or intervened in under this Part shall not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the court given upon such terms as the court thinks fit and, if the court determines that the interests of any complainant may be substantially affected by such stay, discontinuance, settlement or dismissal, the court may order any party to the application or action to give notice to the complainant.

17 In approaching this matter, I believe it should be observed at the outset that the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system.

18 In deciding whether or not to approve a proposed settlement under s. 235(2) of the Act, the court must be satisfied that the proposal is fair and reasonable to all shareholders. In considering these matters, the court must recognize that settlements are by their very nature compromises, which need not and usually do not satisfy every single concern of all parties affected. Acceptable settlements may fall within a broad range of upper and lower limits.

19 In cases such as this, it is not the court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court's function to litigate the merits of the action. I would also state that it is not the function of the court to simply rubber-stamp the proposal.

20 The court must consider the nature of the claims that were advanced in the action, the nature of the defences to those claims that were advanced in the pleadings, and the benefits accruing and lost to the parties as a result of the settlement.

21 When the director under the Act proposes a settlement for approval, he is acting as a public officer authorized, as parens patriae under the Act not only to institute actions but also to compromise them. Settlements proposed by the director, in my view, run with a strong initial presumption that they are reasonable and fair.

22 That presumption operates where, as here, the director is acting after extensive pre-trial discovery, on the advice of experienced and competent counsel, in circumstances where his negotiations have been conducted at arm's length, and, indeed, in a manner which all parties agree, including the objectors, was bona fide. In this context, the judicial evaluation of a proposed settlement involves a limited inquiry as to whether the potential rewards of successful litigation, with its attendant risks and costs, are outweighed by the benefits of the proposed settlements.

23 The matter was aptly put in two American cases that were cited to me in the course of argument. In a decision of the Federal Third Circuit Court in Young v. Katz, 447 F. 2d 431 (1971), it is stated:

> It is not necessary in order to determine whether an agreement of settlement and compromise shall be approved that the court try the case which is before it for settlement. Such procedure would emasculate the very purpose for which settlements are made. The court is only called upon to consider and weigh the nature of the claim, the possible defences, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable.

24 In another case cited by all parties in these proceedings, Greenspun v. Bogan, 492 F. 2d 375 at p. 381 (1974), it is stated:

> ... any settlement is the result of a compromise -- each party surrendering something in order to prevent unprofitable litigation, and the risks and costs inherent in taking litigation to completion. A district court, in reviewing a settlement proposal, need not engage in a trial of the merits, for the purpose of settlement is precisely to avoid such a trial. See United Founders Life Ins. Co. v. Consumer's National Life Ins. Co., 447 F. 2d 647 (7th Cir. 1971); Florida Trailer & Equipment Co. v. Deal, 284 F. 2d 567, 571 (5th Cir. 1960). It is only when one side is so obviously correct in its assertions of law and fact that it would be clearly unreasonable to require it to compromise to the extent of the settlement, that to approve the settlement would be an abuse of discretion.

(Emphasis added.)

25 While the litigation itself has only been pending 12 months, without the proposed settlement, the trial and ensuing appeals would unquestionably consume additional years in a case of this magnitude and complexity. The defendants throughout have denied liability and quite properly have raised all possible defences. The expense of preparing the case, not only on the issue of liability but on issues such as the assessment of the value of options, would be substantial and time-consuming.

26 By the time the final decision would be rendered, the financial markets would have been placed for a long period of time in a state of uncertainty which would impact adversely on the interests of all shareholders involved. I note that this consideration played a role in the decision of the Securities Commission which was cited to me in argument in relation to earlier proceedings with reference to this matter.

27 The objectors in these proceedings represent at the very best count a small percentage of the shareholders. That indicates that most of the shareholders approve the proposed settlement. I cannot let the matter pass without noting that the legal costs of the objectors in this proceeding, save those of Imperial, are all financed by a single investment group (record p. 217). That is a matter which I believe goes to the weight to be attributed to the objections.

28 This proposal, as noted, comes forward at a point in the litigation when counsel have had an opportunity to assess their positions in the light of the productions and discoveries made by the plaintiff and the defendants herein. Such counsel are acting, in recommending this proposal, with a firm grasp of the strengths and weaknesses of this case, and it is not for this court to second-guess that professional judgment.

29 In assessing the fairness and reasonableness of the proposal, the court should also consider the nature of the risks involved in establishing the liability claimed.

30 In this regard, it is noted that the objectors have conceded that the defendant directors believed that

the exchange agreement which is in issue in these proceedings made good business sense for the defendant Southam Inc.: see the factum of the objectors, para. 4(f). Furthermore, it is apparent that there were no statutory or regulatory rules mandating shareholder approval of that exchange. The success of the plaintiff's claim would rest on a court finding as a fact that the primary purpose of the share exchange was to prevent a take-over. In light of the foregoing, establishing that primary purpose -- or the scienter, as it is sometimes referred to -- would have been a contentious matter, both as a matter of fact and as a matter of determining the applicable law in these circumstances. The "proper purpose" doctrine relied upon by the objectors, as it appears in Howard Smith Ltd. v. Ampol Petroleum Ltd., [1974] A.C. 821, to put it simply, is not universally accepted; and I do not believe it has been clearly defined as the only applicable doctrine by the Court of Appeal of this province to govern the fiduciary duties and objectives of directors of a target company resisting unsolicited take- over bids. In my view, there were considerable risks attendant upon the plaintiff's claim. There were issues of some legal and factual significance that were open in this matter, and it would be ludicrous to suggest that the plaintiff in this litigation was so obviously correct in his assertions of law and fact that it was unreasonable for him to compromise.

31 While the settlement in a limited sense affects the right to sue of the existing shareholders, as it removes from prospective litigation the unwinding of the share exchange agreement, it does not affect the right of the shareholders to initiate action for any damages they may have sustained as a result of the impugned transactions. It specifically preserves the rights of potential claimants with respect to the matters complained of in the statement of claim.

32 It has been submitted on behalf of Imperial that this court should direct a vote of a certain group of the public shareholders on the proposed settlement. This submission, while intriguing, is not one which I believe the court should accept. Aside from the mechanical problems -- which would be substantial -- in determining such matters as constituency, content of information circulars, etc., I am not convinced that I should derogate from the responsibility placed on the court by the Act. In this proceeding there has been extensive notification to all of the shareholders of Southam Inc. and an opportunity afforded them to be heard. A relatively few have appeared. The Act imposes the responsibility on the court to consider this matter on the basis of the material put before it. I do not believe that that responsibility should be passed on or adjourned pending such a vote. I note that the Ontario Securities Commission, when this matter was brought before it, concluded, after consideration of a similar request, that such sanction was not appropriate (affidavit of R.W. McDowell, ex. B, p. 30). For the reasons stated by the commission, I am of the same view and I decline to make such an order.

33 In conclusion, therefore, I accept the recommendation of the director. I am not satisfied that the presumption of fairness and reasonableness mentioned above has been overcome, and I am satisfied that the settlement effects a substantial modification of the original arrangements herein and avoids the costs and uncertainty of what was bound to be very extensive litigation. Accordingly, the application for approval is granted.

34 The order will include a direction that all documents and discoveries are to be made available to shareholders who execute an appropriate confidentiality agreement indicating that such documents and discoveries are for use only in considering prospective litigation. I leave it to counsel to work out the appropriate terms.

35 I have considered the matter of costs and am of the view that this court has no mandate to deal with costs incurred by these parties before the Ontario Securities Commission. I have concluded that this is not a proper case for costs in any event.

Order accordingly.

TAB 5

COURT FILE NO.: 00-CV-202080CP
DATE: 20050323

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

GLEN FORD, VITAPHARM CANADA LTD., FLEMING FEED MILL LTD., and MARCY DAVID

Plaintiffs

- and -

F.HOFFMANN-LA ROCHE LTD., HOFFMANN-LA ROCHE LTD., MERCK KGaA, LONZA AG, ALUSUISSE-LONZA CANADA INC., SUMITOMO CHEMICAL CO., LTD., SUMITOMO CANADA LIMITED/LIMITEE and TANABE SEIYAKU CO., LTD.

Defendants

Proceeding under the *Class Proceedings Act*, 1992 (Biotin)

Harvey T. Strosberg, Q.C., C. Scott Ritchie, Q.C., J. J. Camp Q.C., and ***Joe Fiorante*** for the Plaintiffs in all actions

Glenn M. Zakaib, for the Defendant Merck KgaA

John Callaghan, for Sumitomo Chemical Co. Ltd.

William Vanveen and ***François Baril,*** for the Defendants Hoffmann-La Roche Limited, F. Hoffmann-La Roche Ltd.

Ariane Farrell, for Sumitomo Canada Ltd.

Donald Houston, for Lonza AG

HEARD: March 8 and 9, 2005

COURT FILE NO.: 00-CV-200045CP

B E T W E E N:

GLEN FORD, VITAPHARM CANADA LTD., FLEMING FEED MILL LTD., ALIMENTS BRETON INC., OGER AWAD and MARY HELEN AWAD Plaintiffs **- and -** F. HOFFMANN-LA ROCHE LTD., HOFFMANN-LA ROCHE LIMITED/LIMITÉE, RHÔNE-POULENC S.A., AVENTIS ANIMAL NUTRITION S.A., RHÔNE-POULENC CANADA INC., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., BASF AKTIENGESELLSCHAFT, BASF CORPORATION, BASF CANADA INC., EISAI CO., LTD., TAKEDA CHEMICAL INDUSTRIES, LTD., TAKEDA CANADA VITAMIN AND FOOD INC., MERCK KgaA, DAIICHI PHARMACEUTICAL COMPANY, LTD., REINHARD STEINMETZ, DIETER SUTER, HUGO STROTMANN, ANDREAS HAURI, KUNO SOMMER and ROLAND BRÖNNIMANN Defendants Proceeding Under the *Class Proceedings Act*, 1992 (Bulk Vitamins)	***William Vanveen*** and ***François Baril,*** for the Defendants F. Hoffmann-La Roche Ltd. and Hoffmann-La Roche Limited/Limitee ***Glenn M. Zakaib***, for the Defendant Merck KgaA ***Katherine L. Kay*** and ***Eliot N. Kolers***, for the Defendant Eisai Co., Ltd. ***Evangelia Kriaris,*** for Takeda Pharmaceutical Company Limited (formerly Takeda Chemical Industries, Ltd.); Takeda Canada Vitamin and Food Inc. ***Sandra A. Forbes,*** for Aventis Animal Nutrition SA, the Rhone-Poulenc defendants and Daiichi Pharmaceutical Company, Ltd. ***David W. Kent***, for BASF Aktiengesellschaft, BASF Corporation and BASF Canada Inc.

COURT FILE NO.: 00-CV-198647CP

B E T W E E N:

FLEMING FEED MILL LTD., ALIMENTS BRETON INC., LEN FORD and MARCY DAVID

Plaintiffs

- and -

BASF AKTIENGESELLSCHAFT, BASF CORPORATION, BASF CANADA INC., CHINOOK GROUP, LTD., CHINOOK GROUP, INC., DCV, INC., DUCOA L.P. AKZO NOBEL NV, AKZO NOBEL CHEMICALS BV, BIOPRODUCTS, INC., RUSSELL COSBURN, JOHN KENNEDY, ROBERT SAMUELSON, LINDELL HILLING, JOHN I. ("PETE") FISCHER and ANTONIO FELIX

Defendants

Proceeding under the *Class Proceedings Act*, 1992
(Choline Chloride)

David W. Kent, for BASF Aktiengesellschaft, BASF Corporation and BASF Canada Inc.

