

# Self-Interest, Public Interest, and the Interests of the Absent Client: Legal Ethics and Class Action Praxis

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Are existing ethical norms adequate to address the realities of class proceedings? In this article, the author explores the premise that current rules of professional conduct are effective when applied to class action praxis. In Part I, she discusses the peculiar features of class proceedings and how they create unique challenges to the ethical conduct of litigation. In Part II, the author confronts a fundamental (and often overlooked) question: Who is the client in a class proceeding to whom ethical duties are owed? Having identified the range of judicial and academic views on the unique dimensions of class actions, she turns, in Part III, to a discussion of two sources of ethical norms that seek to respond to them: the strictures of class proceedings legislation and the judicial development of rules and guidelines. Throughout the article, the author relies upon information obtained from seven judges interviewed for this project. The article concludes with proposals for amendment to Ontario's *Rules of Professional Conduct* that would more accurately address the realities of this model of litigation.

Les normes éthiques actuelles sont-elles adéquates pour aborder les réalités des recours collectifs? Dans cet article, l'auteure examine la prémisse voulant que les règles actuelles de l'éthique professionnelle soient en vigueur lorsqu'elles ne sont pas efficaces dans la pratique des recours collectifs. Dans la partie I, elle discute des caractéristiques particulières des recours collectifs et de la manière dont ils créent des défis exclusifs en matière d'éthique des litiges. Dans la partie II, l'auteure soulève une question fondamentale (et souvent non

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prise en compte) : Quel est le client dans un recours collectif auquel on doit des obligations éthiques? Ayant déterminé la gamme des opinions judiciaires et académiques sur les dimensions exclusives des recours collectifs, elle se tourne, dans la partie III, vers une discussion de deux sources de normes déontologiques qui cherchent à y répondre : les restrictions des dispositions législatives relatives aux recours collectifs et l'élaboration judiciaire de règles et de lignes directrices. Tout au long de l'article, l'auteure se fonde sur les renseignements obtenus auprès de sept juges consultés dans le cadre de ce projet. L'article conclut que les propositions de modification du *Code de déontologie* de l'Ontario aborderaient de façon plus exacte les réalités de ce modèle de litige.

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*I have the greatest law practice in the world. I have no clients.*<sup>1</sup>

WHEN THE ONTARIO LAW REFORM COMMISSION (OLRC) recommended that class proceedings legislation be enacted, it did so cognizant of the many ethical questions to which class actions as an institution, and class action lawyering as praxis, give rise. In its voluminous and pivotal report, the OLRC also concluded, with uncharacteristic brevity, that the ethical guidelines that typically govern single plaintiff proceedings are ineffective in class actions.<sup>2</sup> Yet the difficulties of integrating class action procedure with existing legal ethics rules did not serve as an indictment of class proceedings. Rather, they reflected a need for the rules

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1. Bill Lerach, formerly of Milberg Weiss Bershad Hynes & Lerach, as quoted in William P Barrett, "I Have No Clients," *Forbes* 152:8 (11 October 1993) 52 at 53. For over two decades, Lerach's firm was the most successful plaintiffs' class action firm in the United States. Between 2007 and 2008, he and his partners Mel Weiss and Dave Bershad, along with fourteen other lawyers and clients, pled guilty to federal conspiracy charges for making secret payments to named plaintiffs recruited for their class actions. Lerach served two years in federal prison and has since been disbarred.
  2. *Report on Class Actions*, vol 1 (Toronto: Ontario Ministry of the Attorney General, 1982) at 201-02 [*OLRC Report* vol 1].

themselves to change. Any such adjustments of traditional rules to accommodate representative litigation, wrote the commissioners, should be undertaken by the Law Society of Upper Canada (LSUC).<sup>3</sup>

Almost twenty years after the Ontario Legislature passed class proceedings legislation,<sup>4</sup> the LSUC has not taken up the OLRC's suggestion to modify its Rules of Professional Conduct.<sup>5</sup> While rules of conduct are not the only—or even the most important—source of ethical guidelines, they do set standards and exercise some normative pull as to how the profession conducts itself. Moreover, to be most effective, rules of conduct should be responsive; if the law or its practice changes, the codes governing lawyers' conduct should change with it.