Andrew J. Roman, for Akzo Nobel N.V. and Akzo Nobel Chemicals B.V.

George D. Hunter, for DCV Inc. and Ducoa L.P.

James Doris, for Bioproducts, Inc.

Tycho Manson, for Chinook Group, Ltd.

COURT FILE NO.: 00-CV-201723CP

B E T W E E N:

GLEN FORD, FLEMING FEED MILL LTD., ALIMENTS BRETON INC., and KRISTI CAPPA Plaintiffs **- and -** RHÔNE-POULENC S.A., RHÔNE-POULENC CANADA INC., DEGUSSA-HÜLS AG, DEGUSSA CORPORATION, DEGUSSA CANADA INC., NOVUS INTERNATIONAL, INC. and AVENTIS ANIMAL NUTRITION S.A. Defendants Proceeding under the *Class Proceedings Act*, 1992 (Methionine)	***Sandra A. Forbes***, for Aventis Animal Nutrition S.A. and the Rhone-Poulenc defendants ***F. Paul Morrison*** and ***J. P. Brown,*** for Degussa Corporation, Degussa Canada Inc. and Degussa-Huls A.G. ***S. A. Dawson***, for Novus International, Inc.

COURT FILE NO.: 00-CV-200044CP

B E T W E E N:	
VITAPHARM CANADA LTD., FLEMING FEED MILL LTD., ALIMENTS BRETON INC., and KRISTI CAPPA Plaintiffs **- and -** DEGUSSA-HÜLS AG, DEGUSSA CORPORATION, DEGUSSA CANADA INC., REILLY INDUSTRIES INC., REILLY CHEMICALS S.A., VITACHEM COMPANY, ALUSUISSE-LONZA CANADA INC., LONZA AG, NEPERA INCORPORATED, ROGER NOACK and DAVID PURPI Defendants Proceeding under the *Class Proceedings Act*, 1992 (Niacin)	***Donald Houston***, for Lonza AG and Alusuisse-Lonza Canada Inc. ***Jennifer Badley*** (per D. Kent) for Reilly Industries Inc. and Reilly Chemicals S.A. ***F. Paul Morrison*** and ***J. P. Brown,*** for Degussa Corporation, Degussa Canada Inc. and Degussa-Huls AG ***S. Vlahakis,*** for Nepera Inc., Roger Noack and David Purpi

COURT FILE NO.: 40610

B E T W E E N:

FLEMING FEED MILL LTD., ALIMENTS BRETON INC., GLEN FORD and MARCY DAVID Plaintiffs **- and -** UCB S.A. and UCB CHEMICALS CORPORATION Defendants Proceedings under the *class Proceedings Act,* 1992 (Supplemental Choline Chloride)	***Donald Houston,*** for UCB S.A. and UCB Chemicals Corporation

COURT FILE NO.: 42267CP

B E T W E E N: GLEN FORD Plaintiff **- and -** NOVUS INTERNATIONAL (CANADA) INC. Defendant Proceeding under the *Class Proceedings Act,* 1992 (Supplemental Ontario Methionine)	***Donald Houston***, for Wippon Soda Co. Ltd. ***Pauline W. Wong*** for Defendant, Mitsui & Co., Ltd. ***S. A. Dawson,*** for Novus International (Canada) Inc.

CLASS PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

REASONS FOR DECISION

CUMMING J.

The Motions

[1] These are motions for certification, and for approval of the settlements, of a group of class actions in respect of certain defendants in the proceedings under sections 32 and 33 of the *Class Proceedings Act,* S.O. 1992, c. 6 ("*CPA*").

[2] In 1999, multiple putative class actions were commenced in Ontario, British Columbia, and Quebec alleging a complex, global, multi-party, price-fixing and market-sharing conspiracy relating to the sale of vitamins in Canada. Ultimately, five separate class actions were reconstituted and pursued in Ontario, dealing with discrete Vitamins and with separate representative plaintiffs. Two additional, so-called "supplemental", class actions have also been initiated. Certain "Settling Defendants" have now entered into a proposed settlement with certain "Settling Plaintiffs" in these class actions in Ontario, culminating in what is called the "Amended Canadian Vitamins Class Actions National Settlement Agreement" ("Agreement") made as of November 1, 2004 and amended as of January 6, 2005. The proposed settlement is for the national classes contemplated in the class actions at hand, together with separate class proceedings in British Columbia and Quebec. Separate settlement approval hearings will take place before the Courts in those provinces. (The status of the several class actions, upon successful motions for certification and settlement approval, is set forth in paragraph 106 of these Reasons.)

[3] The materials filed in support of the motion at hand are voluminous, filling three bankers' boxes. The Agreement is lengthy and complex with several schedules (See Exhibit D to Affidavit of Charles M. Wright in Volume 1 of 9 of the Motion Record). These materials can be found (together with additional information) online <http://www.vitaminsclassaction.com>.

[4] There are also very recent, trailing, additional, separate Settlement Agreements for three Defendants (Akso Nobel Chemicals BV ("Akso"), UCB S.A. ("UCB"), and Reilly Industries Inc.("Reilly")) which, for the purposes of the motion at hand, can be notionally treated as though they are part of a single overall settlement.

[5] Capitalized terms used herein are as defined in the Agreement. However, the term "Class Counsel" means the law firms known as Siskinds, Cromarty, Ivey & Dowler ("Siskinds"), Sutts Strosberg ("Strosberg"), Camp Fiorante Matthews "(Camp"), Desmeules, and Allen Cooper. This definition of "Class Counsel" is different from the definition of "Class Counsel" found in the Agreement. The term "Quebec Counsel" means the two Montreal firms, Sylvestre, Charbonneau, Fafard and Unterberg, Labelle, Lebeau.

[6] As well, "Class Counsel Fees", as this term is used herein, means the total fees payable to both Class Counsel and Quebec Counsel.

[7] The motion for certification and Court approval of the proposed settlement was heard on March 8, 2005 with the motion for the approval of "Class Counsel Fees" being heard separately March 9, 2005. Reasons for Decision in respect of certification and settlement approval have been given separately. The Reasons for Decision at hand deal with the discrete issue of certification and the approval of the settlement Agreement.

[8] The plaintiffs assert that:

(a) the Defendants entered into conspiracies to fix prices with respect to the distribution and sale of Vitamins and related products in the period January 1, 1986 to February 28, 1999; and

(b) the worldwide vitamin industry was dominated by certain groupings of the Defendants who controlled a significant percentage of the world Vitamin market for many of the main types of vitamins.

[9] Some of the Defendants pled guilty in the United States and Canada to price-fixing charges concerning Vitamins. The class actions at hand are based upon the impact of the alleged global conspiracies upon residents of Canada.

[10] Generally, Vitamins are manufactured and marketed for four primary uses: animal and fish feed supplements; direct human consumption; food and beverage additive for human consumption; and cosmetics, as more fully particularized in the chart below:

Product	**Uses**
Biotin (Vitamin B8, Vitamin H)	Human consumption Animal and fish feed supplement
Bulk Vitamins (Vitamin A, Vitamin B1, Vitamin B2, Vitamin B5, Vitamin B6, Vitamin B9, Vitamin B12, Vitamin C, Vitamin E, Beta Carotene, Canthaxanthin, Premix)	Human consumption Food and beverage additive for human consumption Cosmetics Animal and fish feed supplement
Choline Chloride (Vitamin B4)	Food and beverage additive for human consumption Animal and fish feed supplement
Methionine	Human consumption Animal and fish feed supplement

Product	Uses
Niacin, Niacinamide (Vitamin B3)	Human consumption Food and beverage additive for human consumption Animal and fish feed supplement

[11] There is a broad spectrum of plaintiffs because of the different users, namely, Direct Purchasers, Intermediate Purchasers and Consumers.

[12] The plaintiffs pursued this litigation, using a two-stage model. At stage one, on behalf of all purchasers of Vitamins, the plaintiffs sought to hold the alleged conspirators accountable for the aggregate overcharge on all sales of Vitamins in Canada by recovering aggregate damages. Then, at stage two, Class Counsel developed a distribution model for the aggregate damages to be paid to or for the benefit of Direct Purchasers, Intermediate Purchasers and Consumers, all of whom comprise the distribution chain.

[13] Class Counsel submits this two-stage approach is novel in that it avoids the fragmented approach in the United States to price-fixing conspiracy claims. Under U.S. Federal anti-trust laws, only direct purchasers are entitled to claim damages, notwithstanding that some of the overcharge may have been passed through the distribution chain: *Sherman Act,* 26 Stat. 209, 15 U.S.C. §1. Over 20 states have responded to this Federal law by passing state laws that permit indirect purchasers, harmed by a conspiracy, to claim damages in state courts.

The Motions for Certification

[14] The *CPA* is a procedural statute. Section 5 of the *CPA* sets out the test for certification. The word "*shall*" in s. 5(1) is mandatory: the court must certify an action as a class proceeding if all of the five criteria of s. 5(1) of the *CPA* are met and if there is no other reason to refuse to make the order. *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 at 744 (Gen. Div.); *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 at para. 13.

[15] To certify an action as a class proceeding under s. 5, the plaintiff requires a "minimum evidentia[ry] basis for a certification order." It is necessary that the plaintiff "show some basis in fact for each of the certification requirements," other than the requirement in s. 5(1)(a). The "adequacy of the record will vary in the circumstances of each case." *Hollick v. The City of Toronto,* [2001] S.C.J. 67 at para. 25.

[16] On thes certification motions, there is before the court a substantial evidentiary base touching on all the requirements of s. 5(1). While the motions for certification vary in terms of the parties and Vitamins involved, the motions can conveniently be discussed as a single motion.

[17] The following principles apply to the issue as to whether the pleadings disclose a cause of action under s. 5(1)(a) of the *CPA*:

(a) no evidence is admissible for the purposes of determining the s. 5(1)(a) criterion;
(b) all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved and thus assumed to be true;
(c) the pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect;
(d) the novelty of the cause of action will not militate against the plaintiff;
(e) matters of law not fully settled in the jurisprudence must be permitted to proceed; and
(f) the statement of claim must be read generously to allow for inadequacies due to drafting frailties and the plaintiff's lack of access to key documents and discovery information. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 990-991; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.) at 679; *Hollick, supra*, at para. 25; *M.C.C. v. Canada (A.G.)*, [2004] O.J. No. 4924 (C.A.) at para. 41.

[18] The plaintiffs allege the following causes of action:

(a) the Defendants contravened s. 45(1) of Part VI of the *Competition Act*, R.S.C. 1985 c.C-34, giving rise to a right of damages under ss. 36(1) and 45(1);

(b) the Defendants are liable for tortious conspiracy and intentional interference with economic interests; and

(c) the Defendants are liable for punitive damages.

[19] The plaintiffs submit that it is not "plain and obvious" and beyond doubt that they could not succeed in the causes of action pleaded.

[20] Class definition is critical because it identifies the persons who are entitled to notice, entitled to relief, if relief is awarded, and bound by the judgment. A class definition must be "defined...by reference to objective criteria." A class definition dependent upon a determination of an issue in the action is unacceptable because the merits are not to be decided at the certification stage. *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, at para. 38.

[21] A class definition must bear a rational relationship to the common issues. *Canadian Shopping Centres, supra*, at para. 38; *Hollick, supra*, at para. 17; *M.C.C. v. Canada, supra*, at para. 45.

[22] The proposed class definition for each of the Ontario Actions can be stated as follows:

> All persons in Canada who purchased the relevant Class Vitamin(s) in Canada in the relevant Purchase Period(s) except the Excluded Persons and persons who are included in the corresponding British Columbia and Quebec Actions.

[23] The proposed class definitions embody all levels of purchasers, including those who purchased Vitamins in raw form and those who purchased a product of which Vitamins were a component part. As the court recognized in *Illinois Brick Co. v. Illinois,* 97 S. Ct. 2061 (1977) at paras. 737-38, in the absence of a bar respecting the use of the passing-on defence, the class necessarily has to include all levels of plaintiffs, from direct purchasers to intermediate purchasers to ultimate consumers. All groups of class members must be present to ensure that the wrongdoers do not retain any of the fruits of their wrongdoing and to protect the rights of the class members to make a claim against a common fund to address their losses.

[24] The case of *Hanover Shoe v. United Shoe Machinery Corp.,* 392 U.S. 481 (1968) serves as a starting point for the background of American price-fixing case law. Heard by the U.S. Supreme court in 1968, *Hanover Shoe* involved allegations by the plaintiffs that the defendants had monopolized the shoe machinery industry in violation of the *Sherman Act, supra,* resulting in an overcharge. The defendants argued that the plaintiff class had passed on some or all of the overcharge and therefore, was not entitled to recover such damages. The court rejected this defence, holding that the passing-on defence was not available to the defendants. In making its decision, the court determined that if the passing-on defence was permitted treble-damages actions would become too complicated, and the alleged co-conspirators "would retain the fruits of their illegality" because indirect purchasers, having only modest claims, would be unlikely to sue.

[25] The above decision was affirmed in 1977 in *Illinois Brick, supra,* another U.S. Supreme Court decision. The State of Illinois brought an action against manufacturers and distributors of concrete block in the Greater Chicago area. The State alleged that the defendants' illegal overcharges had been passed on through various levels of contractors to the plaintiff consumers, or indirect purchasers, causing them to suffer a loss. The court held that the passing- on theory must be applied uniformly for plaintiffs and defendants alike. Therefore, the plaintiffs could not use the passing-on theory offensively in light of the court's prior ruling that it could not be used defensively. The court further stated that only overcharged direct purchasers, and not others in the chain of manufacture or distributors, are considered parties "injured in his business or property" within the meaning of the *Clayton Act,* 38 Stat. 731, 15 U.S.C. §15: *Illinois Brick.*

[26] The result of *Illinois Brick* is arguably to create a windfall for a direct purchaser that passes on an overcharge in whole or in part to an indirect purchaser. The indirect purchaser, who suffers a loss as a result of the conspiracy, would be barred from any recovery.

[27] The decision of the U.S. Supreme Court in *Illinois Brick* was criticized in many quarters. The reasoning of its critics is largely contained within the dissent written by Mr. Justice Brennan at 749, joined by Mr. Justice Marshall and Mr. Justice Blackmun:

> Today's decision flouts Congress' purpose and undermines the effectiveness of the private treble-damages action as an instrument of antitrust enforcement. For in many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution. In these instances, the Court's decision frustrates both the compensation and deterrence objectives of the treble-damages action. Injured consumers are precluded from recovering damages from manufacturers and direct purchasers who act as middlemen have little incentive to sue suppliers so long as they may pass on the bulk of the illegal overcharges to the ultimate consumers.

[28] Since the Supreme Court's decision in *Illinois Brick,* more than twenty states have enacted statutes which authorize indirect purchaser lawsuits. These statutes serve to ensure that the *Illinois Brick* decision does not bar state residents from potential recoveries against alleged conspirators. The United States Supreme Court has ruled that such statutes are not pre-empted by the court's decision in *Illinois Brick.* See *California v. ARC America Corp.*, 109 S. Ct. 1661 (1989) at 1665.

[29] A national class which includes class members in all provinces and territories except Quebec (Consumers only) and British Columbia is appropriate. The subject matter of the class actions has a real and substantial connection to the province of Ontario. As stated by this Court in its decision dismissing the Defendants jurisdictional challenge:

> [i]n my view, if the alleged conspiracy in each of the class actions is proven, there is a real and substantial connection with Ontario in respect of the subject matter of the actions in tort.

[30] I continued on to say:

> [t]he centre of gravity for each of the class actions, initially on behalf of putative plaintiff 'national classes', is Ontario. *Vitapharm Canada Ltd. v. F. Hoffmann-LaRoche Ltd.*, [2002] O.J. No. 298 (S.C.J.) at paras. 100-101.

[31] National classes have been certified by the Ontario court in many class actions. *Wilson v. Servier Canada Inc.,* (2000), 50 O.R. (3d) 219 at 228 (Sup. Ct.), leave to appeal denied (2000), 52 O.R. (3d) 20, leave to appeal to S.C.C. denied September 6, 2001. Recently, Sharpe J.A. said that "there are strong policy reasons favouring the fair and efficient resolution of interprovincial and international class action litigation." *Currie* v. *McDonald's Restaurants of Canada Ltd.,* [2005] O.J. No. 506 (C.A.) at para. 15; *Alfresh Beverages Canada Corp. v. Hoechst AG,* [2002] O.J. No. 79 (S.C.J.) at para. 2.

[32] The plaintiffs propose the following common issue for each of the Ontario Actions:

> Did the Settling Defendant(s) and its/their Affiliated Defendants(s) in the relevant Ontario Action agree to fix, raise, maintain or stabilize the prices of, or allocate markets and customers for, the relevant Vitamins(s) in Canada in the relevant Purchase Period?

[33] The definition of "common issues" in section 1 of the *CPA* "represents a conscious attempt by the Ontario legislature to avoid setting the bar for certification too high." The common issues need only to "advance the litigation. Resolution through the class proceeding of the entire action, or even resolution of a particular legal claim...is not required." This requirement has been described by the Court of Appeal "as a low bar." The Supreme Court of Canada has held that in framing the common issues, the guiding question should be "whether allowing the suit to proceed as a representative one would avoid duplication of fact finding or legal analysis." The common issues question should be approached purposively. *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.) at 248-249; *M.C.C. v. Canada, supra*, at para. 52; *Western Canadian Shopping Centres, supra*, at para. 39; *Rumley v. British Columbia*, [2001] S.C.J. No. 39 at para. 29.

[34] Price-fixing conspiracy cases by their nature, deal with common legal and factual questions about the existence, scope and effect of an alleged conspiracy. Putative class members have a common interest in any proof of a concerted action, conspiracy and of agreement with the aim and result of restricting trade. *In Re Sugar Industry Antitrust Litigation* 73 F.R.D. 322 (E.D. Pa. 1976) at 335.

[35] In the United States, it is widely accepted that:

> [An] allegation of price-fixing...will be viewed as a central or single overriding issue or a common nucleus of operative fact and will establish a common question. Herbert B. Newberg & Alba Conte, *Newberg on Class Actions,* 3d. ed. (Colorado: Sheppards/McGraw-Hill, 1992) at 18-15 to 18-21.

[36] If each class member in the subject class actions proceeded individually against the Defendants, each would have to prove the existence and impact of the identical conspiracy to fix prices and allocate markets. Therefore, in each of these actions the common issue satisfies the test of advancing the proceeding and avoiding duplication of the fact-finding and legal analysis. *Rumley, supra*, at para. 29.

[37] "[T]he preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members." The only litigation alternatives to these class actions are

a plethora of individual actions or no individual actions. These are not realistic alternatives to a class action. *M.C.C. v. Canada, supra*, at para. 73.

[38] One goal of the *CPA* is "litigation efficiency" or "judicial economy ... to enable the court system to deal efficiently with a large number of claims [arising] from the same event." Another goal is to encourage access by victims to the court system. Thus, it is said, the *CPA* is "anchored in the principles of access to justice and judicial economy." The assessment of the s. 5(1)(d) requirement of the *CPA* "should be conducted through the lens of the three principles of advantages of class actions – judicial economy, access to justice, and behavioural modification." *Carom, supra*, at 238-239; *Hollick, supra*, at para. 27.

[39] It is necessary "to assess the litigation as a whole" and "to adopt a practical cost-benefit approach to" the s. 5(1)(d) requirement. It is "essential to assess the importance of the common issues in relation to the claim as a whole." *Hollick, supra,* at para. 29; *M.C.C. v. Canada, supra*, at para. 76.

[40] These class actions are the preferable procedure because they present a fair and manageable process. Moreover, for class members there are no "alternative avenues of redress apart from individual actions." Further, "individual actions would be less practical and less efficient than a class proceeding." Thus, certification would increase access to justice. *Hollick, supra*, at para. 31; *Rumley, supra,* at paras. 37-38.

[41] A class proceeding is the preferable procedure because it provides a fair, efficient and manageable method of determining the common issues and because it will advance the actions in accordance with the goals of judicial economy, access to justice and behaviour modification. In the absence of these class actions, it is unlikely that the majority of claims would be advanced at all. This accords with the preferability test as enunciated by the Supreme Court of Canada in *Rumley* and in *Hollick,* namely, whether or not the class proceeding would be a fair, efficient and manageable method of advancing the claim, and whether a class proceeding is preferable, in the sense of preferable to other procedures. *Rumley, supra,* at para. 35; *Hollick, supra*, at paras. 28-31.

[42] Any notion of judicial economy would be destroyed if each class member was required to proceed individually against the Defendants and to prove the existence and impact of the identical conspiracy to fix prices. *Re Catfish Antitrust Litigation,* 826 F. Supp. 1019 (N.D. Miss. 1993) at 1034.

[43] Each of the proposed representative plaintiffs is a Direct Purchaser, Intermediate Purchaser, or Consumer, and each is a class member within the proposed relevant Settlement Class definition. Each of the plaintiffs would fairly and adequately represent the interests of the Settlement Classes.

[44] The plaintiffs do not have on the common issue any interest in conflict with the interests of other class members. In conspiracy claims, every buyer and seller in the class has a common interest in proving the existence of the conspiracy and in maximizing the aggregate amount of

class-wide damages. *Re NASDAQ Market-Makers Antitrust Litigation,* 169 F.R.D. 493 (S.D.N.Y. 1996) at 513.

[45] The plaintiffs have produced a plan through the Agreement which sets out a workable method of resolving the litigation on behalf of the Settlement Classes and of notifying class members.

[46] The motion for certification is, of course, a necessary prerequisite to obtaining approval of the proposed settlement. The Settling Defendants will only settle if the plaintiff class members are to be bound by the settlement, subject to the right to opt out. The consent of the Settling Defendants is only for the purpose of giving effect to the settlement and is conditional upon the Court's approval of the settlement.

[47] In my view, and I so find, the prerequisite criteria required by the *CPA* for certification are met. Subject to the issue of the motions for settlement approval being determined favourably, orders shall issue certifying the Ontario class actions under consideration as requested in the motion records in respect of the Settling Defendants. (See paragraph 106 of these Reasons for a summary.) I turn now to a consideration of the proposed settlements.

The Proposed Settlements

[48] The proposed class action settlements at hand total, by far, the largest amount recovered in a class action relating to price-fixing in Canada. The settlements are based on a total damage assessment of about $140 million, including interest, expenses and costs and would result in an anticipated recovery of about $100 million after the deduction of Settlement Credits.

[49] Direct Purchasers will receive up to 12% of the value of their Vitamin purchases. The benefits available to Intermediate Purchasers and Consumers will be paid *cy-près* to carefully selected and well-recognized consumer and industry organizations. Each *cy-près* recipient has prepared a detailed proposal for the expenditure of its share of the settlement monies. Each recipient will be held accountable for the monies it receives through compliance with strict governing rules.

[50] During the settlement negotiations, Class Counsel sought damages for the class as a whole. As a result of these negotiations, the Settlement Amount reflected in the Agreement was $132,450,000 plus Pre-Deposit Interest. Since then:

(a) Akzo, a defendant in the Ontario Choline Chloride Action, has agreed to pay $250,000 to settle the claims against it. (Akzo did not sell choline chloride in Canada);

(b) UCB, a defendant in the Supplemental Ontario Choline Chloride Action, has agreed to pay $250,000 to settle the claims against it. (UCB did not sell choline chloride in Canada); and

(c) Reilly, a defendant in the Ontario Niacin Action, has agreed to settle the claims against it for $32,728.80, based on 16.5% of its sales of $184,154.50, plus interest of $2,323.30 from March 1, 2003.

[51] In April 2002, the plaintiffs reached an agreement in principle with three of the Settling Defendants to resolve all of the actions for the amount of $144,000,000 plus post-agreement interest, assuming that all other Defendants agreed to participate.

[52] In November 2002, after the first mediation before Mr. Justice Winkler, a memorandum of understanding was signed with some of the Defendants reflecting a Settlement Amount of $148,500,000, being $144,000,000 plus capitalized interest of $4,500,000.

[53] By February 2003, some of the Defendants who sold methionine advised that they would not participate in the proposed settlement. Thus, an adjustment was required. After negotiations and as a result of a second mediation, the amount of $148,500,000 was reduced to $133,200,000.

[54] In the fall of 2004 and January, 2005, there ware further adjustments to the Settlement Amount to bring it to $132,450,000.

[55] The $132,450,000 includes some capitalized interest (in an amount less than $4,500,000) and is treated as damages.

[56] The proposed settlements are based on a total of $140,676,928, as of the Deposit Date, calculated as follows:

Item	**Amount**
Aggregate damages per Amended Settlement Agreement (Settlement Amount $132,450,000 less expenses of $10,000,000)	$122,450,000
Plus: Akzo, UCB, Reilly settlement amounts totaling	$532,728
Subtotal of aggregate damages	**$122,982,728**
Plus: expenses per Amended Settlement Agreement	$10,000,000
Subtotal including expenses	**$132,982,728**
Plus: Pre-Deposit Interest per Amended Settlement Agreement	$7,694,200
Total	**$140,676,928**

[57] Sales of Vitamins in Canada which were subject to the alleged conspiracies totaled about $950,000,000. This amount includes about $43,000,000 of methionine sales by a Settling Defendant and estimated methionine sales of about $80,000,000 by the Defendants who have not

settled. Therefore, the settlements are based upon Vitamins sales in Canada totaling about $870,000,000 ($950,000,000 minus $80,000,000).

[58] Dr. Thomas Ross, the plaintiffs' expert, concludes in his affidavit that the "best 'point' estimate corresponds to overcharges on the order of 16%." He also states, "absent the conspiracy, the quantity of vitamins purchased would have cost buyers only $749 million rather than $870 million, implying an aggregate damage number (overcharge) of $121 million."

[59] Dr. Ross also states:

> In summary, I suggest that a range of $103 million to $138 million provides a very good estimate of the damage arising from the price-fixing conspiracy considered in this affidavit. The "best estimate" or "point estimate" is approximately $121 million and the associated price overcharge is 16.2%. This percentage price overcharge is similar to that estimated by Beyer for the United States.

[60] The settlements contemplate aggregate damages of $122,982,728 which compares favourably with Dr. Ross' "estimate of the damage arising" in the "range of $103 million to $138 million."

[61] In his affidavit on settlement approval in the U.S. direct purchaser vitamins class action, economist Dr. John Beyer opined that the weighted average overcharge based on his regression analysis (using U.S. data) was 13.5%. This estimate can be compared to Dr. Ross' regression analysis of a 16.2% overcharge (using Canadian data). The settlement in the U.S. Federal Court was in the range of 18% to 20% of gross sales in an environment of treble damages and large jury verdicts.

Direct Purchasers

[62] The aggregate damages of $122,982,728 includes the sales to the Direct Purchasers who commenced actions or made claims against some Settling Defendants and who have settled their claims directly with them.

[63] Prior to the first mediation on October 7, 2002, and in the context of claims and/or ongoing litigation and at arm's length, three Settling Defendants paid, in total, $24,100,000 to settle individual claims of Direct Purchasers who had purchased a total of $200,500,000 of Vitamins from them. This equates to an average overcharge of 12% of sales.

[64] Each Direct Purchaser who settled with a Settling Defendant is excluded from the settlements as an "Excluded Customer" because it has already been paid and no longer has a claim. The Settling Defendants are entitled to a deduction from the aggregate damages, reflecting the payments they made to such Excluded Customers who are not class members because they no longer have a claim.

[65] Each Settling Defendant who settled with a Direct Purchaser is entitled to a Settlement Credit calculated as 12% of the Purchase Price. The Settlement Credits particularized in the Agreement total $42,436,670. These Settlement Credits represent settlements made by the Settling Defendants with Direct Purchasers who purchased approximately $353,639,000 of Vitamins, calculated as:

$$\frac{\$42,436,670}{12\%} \times 100\%$$

[66] By the time of the signing of the Agreement, the aforementioned three Settling Defendants had paid, on average, 11.5% of the Purchase Price to the Direct Purchasers with whom they settled.

[67] After taking into account Settlement Credits, the Settling Defendants have agreed to pay to the Administrator approximately $98,240,258 as calculated in the following chart:

Item	Amount
Aggregate damages as per Amended Settlement Agreement	$122,450,000
Plus: Akzo Settlement Amount	250,000
Plus: UCB Settlement Amount	250,000
Plus: Reilly Settlement Amount	32,728
Subtotal of aggregate damages	**122,982,728**
Plus: expenses as per Amended Settlement Agreement	10,000,000
Subtotal of aggregate damages plus expenses	**132,982,728**
Plus: Pre-Deposit Interest as per Amended Settlement Agreement	7,694,200
Subtotal of aggregate damages, expenses and Pre-Deposit Interest	**140,676,928**
Less: Settlement Credits per the Amended Settlement Agreement	(42,436,670)
Total payable to Administrator	**$98,240,258**

[68] The monies paid to the Administrator will earn interest in the Administrator's hands before being paid out. The additional interest to be earned will total about $2,000,000. Thus, the total recovered through the settlement of the class actions is estimated to be in excess of $100,000,000 ($98,240,258 + $2,000,000).

[69] Five Funds are established by s. 6.1(1) of the Agreement. The estimated amount allocated to each Fund is set forth in the following chart:

Fund	Allocation by Amended Settlement Agreement	Settlement Credits	Interest % allocation	Pre-Deposit Interest	Akzo, UCB and Reilly Settlements	Amount Allocated to Each Fund
Direct Purchaser	94,450,000	(42,436,670)	.578	4,447,247	250,000	56,710,577
Intermediate Purchaser	11,000,000	n/a	.122	938,693	141,364	12,080,057
Consumer	11,000,000	n/a	.122	938,693	141,364	12,080,057
Methionine	6,000,000	n/a	.067	515,511	n/a	6,515,511
Expense	10,000,000	n/a	.111	854,056	n/a	10,854,056
Total	**132,450,000**	**(42,436,670)**		**7,694,200**	**532,728**	**$98,240,258**

[70] The recognition of Settlement Credits at 12% and the entitlement of each Direct Purchaser to receive up to 12% of the Purchase Price are inter-related and flow from the same relevant statistical information obtained by Class Counsel from some of the Defendants during the course of settlement negotiations.

[71] As a result of the first mediation, Class Counsel agreed that it was reasonable for each Direct Purchaser to be paid up to 12% of its Purchase Price.

[72] Together, the Direct Purchaser Fund and the Methionine Fund are allocated $105,662,758 with Pre-Deposit Interest (but before Settlement Credits), calculated as follows:

Item	Amount
Direct Purchaser Fund: Amended Settlement Agreement	94,450,000
Methionine Fund: Amended Settlement Agreement	6,000,000
Subtotal	100,450,000
Pre-Deposit Interest on Direct Purchaser Fund	4,447,247
Pre-Deposit Interest on Methionine Fund	515,511
Akzo Settlement Agreement contribution to the Direct Purchaser Fund	250,000
Total	**$105,662,758**

[73] The allocation of $105,662,758 to the Direct Purchaser Fund and the Methionine Fund was made in contemplation of payments to Direct Purchasers of $104,400,000, being 12% of the total Vitamin sales of $870,000,000. Class counsel submits that this allocation to the Direct

Purchaser Fund gives Direct Purchasers added assurance that they will be paid 12% of the Purchase Price and will motivate them to participate in the settlements rather than opt out.

[74] Direct Purchasers must decide whether or not to participate before the precise percentage payout of the Purchase Price to each Direct Purchaser is known. It is critical to the implementation of the settlements that Direct Purchasers do not opt out of the settlements. If Direct Purchasers with sales in excess of the Opt Out Threshold opt out, then the Settling Defendants, at their option, may declare the Agreement null and void pursuant to s. 14.4 thereof.

[75] The Methionine Fund will not be distributed to Direct Purchasers of methionine at this time. It will be held pending a further order of the Court.

[76] However, if the requested $18,075,000 for Administration Expenses and Class Counsel Fees were to become payable, approximately $300,000 would be paid out of the Methionine Fund towards these costs.

[77] The proposed method of payments by the Administrator is user friendly for Direct Purchasers. The Administrator will write to virtually all Direct Purchasers to advise of their right to claim and, for many, will provide the precise amount due to the Direct Purchaser based on 12% of their Purchase Price as disclosed by the Settling Defendants to the Administrator.

[78] If the Direct Purchaser agrees with the amount calculated by the Administrator, the Direct Purchaser need not produce any Purchase Price information. If the Direct Purchaser disagrees with the Administrator's calculation or the Administrator has no Purchase Price data for a particular Direct Purchaser, then the Direct Purchaser must prove the Purchase Price to the satisfaction of the Administrator by producing invoices or other records.

[79] There are tens of thousands of Intermediate Purchasers and millions of Consumers in the classes.

[80] There are substantial difficulties associated with the determination of the actual damage (taking into account pass through) suffered by each Intermediate Purchaser and Consumer. Moreover, the complexity and administrative costs associated with any direct distribution to each Intermediate Purchaser and Consumer would be prohibitive. Thus, the settlements contemplate *cy-près* distributions to these two groups of class members.

[81] After the allocation to Direct Purchasers and to expenses, the balance of the settlement monies is to be divided equally between the Intermediate Purchasers and Consumers so that each Fund initially would receive $11,000,000 plus Pre-Deposit Interest. Class Counsel submit this to be reasonable given the complexities associated with a precise calculation of the damages of these class members.

Intermediate Purchasers

[82] The Intermediate Purchaser Fund will be distributed *cy-près* to industry organizations for the benefit of Intermediate Purchasers.

[83] Intermediate Purchasers can generally be classified into one of three categories: agricultural producers, grocer/wholesalers, and drugstores/pharmacies. The Intermediate Purchaser Fund Distribution Protocol, a negotiated term of the Agreement, is found at Schedule F. It allocates 70% percent of the fund to agricultural producers, 15% to grocer/wholesalers and 15% to drugstores/pharmacies.

[84] The Intermediate Purchaser Fund Distribution Protocol is intended to provide benefits to Intermediate Purchasers by funding industry organizations. Class Counsel identified potential recipient organizations by internet research and discussions with various industry organizations. Each potential recipient was evaluated against the following criteria:

(a) the organization's membership base;

(b) whether the organization was national in scope;

(c) the organization's ability to deliver benefits to a particular group of Intermediate Purchasers; and

(d) the organization's financial stability.

[85] Proposed recipients have agreed to comply with the rules governing *cy-près* distributions which were developed with the assistance of the Administrator, Deloitte & Touche LLP, and are found at s. 1.3 of Schedule F. These rules seek to ensure that all recipient organizations account to the Courts for the settlement funds they receive.

[86] Each proposed recipient:

(a) prepared a detailed proposal which is before the Court;

(b) delivered a resolution from its Board of Directors or governing body authorizing the submission of a proposal for funding and confirmed it would comply with the procedures governing distribution; and

(c) has agreed to use the funds in a manner that will deliver an identifiable benefit to its respective membership.

[87] The Canadian Cervid Council was to receive 0.112% of the money available to Intermediate Purchasers. However, it is now defunct. Thus, funds otherwise to have been allocated to the Canadian Cervid Counsel will be distributed to the remaining participating organizations as provided in Schedule F.

[88] The Canadian Goat Society is to receive 0.098% of the Intermediate Purchaser Fund. The Canadian Goat Society seeks approval to share its portion of the settlement funds with the Canadian Boer Goat Association, a group that also represents Canadian goat producers. This is accepted as a request. Therefore, upon Court approval, each of these two organizations will receive 50% of the funds earmarked for the Canadian Goat Society.

[89] Schedule F provides that two industry organizations representing grocers and grocer/wholesalers in Canada, the Federation of Independent Grocers and the Canadian Council of Grocery Distributors, are to receive 4.5% and 10.5% respectively of the available monies. Combined, the membership in these two organizations accounts for virtually all grocer/wholesalers in Canada.

[90] Schedule F also provides that the Canadian Association of Chain Drugstores, an industry organization that represents the interests of over 70% of all retail drugstores and pharmacies in Canada, is to receive 15% of the available monies on behalf of drugstore/pharmacies.

[91] Assuming a distribution of $11,400,000, the following chart lists the proposed *cy-près* recipients on behalf of Intermediate Purchasers, the initial percentage they were to receive, their percentage taking into account the adjustment because of the demise of the Canadian Cervid Council, and the amount each is actually to receive:

Proposed Recipients	**Initial %**	**Adjusted %**	**Adjusted Allocation**
Agricultural Producers - 70%			
Canadian Pork Council	22.12	22.123	2,522,022
Canadian Cattlemen's Association	18.795	18.799	2,143,086
Dairy Farmers of Canada	10.927	10.934	1,246,476
Chicken Farmers of Canada	7.469	7.476	852,264
Canadian Egg Marketing Agency	3.22	3.227	367,878
Canadian Aquaculture Industry Alliance	2.884	2.891	329,574
Canadian Turkey Marketing Agency	1.463	1.47	167,580
Equine Canada	1.162	1.169	133,266
Poultry Research Council	0.784	0.791	90,174
Canadian Broiler Hatching Egg Marketing Agency	0.525	0.532	60,648
Canadian Sheep Federation	0.266	0.273	31,122
Canadian Bison Association	0.175	0.182	20,748
Canadian Cervid Council (now defunct)	0.112	0	0
Canadian Goat Society	0.098	0.056	6,384
Canadian Boer Goat Association	0	0.056	6,384
Grocer Wholesalers - 15%			

Proposed Recipients	Initial %	Adjusted %	Adjusted Allocation
Canadian Council of Grocery Distributors	10.5	10.507	1,197,798
Canadian Federation of Independent Grocers	4.5	4.507	513,798
Drugstores/Pharmacies - 15%			
Canadian Association of Chain Drugstores	15.0	15.007	1,710,798
Total	**100.0**	**100.0**	**11,400,000**

Consumers

[92] The initial corpus of the Consumer Fund will be distributed to consumer organizations for activities related to Vitamin Products, such as food and nutritional research, education and food programs, consumer services, or consumer protection activities for the indirect benefit of Consumers of all ages.

[93] The Consumer Fund Distribution Protocol, a negotiated term of the Agreement, is found at Schedule G. It allocates 30% of the initial monies in the Consumer Fund to research/advocacy groups for the benefit of all Consumers across Canada. The remaining 70% will be divided, based on population, between Quebec (16.5%) and the rest of Canada (53.5%) and allocated to service delivery groups. (Quebec Counsel independently have assumed responsibility for allocating the portion of the Consumer Fund earmarked for Quebec Consumers. This distribution is set out in s. 1.2(4) of Schedule G.) (The Quebec Court is to receive full particulars of these organizations and their plans.)

[94] Proposed recipients were identified through internet research, discussions with various consumer organizations and through consultation among Class Counsel. Additionally, Class Counsel consulted with Mr. Gordon Wolfe, a person employed in the non-profit sector with knowledge of charitable and non-profit organizations.

[95] Class Counsel recognized that selecting regional or provincial organizations would make equal treatment across Canada difficult, so they concentrated on selecting Canadian-wide organizations that had a presence in most, if not all, provinces and territories.

[96] Each potential recipient was evaluated against the following criteria:

(a) the organization's ability to deliver benefits in each province and territory;

(b) the organization's ability to reach one or more of the target age groups, being children, youth, adults, or the elderly;

(c) whether the organization was non-denominational;

(d) whether the organization had a charitable or non-profit designation;

(e) the organization's financial stability and budget; and

(f) the organization's history of advocacy, service delivery, research, or education relevant to Vitamin Products.

[97] Financial information was obtained from each potential recipient. The size of an organization's budget was a consideration in determining what proportion of the Consumer Fund, if any, a particular organization should receive.

[98] Each proposed recipient prepared a detailed proposal which is before the Court. Each proposed recipient also delivered a resolution from its Board of Directors or governing body authorizing the submission of a proposal for funding and confirming that it will comply with the rules governing *cy-près* distributions found at Schedule G. Class Counsel have reviewed all of the proposals and state their belief that, if the distribution is made as proposed, the funds will provide a tangible benefit to Consumers.

[99] Assuming an initial distribution of $11,400,000, the following chart lists the proposed *cy-près* recipients on behalf of Consumers and the amount each is to receive:

Proposed Recipients	**%**	**Allocation**
Allocation to National Organizations - 30%		
Food Safety Network	29.0	991,800
Option Consommateurs (Canada)	29.0	991,800
Canadian Foundation for Dietetic Research	12.5	427,500
The Centre for Research in Women's Health	10.5	359,100
The Centre for Science in the Public Interest	10.5	359,100
Canadian Institute of Food and Nutrition	8.5	290,700
Allocation to all provinces and territories except Québec - 53.5%		
Victoria Order of Nurses	35.0	2,134,650
Canadian Association of Food Banks	25.0	1,524,750
Boys and Girls Clubs of Canada	20.0	1,219,800
Breakfast for Learning	15.0	914,850
Canadian Feed the Children	5.0	304,950
Allocation to Québec - 16.5%		
Centraide pour tout le Québec	46.0	865,260
Fonds d'aide au recours collectif	19.0	357,390
Campagne de prévention à l'endettement des 40	10.0	188,100

Proposed Recipients	%	Allocation
associations de consommateurs du Québec		
Projet Petits prêts (en collaboration avec la Fiducie Desjardins et la Coalition des associations des consommateurs du Québec)	9.0	169,290
Fondation Claude Masse	8.0	150,480
Option Consommateurs	8.0	150,480
Total		**$11,400,000**

[100] The Agreement also provides in s. 6.2(7) that any remaining "balance in the Direct Purchaser Fund...shall be transferred to and become part of the Consumer Fund." Based on experience and the statistics from other price-fixing class actions, class counsel are of the view that it is probable that the "take-up rate" by Direct Purchasers will be less than 100% and that substantial monies will trickle down to the Consumer Fund.

[101] Section 1.3 of the Consumer Fund Distribution Protocol creates an alternative method to distribute monies which are subsequently allocated to the Consumer Fund as a result of trickle down from the Direct Purchaser Fund.

[102] Although within the Consumer Fund Distribution Protocol, the intent of this alternative method of distribution is to benefit both Consumers and Intermediate Purchasers. This is accomplished by paying the vast majority of the trickle down monies to universities and colleges.

[103] For example, the allocation to the Ontario Veterinary College at the University of Guelph seeks in part to benefit Intermediate Purchasers, many of whom are in the agricultural business.

[104] The following chart lists the proposed recipients of the monies which could subsequently be allocated to the Consumer Fund and the amounts each would receive, assuming an amount of $10,000,000 trickles down:

	%	Allocation
Northwestern Region - 30.3%		
University of British Columbia	45	1,363,500
University of Alberta	33	999,900
University of Manitoba	12	363,600
Western College of Veterinary Medicine, University of Saskatchewan	10	303,000
Eastern Region – 7.6%		
Memorial University	50	380,000
Dalhousie University	50	380,000
Ontario - 38.4%		

	%	Allocation
University of Toronto	25	960,000
University of Guelph	25	960,000
Ontario Veterinary College, University of Guelph	25	960,000
Ontario Agri-Food Education	25	960,000
Québec - 23.7%		
Université Laval	27	639,900
McGill University	26	616,200
Faculté de médecine vétérinaire, Université of Montréal	27	639,900
Option Consommateurs [to a maximum of $1 million]	20	474,000
Total	**100**	**$ 10,000,000**

[105] Option Consommateurs is to receive $1,142,280 of the initial Consumer *cy-près* distribution and 20%, to a maximum of $1,000,000, of the trickle down distribution. Option Consommateurs is not only a *cy-près* recipient but also a representative plaintiff in Quebec. In Quebec, Option Consommateurs has a unique status and has the capacity to sue on behalf of Consumers. As representative plaintiff, Option Consommateurs has been the recipient on behalf of Quebec Consumers of a portion of settlement funds in eight settled actions.

The status of the Ontario class actions upon settlement approval

[106] The following chart lists the outstanding class actions in Ontario and the status of each action if the Court approves the proposed settlements and they become effective.

Proceeding	Settling Defendants	Non-Settling Defendants
Ontario Biotin Action Glen Ford v. F. Hoffmann-La Roche Ltd.	F. Hoffmann-La Roche Ltd., Merck KGaA, Lonza AG, Sumitomo Chemical Co., Ltd., Tanabe Seiyaku Co., Ltd.	none
Ontario Bulk Vitamins Action Glen Ford v. F. Hoffmann-La Roche Ltd.	F. Hoffmann-La Roche Ltd., Aventis Animal Nutrition S.A., Eisai Co., Ltd., Takeda Pharmaceutical Company Limited (formerly Takeda Chemical Industries, Ltd.), Merck KGaA, Daiichi Pharmaceutical Company,	none

Proceeding	Settling Defendants	Non-Settling Defendants
	Ltd.	
Ontario Choline Chloride Action Fleming Feed Mill Ltd. v. BASF Atkiengesellschaft	Chinook Group Limited (incorrectly named Chinook Group, Ltd.) BASF Aktiengesellschaft Bioproducts, Incorporated (incorrectly named Bioproducts, Inc.) Akzo Nobel Chemicals BV	DCV, Inc. DuCoa, L.P.
Supplemental Ontario Choline Chloride Action Fleming Feed Mill Ltd. v. UCB S.A.	UCB S.A. UCB Chemicals Corporation UCB, Inc.	none
Ontario Niacin Action VitaPharm Canada Ltd. v. Degussa-Hüls AG	Degussa Canada Inc. Lonza AG Nepera, Inc. (incorrectly named Nepera, Incorporated) Reilly Industries Inc.	none
Ontario Methionine Action Glen Ford v. Rhône-Poulenc S.A.	Aventis Animal Nutrition S.A.	Degussa-Hüls AG Degussa Corporation Degussa Canada Inc. Novus International, Inc.
Supplemental Ontario Methionine Action Glen Ford v. Novus International (Canada) Inc.	none	Novus International (Canada) Inc. Nippon Soda Co. Ltd. Mitsui & Co. Ltd.

[107] If the proposed settlements are approved, Class Counsel will continue to prosecute the Ontario Methionine Action and the Supplemental Ontario Methionine Action.

[108] The only other outstanding action will be the Ontario Choline Chloride Action against DCV Inc. and DuCoa L.P. These companies represent that they are insolvent. Class Counsel will seek the Court's direction about whether or not to continue this action against these Defendants.

[109] The following chart sets out an estimate of the timeline for the implementation of the settlement if the Courts in the three provinces give their approval :

Ontario approval hearing	March 8, 9, 2005

Decision – Ontario	By March 24, 2005
British Columbia and Quebec approval hearings	April 6 and 21, 2005
Ontario judgment final	By April 24, 2005
British Columbia and Quebec judgments final	By May 6, 2005
Implementation of Notice Program	By June 5, 2005
Opt-Out period expires and claim period for Direct Purchasers begins	By August 5, 2005
Assume Opt Out Threshold is not exceeded, Administrator will report to the Courts and the Courts declare that settlements are operative and binding (s.16.1 Amended Settlement Agreement)	By September 9, 2005
Payout of Intermediate *cy-près* and initial Consumer *cy-près* no earlier than	September 9, 2005
Claim period expires	By November 5, 2005
Payout to Direct Purchasers no earlier than	December 1, 2005
Calculation of trickle down and payout no earlier than	January 6, 2006
Final reports to Courts no earlier than	February 1, 2006

The Law

[110] A settlement of a class proceeding is not binding unless approved by the Court. To approve a settlement, the Court must find that it is fair, reasonable, and in the best interests of the class. *CPA* s. 29(2); *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 at 444 (Gen. Div.), aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372.

[111] The resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy. As observed in *Amoco Canada Petroleum Co. v. Propak Systems Ltd.* (2000), 200 D.L.R. (4th) 667 at 677 (Alta. C.A.):

> In these days of spiralling litigation costs, increasingly complex cases and scarce judicial resources, settlement is critical to the administration of justice.

[112] Similar sentiments have been expressed by Cronk. J.A., in *J.M. v. W.B.*, [2004] O.J. No. 2312 at para. 65 (C.A.) :

> Finally, there is an additional, and powerful, reason to support the implementation of the Agreements in this case: the overriding public interest in encouraging the pre-trial settlement of civil cases. This laudatory objective has long been recognized by Canadian courts as fundamental to the proper administration of civil justice...Furthermore,

> the promotion of settlement is especially salutary in complex, costly, multi-party litigation.

[113] There is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arms-length by counsel for the class, is presented for court approval. *Manual for Complex Litigation,* Third §30.42 (1995). See *Cotton v. Hinton,* 559 F.2d 1326 (5th Cir. 1977) at 1330; *Dabbs* (Gen. Div.), *supra,* at 440.

[114] To reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a range of reasonable outcomes. *Dabbs* (Gen. Div.), *supra,* at 440.

[115] In general terms, a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a "zone or range of reasonableness":

> ...all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation. *Dabbs* (Gen. Div.), *supra,* 440; Newberg, *supra,* at 11-104.

[116] A similar standard has been applied in non-class action proceedings in Ontario. The courts recognize that settlements are by their very nature compromises, which need not, and usually do not, satisfy every single concern of every stakeholder. Acceptable settlements may fall within a broad range of upper and lower limits:

> In cases such as this, it is not the court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court's function to litigate the merits of the action. I would also state that it is not the function of the court to simply rubber-stamp the proposal. *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 at 230 (H.C.J.).

[117] In determining whether to approve a settlement, a court takes into account factors such as:

(a) the likelihood of recovery or likelihood of success;
(b) the amount and nature of discovery, evidence or investigation;
(c) the proposed settlement terms and conditions;
(d) the recommendation and experience of counsel;
(e) the future expense and likely duration of litigation;
(f) the recommendation of neutral parties, if any;

(g) the number of objectors and nature of objections;
(h) the presence of arms-length bargaining and the absence of collusion;
(i) the information conveying to the court the dynamics of, and the positions taken by
(j) the parties during the negotiations; and
(k) the degree and nature of communications by counsel and the representative
(l) plaintiff with class members during the litigation.

Dabbs v. Sun Life Assurance Co. of Canada, [1998] O.J. No. 1598 at para. 13 (Gen. Div.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at paras. 71-72 (S.C.J.).

[118] These factors constitute a guide in the process. It is not necessary that all factors receive the same consideration. In any particular case, certain of the listed factors will have greater significance than others, and weight should be attributed accordingly. *Parsons, supra,* at para. 73.

[119] When the subject class actions were commenced, this type of litigation was novel in Canada and the approach taken by Class Counsel was significantly different from that which had been seen in the United States Federal Court. Class Counsel advanced the actions on the theory that:

> (1) the Defendants should pay the total overcharge for Vitamins sold in Canada; and
>
> (2) the actions would be pursued in a two-phased approach: first, damages for the entire Canadian Vitamins marketplace would be measured by the total overcharge for Vitamins sold in Canada during the Purchase Periods; and second, an appropriate distribution protocol would be determined or negotiated.

[120] The plaintiffs faced litigation risks. The novel nature of the actions and the theory pursued by Class Counsel created the risk that the actions, or some of them, would not be certified, and the risk that if certified, the Court would not assess damages in the aggregate. Quite probably, the Defendants would have argued that the decision of the Ontario Court of Appeal in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), aff'g (2001), 54 O.R. (3d) 520 (Div. Ct.) (certification denied), rev'g (1999), 45 O.R. (3d) 29 (Gen. Div.) (certification granted), leave to appeal to S.C.C. denied, ought as precedent to preclude certification in the actions at hand.

[121] The plaintiffs also faced risks specific to some of the Defendants and actions. For example, until October 2002, there were no guilty pleas relating to Niacin. Certain Bulk Vitamins were not the subject of criminal convictions. Moreover, certain pleas refer to

conspiracy periods which are considerably shorter than those pleaded in the actions. Therefore, Class Counsel faced the significant hurdle of having much less information to work with to prove overcharge rates for these Bulk Vitamins.

[122] If the Defendants, or some of them, were successful in establishing any of the general defences, such as pass through, or the product specific defences, such as no sales in Canada or no conspiracy, then the plaintiffs would not succeed, at least in the entirety, at a trial of the common issues and there would be limited recovery. While these defences were arguably problematical, at the very least their number and complexity would lengthen a trial of the common issues.

[123] A court "need not possess evidence to decide the merits of the issue, because the compromise is proposed in order to avoid further litigation. At minimum, a court must possess sufficient information to raise its decision above mere conjecture." The parties proposing the settlement have an obligation to provide sufficient information to permit the court to exercise its function of independent approval. Newberg, *supra*, at 11-100 & 11-101; *Dabbs v. Sun Life Assurance Co. of Canada, supra,* O.J. No. 1598, at para. 15.

[124] While the court requires sufficient evidence to be able to exercise an objective, impartial and independent assessment of the fairness of the settlement in all of the circumstances, it is not necessary that formal discovery have occurred at the time of settlement. It is clear that settlements reached at an early stage of proceedings are appropriate. *Dabbs v. Sun Life Assurance Co. of Canada, supra*, O.J. No. 1598 at paras. 15 and 24.

[125] Class Counsel had significant information about the case and a good understanding of liability and damages issues before embarking on the negotiation process. Class Counsel's grasp of these issues continued to increase throughout the negotiation process as a result of, among other things:

(a) interaction with U.S. counsel who had been litigating extensively against these Defendants and were able to assist in devising strategy and highlighting some of the strengths and weaknesses of the case;

(b) independent analysis of class member records including transaction data from Agro-Pacific, Statistics Canada data, and industry data;

(c) affidavit evidence and cross-examinations on affidavits conducted in the context of the motions by some Defendants challenging the jurisdiction of the Ontario Court;

(d) information obtained through, and as the result of, settlements with Lindel Hilling and Merck KGaA;

(e) the Agreed Statements of Fact that supported the guilty pleas; and

(f) the input from expert economists, Dr. Thomas Ross and Dr. John Beyer.

[126] There is sufficient evidence before the court to allow it to exercise an objective and independent assessment of the fairness of the proposed settlement agreements.

[127] The function of a court in reviewing a settlement is not to reopen and enter into negotiations with litigants in the hope of possibly improving the terms of the settlement. It is within the power of the court to indicate areas of concern and afford the parties an opportunity to answer those concerns with changes to the settlement. However, the court's power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement. *Dabbs v. Sun Life Assurance Co. of Canada, supra*, O.J. No. 1598 at para. 10; *Manual for Complex Litigation, supra*, at §30.42.

[128] In reviewing the terms of a settlement, a court must be assured that the settlement secures an adequate advantage for the class in return for the compromise of litigation rights; Newberg, *supra*, at 11-46.

[129] The proposed settlement under consideration contemplates aggregate damages of $122,982,728, or $132,982,728 including expenses and costs of $10,000,000, or a total of $140,676,928 with Pre-Deposit Interest. The $122,982,728 compares favourably with Dr. Ross' estimate of the actual damages being in the "range of $103 million to $138 million."

[130] The settlement reasonably allocates $56,710,577 of the settlement monies to the Direct Purchaser Fund. Any unclaimed portion will flow down to the Consumer Fund to be predominately used by universities for the benefit of Intermediate Purchasers and Consumers. Class Counsel expect that substantial amounts will flow down because the take-up rate by Direct Purchasers will not be 100%.

[131] The distribution to Intermediate Purchasers and Consumers is through two *cy-près* distribution plans, the Intermediate Purchaser Fund Distribution Protocol and the Consumer Fund Distribution Protocol to recognized industry and consumer organizations and universities. Class Counsel identified the recipient organizations through diligent research and consultation. All recipient organizations will be accountable for settlement monies received by them.

[132] Section 24 of the *CPA* permits damages to be assessed in the aggregate. Section 26 permits the court to direct the distribution of settlement monies by any means it considers appropriate whether or not such a distribution would benefit persons who are not class members or persons who otherwise might receive monetary compensation as a result of the proceeding. In other words, the *CPA* permits *cy-près* distributions of the type contemplated in Schedules F and G of the Agreement.

[133] *Cy-près* distributions of the type outlined in Schedules F and G have been accepted by the Ontario Court. In *Hoechst, supra,* at paras. 15-16, a price-fixing case involving food additives, this Court held:

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

[134] This reasoning was adopted by the Court in *Sutherland v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 (S.C.J.). The Court approved a settlement which distributed all of the settlement benefits *cy-près* to various consumer groups for the indirect benefit of class members. The Court held:

> [w]here in all the circumstances an aggregate settlement recovery cannot be economically distributed to individual class members the court will approve a cy-près distribution to recognized organizations or institutions which will benefit class members.

[135] Class Counsel are seeking an order barring any future claim for contribution or indemnity against the Settling Defendants (and UCB in the additional, trailer settlement achieved with it). Once it became clear in the course of negotiations some Defendants would not participate in a global settlement, a bar order was critical in the negotiation of the Agreement. Class Counsel submits that the form of the bar order is fair and properly balances the competing interests of the classes, the Settling Defendants, UCB and the Non-Settling Defendants. No bar order is sought by Akzo or Reilly.

[136] Bar orders have their origin in the United States and are frequently used to achieve settlement in complex tort and securities litigation, including class proceedings. In the California case of *Nelson* v. *Bennett,* 662 F.Supp. 1324 (E.D. Cal. 1987) at 1335, District Court Judge Ramirez traced the history of the development of such orders and commented that they arose to counteract the inhibiting effect of claims for contribution on settlement. From a policy perspective, Ramirez J. concluded that ruling in favour of a bar order would "accommodate both the interests of settlement and of fairness and deterrence". He further stated that a "no bar" rule would give "exclusive weight to fairness and deterrence at the complete expense of settlement."

[137] In the case *Re Nucorp Energy Securities Litigation,* 661 F.Supp. 1403 (S.D. Cal. 1987) at 1408, District Court Judge Irving went so far as to say that without some sort of settlement bar, partial settlement of any federal securities case before trial is, "as a practical matter, impossible". Any single defendant who refuses to settle, would force all other defendants to trial.

[138] Ontario courts favour settlement wherever possible and have found that the underlying principles of American bar orders may be applied in Canada. For example, in *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 at 141, a settlement agreement preventing non-settling defendants from making claims for contribution or indemnity was approved. Winkler J. considered many American authorities in support of the proposed bar order and concluded that while the U.S. cases were not dispositive of the issue, the underlying principles were applicable and, in the Ontario context, sections 12 and 13 of the *CPA* provided a mechanism for supporting these principles:

> I do, however, find that the underlying principles on which "bar orders" are granted in the American cases have some application to these proceedings. Moreover, the *Class Proceedings Act* provides a specific mechanism through which these objectives can be achieved in class proceedings in Ontario. Under s. 13 a court may "stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate". This broad discretion is buttressed by s. 12 which permits the court, on a motion by a party or class member, to make such orders as are necessary to ensure the fair and expeditious determination of the class proceeding.

[139] Following the *Ontario New Home Warranty* decision, bar orders have been approved in the class actions context in order to facilitate partial settlements in mass tort claims that benefit the plaintiffs and achieve the goals of the class proceeding legislation. See *Millard v. North George Capital Management Ltd.*, [2000] O.J. No. 1535 (S.C.J.); *Sawatzky* v. *Societe Chirurgicale Instrumentarium Inc.*, [1999] B.C.J. No. 1814 (S.C.); *Killough v. Canadian Red Cross Society*, [2001] B.C.J. No. 1481 (S.C.); *McCarthy v. Canadian Red Cross Society,* [2001] O.J. No. 2474 (S.C.J.); and *Gariepy v. Shell Oil Company* (16 April 2004), Toronto 30781/99 (Ont. Sup. Ct.) at para. 16. Most recently, in a price-fixing case, the court approved a bar order. *Bona Foods Ltd. v. Ajinomoto U.S.A,. Inc.*, [2004] O.J. No. 908.

[140] In my view, the requested bar order is fair and reasonable.

[141] The burden of proving that a settlement ought to be approved rests with the proponents, however, the recommendation of capable counsel is significant. The recommendation of class counsel is clearly not dispositive as class counsel have a significant financial interest in having the settlement approved. Still, the recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputations for integrity and diligent effort on behalf of their clients is also at stake. *Dabbs* (Gen. Div.), *supra*, at 440.

[142] In the absence of evidence to the contrary, the recommendation of experienced counsel should be accorded considerable weight, as stated in *Manual for Complex Litigation, supra,* at §30.42:

> [T]he judge should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation; a presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arms length negotiations between experienced, capable counsel after meaningful discovery.

[143] In the normal course, once a court is satisfied that a settlement is the product of arm's length bargaining by experienced counsel, the settlement will be approved:

> As a practical matter, the overwhelming majority of proposed settlements are approved when the Court is satisfied that arms-length bargaining took place during settlement negotiations and experienced class counsel has recommended approval of the settlement. Newberg, *supra,* at 11-42.

[144] Class Counsel and defence counsel have a unique ability to assess the potential risks and rewards of litigation. Class Counsel recommend approval of the proposed settlement. They have extensive experience in class action litigation and price-fixing litigation. In the absence of evidence to the contrary, the recommendation of these experienced counsel should be given considerable weight.

[145] The proposed settlement achieves the legislative goals of the *CPA* and affords significant judicial efficiency and economy, while allowing access to justice through an efficient and cost effective distribution mechanism. To the extent that civil damages are paid to or for the benefit of the class over and above the criminal fines and penalties which have been paid by some Settling Defendants, there will be an incentive for these Settling Defendants, and others, to refrain from engaging in the type of behaviour complained of in the future.

[146] Class members will receive fair and reasonable benefits in return for the compromise of their litigation rights against the Settling Defendants, and Akzo, UCB and Reilly.

[147] If there were to be a trial of the common issues, the litigation process to determine liability would be complicated and protracted, and no class member would be paid until the litigation process ended. The practical value of an expedited recovery is a significant factor for consideration. In addition to the legal and factual risks, a practical concern favouring settlement includes the potential that a case such as this one would take considerable expense and many more years to reach trial and exhaust all appeals. *Dabbs* (Gen. Div.), *supra* at 441.

[148] The Court acknowledges a range of acceptable settlements, thereby recognizing, "the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Dabbs v. Sun Life Assurance Co. of Canada, supra,* O.J. No. 1598 at para. 12 (Gen. Div.).

[149] The settlements at hand were, in part, as a result of two mediations conducted by Winkler J. Also, the Children's Lawyer and the Public Trustee were aware of the ongoing negotiations and having been given notice of this approval hearing have indicated they do not wish to make submissions.

[150] In appropriate circumstances, objectors to a class action settlement may be granted leave to participate in the settlement approval hearing. Objectors who are granted leave are not parties to the proceeding, and accordingly do not have the rights of a party. *Dabbs* (C.A.), *supra*, at 100.

[151] Even in the presence of objectors, the settlement approval process is non-adversarial in nature:

> It is important that the Court itself remain firmly in control of the process and that the matter not be treated as if it were a dispute to be resolved between the proponents of the settlement on the one side and the objectors on the other. *Dabbs* v. *Sun Life Assurance Co. of Canada, supra*, O.J. No. 1598 at para. 21.

[152] An objector who suggests that Class Counsel ought to have structured the settlement differently essentially seeks to substitute the personal judgment of such objector for the judgment of Class Counsel.

[153] It is not within the jurisdiction of the Court to consider an objection based upon extra-legal concerns. The approval process does not include an assessment of the proposed settlement from a social or political context:

> The parties have chosen to settle the issue on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the class as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra legal and outside the ambit of the court's review of the settlement. *Parsons, supra*, at para. 77.

[154] The test for approval is whether the settlement is fair and reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular class member. Further, when a settlement is reached prior to the expiry of the opt out period, class members have a further element of control:

> The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. The *CPA*

> mandates that class members retain for a certain time, the right to opt out of a class proceeding. This ensures an element of control by allowing a claimant to proceed individually with a view to obtaining a settlement or judgment that is tailored more to the individual's circumstances. In this case, there is the added advantage in that a class member will have the choice to opt out while in full knowledge of the compensation otherwise available by remaining a member of the class. *Parsons, supra,* at para. 79; *Dabbs* v. *Sun Life Assurance Co. of Canada, supra,* O.J. No. 1598 at para. 11.

The Objections

[155] As of February 15, 2005, the original deadline for written objections, Mr. William Dermody, the appointed friend of the Ontario Court in this settlement approval process, had received only three written objections in respect of the proposed settlement.

[156] These were on behalf of two organizations, the International Society for Orthomolecular Medicine and the Health Action Network Society.

[157] The third objection is by Dr. A. Hoffer, a retired psychiatrist and former Director of Psychiatric Research, Department of Public Health, for the province of Saskatchewan and a founder of the developing branch of medicine known as "orthomolecular medicine and psychiatry." His letter seeks consideration for patients who receive treatment of "optimum doses of vitamins for...forms of mental and physical illness." Dr. Hoffer could not appear so that he did not make an oral submission.

[158] It is necessary and appropriate that only well-recognized entities be the recipients of the *cy-près* distributions. Such entities have an established record of providing not-for-profit services, with transparency in respect of their activities and accounting. They provide the greatest level of confidence and assurance to the general consuming public that the monies distributed will be responsibly used. There are a multitude of charitable organizations in Canada who can use the limited monies available through the contemplated *cy-près* distribution. It is readily apparent that the organizations listed in Schedule G of the Agreement meet this criteria. It is also clear that there are other organizations who could arguably meet the criteria.

[159] The process to determine recipients, and the reasons for the choices made, in respect of the listed organizations which are to receive the distributions in accordance with the Consumer Fund Distribution Protocol (Schedule G to the Agreement), including the proposals received from the successful intended recipients, are set forth in the Affidavit of Ms. Andrea DeKay dated February 16, 2005 (Vols. 3 and 4 of the Motion Record).

[160] The first step in creating the Consumer Fund Distribution Protocol was to identify the primary objective, being the delivery of Vitamin related benefits to Canadian Consumers of all ages and across Canada. The second step was to identify potential recipient organizations which would meet the primary objective.

[161] Class Counsel took into consideration the extent to which a proposed organization could deliver benefits in each province and territory, could reach one or more of the target age groups, whether the organization was non-denominational, whether there was a registered charitable designation, the organization's financial stability and budget and the organization's history of advocacy, service delivery, research or education relevant to Vitamin Products. Consultation was also made with an expert in the non-profit sector as to the tentative list of possible recipients for review and comment.

[162] The third step in the process was to develop a draft plan of distribution and the allocation of the limited resources. Ultimately, money was not allocated simply on a provincial or regional population basis but also on the basis of research/advocacy or service delivery. For example, 30% of the Fund is allocated to research/ advocacy focused organizations.

[163] Finally, stringent guidelines were developed and reviewed by the accounting firm Deloitte & Touche LLP (the proposed Administrator) to ensure accountability. A binding commitment was obtained from each organization to use the monies solely for activities related to Vitamin Products, to maintain a separate account for the monies received, to provide reports, and to consent to an independent audit and to reimburse monies in the event a court should so order.

[164] For example, The Food Safety Network is to receive 29%, The Centre for Research in Women's Health 10.5%, Breakfast for Learning 15% and Canadian Feed the Children 5%.

[165] The distribution of any monies subsequently allocated to the Consumer Fund because of a less than 100% take-up in respect of the Direct Purchasers Fund (anticipated by Class Counsel) will go to listed universities.

[166] Each objection was in respect of the list of proposed recipients of the Consumer Fund *cy-près* distribution. The objectors are persons or supporters of organizations or groups who wish to be recipients of the *cy-près* distribution.

[167] A further objection was received by fax from the Consumer Health Organization of Canada March 4, 2005. A fifth objection was received by fax from Mr. Lars Soderstrom March 6, 2005.

[168] The written submissions received were filed as part of the record of this proceeding. Each of the individual objectors who appeared at the hearing March 8, 2005 was allowed to make an oral submission and to file such further materials as desired.

[169] Mr. Soderstrom's submission is unique in that he seems to argue against the merits of the proposed settlement on the basis that it does not result in payments directly to consumers. Mr. Borden has recently commenced an application on behalf of Mr. Soderstrom on the asserted basis that Mr. Stroderstrom's rights under the *Canadian Charter of Rights and Freedoms* are violated by the proposed settlement. The short answer to Mr. Soderstrom's objection is that he can, of course, opt out of the settlement and pursue his individual application, as he apparently intends to do. As I have stated above, in my view, a *cy-près* mechanism for the distribution of benefits through the recovery in respect of the damages to Consumers is the only viable, cost efficient and fair approach.

[170] I turn now to the other four objections. Class Counsel properly objected to any organization or corporate entity which filed an objection being heard itself as an objector for the reason that it is not a class member. Hence, individuals, each being within the Consumer class in respect of the class actions at hand, made submissions, arguing that some parts of the monies available should go to certain organizations.

[171] The only objector without an individual present who could speak in its interest was the International Society for Orthomolecular Medicine. Dr. Hoffer's letter objecting, discussed above, was also addressed to a like interest and concern as expressed by this organization. The responding affidavit of Ms. Andrea Dekay suggests that this organization represents a group of orthomolecular societies throughout the world, with its president being in the Netherlands.

[172] Mr. Milt Bowling, Mr.Trueman Tuck, "a legal and political rights advocate", Dr. David Rowland and Mr. Paul Anderson, each made oral submissions. Mr. Tuck filed an extensive written submission.

[173] Mr. Bowling argues for the inclusion of the Health Action Network Society ("HANS") as a recipient of funds. This organization is an educational, non-profit and charitable organization which has reportedly worked for some 22 years in educating consumers on the benefits of nutritional therapies, including the use of vitamins and minerals.

[174] Mr. Anderson argued for the inclusion of the Consumer Health Organization of Canada in the list of recipients from the Consumer Fund.

[175] Mr. Tuck proposes that funds from the settlement be given to the Live Longer Foundation. However, this entity was incorporated only in November, 2004. Mr. Tuck is also active on behalf of "Friends of Freedom," not a registered charity, which reportedly actively supports several court actions by alternative health organizations against Health Canada. This group also supports HANS. Mr. Tuck is an advocate on behalf of a number of organizations which promote food based medicines as a health measure. Mr. Tuck is a passionate advocate in favour of vitamins for health purposes. He states he is opposed to doctors and prescription drugs.

[176] Ms. DeKay states in her responding affidavit of March 3, 2005, to the objections, after completing her research into the organizations favoured by the objectors, that Class Counsel "are satisfied that none of the organizations which objected to the settlement satisfy the criteria"

determined by the process employed for the selection of recipient organizations, as outlined in her affidavit of February 16, 2005 (and discussed above). She concludes that she "would not have recommended that any of these organizations receive settlement monies from the Consumer Fund."

[177] The Court concurs with the view of Class Counsel that the organizations favoured by the objections do not meet the selection criteria. This is not to imply any condemnation or criticism of these organizations. It is simply to say that none are sufficiently substantial to meet the extensive, demanding criteria for selection. As discussed above, the selection criteria is quite reasonable and responsible in all the circumstances. To repeat, there is a very limited supply of monies for distribution, with potentially many worthy claimant organizations. Not nearly all can be selected. The stringent criteria for selection is both appropriate and necessary for selection and maximizes the confidence of the broad, vitamin consuming public that the objectives of the settlement are being realized, and will be easily seen to be realized, by the proposed recipient organizations.

[178] Given the substantial size of the class (millions in this case) and the relatively small number of objections, the Court must also take account of the relative paucity of objections and conclude that the vast majority of the class is supportive of the settlement. Finally, the selection put forward by Class Counsel is certainly reasonable, worthy and appropriate from every objective viewpoint.

[179] "While approval of a proposed class settlement is not a matter to be determined by a plebiscite, the views of putative class members are certainly relevant and entitled to great weight": *Re Silicone Gel Breast Implant Products Liability Litigation,* 1994 WL 578353 at 5 (N.D. Ala.).

Disposition

[180] All of the negotiations in this case, including those with Lindel Hilling, Merck KGaA, Nepera, Inc., Lonza, Akzo, UCB and Reilly were at arms' length and adversarial in nature. Each clause of each settlement agreement was achieved through extensive, adversarial and protracted negotiations.

[181] The drafting and negotiation of the Agreement was adversarial and hard fought over eighteen months. Reportedly, over 60 drafts of the agreements were circulated.

[182] During the litigation process, before the announcement of the proposed settlement, Class Counsel did not attempt to directly communicate with or register individual class members because the large number (in the millions) made it impractical to do so. However, Class Counsel did maintain Vitamins websites and received numerous telephone and electronic contacts initiated by class members.

[183] The proposed representative plaintiffs support and recommend approval of the settlement.

[184] The inclusive model adopted by Class Counsel assesses aggregate damages for the entire marketplace, and provides benefits, directly and indirectly, to all purchasers in an efficient and manageable way.

[185] Numerous price-fixing class actions have been commenced in Ontario. Two of these cases, *Chadha v. Bayer, supra* and *Price v. Panasonic Canada Inc.*, [2002] O.J. No. 2362, were commenced on behalf of consumers only. In each of these consumer-only cases, the court refused to grant certification. Conversely, seven price-fixing class actions have been certified in Ontario in the context of negotiated settlements. In each of the settled cases, all purchasers of the price-fixed product, including Direct Purchasers, Intermediate Purchasers and Consumers, were included in the class. See *Alfresh Beverages Canada Corp. v. Archer Daniels Midland Co.*, [2001] O.J. No. 6028; *Hoechst, supra; Bona Foods Ltd. v. Pfizer Inc.*, [2002] O.J. No. 5553; *Newly Weds Foods Co. v. Pfizer Inc.* (7 April 2003) Toronto 39495; *Minnema v. Archer Daniels Midland Co.* (28 February 2003), Barrie G23495-99CP (Ont. Sup. Ct.); *A & M Sod Supply Ltd. v. Akzo Nobel Chemicals B.V.* (22 December 2003) Toronto 02-CT-40300CP; *Bona Foods Ltd. v. Ajinomoto U.S.A., Inc., supra.*

[186] In approving the settlement in *Hoechst,* this Court recognized that such settlements and payments "serve the important policy objective of general and specific deterrence of wrongful conduct through price-fixing." *Hoechst, supra,* at para. 16.

[187] The *CPA* is remedial and is to be given a generous, broad, liberal and purposive interpretation. The three goals of a class action regime, as recognized by the 1982 Ontario Law Reform Commission's *Report on Class Actions* (vol. 1 (Toronto: Ministry of the Attorney General, 1982)), by the Attorney General's Advisory Committee on Class Action Reform and by the Supreme Court of Canada, are judicial efficiency, improved access to the courts and behaviour modification. *Interpretation Act*, R.S.O. 1990, c. I-11, s. 10; *Hollick, supra,* at para. 15; *Western Canadian Shopping Centres, supra,* at paras. 27-29.

[188] The settlements are the product of lengthy, adversarial negotiations which understandably have involved compromise. Given the number of parties, the complexities of the issues and the litigation risks involved in proceeding to trial, in my view, and I so find, the settlements are fair and reasonable and in the best interests of the classes as a whole and should be approved.

[189] For the reasons given, the overall settlement of the subject class actions is found to be fair and reasonable and in the best interests of all class members. Approval is given to the proposed settlement as set forth in the Agreement, subject to a determination and findings in respect of the regime set forth in s. 18.1 thereof, to be dealt with in separate Reasons for Decision, relating to the motion for approval of Class Counsel Fees.

[190] Counsel can prepare the necessary implementing orders and judgments for my signature consistent with these Reasons for Decision and the separate Reasons for Decision relating to Class Counsel Fees.

CUMMING J.

Released: March 23, 2005

COURT FILE NO.: 00-CV-202080CP
DATE: 20050323

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

GLEN FORD, VITAPHARM CANADA LTD., FLEMING FEED MILL LTD., and MARCY DAVID

Plaintiffs

- and -

F.HOFFMANN-LA ROCHE LTD., HOFFMANN-LA ROCHE LTD., MERCK KGaA, LONZA AG, ALUSUISSE-LONZA CANADA INC., SUMITOMO CHEMICAL CO., LTD., SUMITOMO CANADA LIMITED/LIMITEE and TANABE SEIYAKU CO., LTD.

Defendants

Proceeding under the *Class Proceedings Act*, 1992
(Biotin)

COURT FILE NO.: 00-CV-200045CP

B E T W E E N:

GLEN FORD, VITAPHARM CANADA LTD., FLEMING FEED MILL LTD., ALIMENTS BRETON INC., OGER AWAD and MARY HELEN AWAD

Plaintiffs

- and -

F. HOFFMANN-LA ROCHE LTD., HOFFMANN-LA ROCHE LIMITED/LIMITÉE, RHÔNE-POULENC S.A., AVENTIS ANIMAL NUTRITION S.A., RHÔNE-POULENC CANADA INC., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., BASF AKTIENGESELLSCHAFT, BASF CORPORATION, BASF CANADA INC., EISAI CO., LTD., TAKEDA CHEMICAL INDUSTRIES, LTD., TAKEDA CANADA VITAMIN AND FOOD INC., MERCK KgaA, DAIICHI PHARMACEUTICAL COMPANY, LTD., REINHARD STEINMETZ, DIETER SUTER, HUGO STROTMANN, ANDREAS HAURI, KUNO SOMMER and ROLAND BRÖNNIMANN

Defendants

Proceeding under the *Class Proceedings Act, 1992*

(Bulk Vitamins
COURT FILE NO.: 00-CV-198647CP

B E T W E E N:

FLEMING FEED MILL LTD., ALIMENTS BRETON INC., LEN FORD and MARCY DAVID

Plaintiffs

- and -

BASF AKTIENGESELLSCHAFT, BASF CORPORATION, BASF CANADA INC., CHINOOK GROUP, LTD., CHINOOK GROUP, INC., DCV, INC., DUCOA L.P. AKZO NOBEL NV, AKZO NOBEL CHEMICALS BV, BIOPRODUCTS, INC., RUSSELL COSBURN, JOHN KENNEDY, ROBERT SAMUELSON, LINDELL HILLING, JOHN I. ("PETE") FISCHER and ANTONIO FELIX

Defendants

Proceeding under the *Class Proceedings Act*, 1992
(Choline Chloride)

COURT FILE NO.: 00-CV-201723CP

B E T W E E N:

GLEN FORD, FLEMING FEED MILL LTD., ALIMENTS BRETON INC., and KRISTI CAPPA

Plaintiffs

- and -

RHÔNE-POULENC S.A., RHÔNE-POULENC CANADA INC., DEGUSSA-HÜLS AG, DEGUSSA CORPORATION, DEGUSSA CANADA INC., NOVUS INTERNATIONAL, INC. and AVENTIS ANIMAL NUTRITION S.A.

Defendants

Proceeding under the *Class Proceedings Act*, 1992
(Methionine)

COURT FILE NO.: 00-CV-200044CP

B E T W E E N:

VITAPHARM CANADA LTD., FLEMING FEED MILL LTD., ALIMENTS BRETON INC., and KRISTI CAPPA

Plaintiffs

- and -

DEGUSSA-HÜLS AG, DEGUSSA CORPORATION, DEGUSSA CANADA INC., REILLY INDUSTRIES INC., REILLY CHEMICALS S.A., VITACHEM COMPANY, ALUSUISSE-LONZA CANADA INC., LONZA AG, NEPERA INCORPORATED, ROGER NOACK and DAVID PURPI

Defendants

Proceeding under the *Class Proceedings Act*, 1992
(Niacin)

COURT FILE NO.: 40610

B E T W E E N:

FLEMING FEED MILL LTD., ALIMENTS BRETON INC., GLEN FORD and MARCY DAVID

Plaintiffs

- and -

UCB S.A. and UCB CHEMICALS CORPORATION

Defendants

Proceedings under the *class Proceedings Act,* 1992
(Supplemental Choline Chloride)

COURT FILE NO.: 42267CP

B E T W E E N:

GLEN FORD

Plaintiff

- and -

OVUS INTERNATIONAL (CANADA) INC.

Defendant

Proceeding under the *Class Proceedings Act,* 1992
(Supplemental Ontario Methionine)

REASONS FOR DECISION

CUMMING J.

Released: March 23, 2005