In this article, I explore the OLRC's premise that existing ethical rules are ineffective when applied to the conduct of class action litigation. To do so, I draw upon extensive US literature on the subject as well as upon Canadian jurisprudence and original research involving interviews of seven class action judges on questions of class action legal ethics. In Part I, I discuss the peculiar features of class proceedings and how they create unique—or exacerbate existing—challenges to the ethical conduct of litigation. Where appropriate, I refer to areas of tension between rules of professional conduct<sup>6</sup> and class action praxis. In Part II, I confront the fundamental (and often overlooked) question: Who is the client to whom ethical duties are owed in a class proceeding? Varying answers to this question can be gleaned from the jurisprudence and from scholarly commentary in both the United States and Canada. My brief survey reveals an important divergence of views in the two jurisdictions on this fundamental question.

Having identified the range of judicial and academic views on the unique dimensions of class actions, I then turn in Part III to a discussion of the development of ethical rules that seek to respond to these views. In the absence of amendments to formal rules of conduct, what are the sources of class counsel's role morality?<sup>7</sup> I discuss two: the strictures of class proceedings legislation and judicial development of rules and guidelines. Throughout this article, but especially in Part III, I rely upon information and views conveyed to me by the seven judges interviewed for this project in the summer and fall of 2010 and in early 2011.

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3. *Ibid.*

4. *Class Proceedings Act, 1992*, SO 1992, c 6 [CPA].

5. Ontario, Law Society of Upper Canada, *Rules of Professional Conduct*, online: <<http://www.lsuc.on.ca/media/rpc.pdf>> [*Rules*].

6. I will refer mainly to the *Rules*, *ibid.*, though the analysis applies equally to other provincial codes.

7. According to David Tanovich, role morality is “the set of norms, standards and values that govern the conduct of individuals when acting as lawyers.” See “Law’s Ambition and the Reconstruction of Role Morality in Canada” (2005) 28 Dal LJ 267 at 274.

Finally, I return to the question set out in the introductory paragraphs of this article, namely, whether existing ethical norms are adequate to address the realities of class proceedings. In my view, the *Rules* insufficiently address class action praxis, and class action jurisprudence has only partially filled the void. I offer modest proposals for amendment to Ontario's *Rules* that would more accurately address the realities of this model of litigation. These amendments would thereby provide clearer guidance to lawyers, the clients they serve, and the judges who play such a significant role in the cases that those lawyers prosecute.

There is no question that the class action terrain has its share of ethical minefields. Lawyers must regularly mediate between self-interest, the interests of the client, and the public interest. Judges must consistently ensure that the latter two interests prevail. By critically examining the existing normative framework of class action lawyering and proposing changes to current rules and guidelines, I hope to contribute to a better understanding of this minefield, those who navigate it, and the forces that keep them whole.

## I. THE UNIQUE DIMENSIONS OF CLASS ACTION LITIGATION

The American Bar Association, state bar associations, and US academics have expended great effort, and spilled much ink, calling for ethical reform of class action lawyering.<sup>8</sup> By comparison, little has been written on the topic in Canada—and almost all of it has been written by practitioners.<sup>9</sup> The application of the

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8. Not including continuing legal education conference papers, more than two dozen such articles and proposals have been published in academic journals in the last two decades. For recent examples, see *e.g.* Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics, "Formal Opinion 2004-01: Lawyers in Class Actions" (2004) 59 *The Record* 435, online: <[http://www2.nycbar.org/Publications/record/Vol\\_59\\_%20no\\_2.pdf](http://www2.nycbar.org/Publications/record/Vol_59_%20no_2.pdf)>; Alon Klement, "Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers" (2002) 21 *Rev Litig* 25; Geoffrey C Hazard, Jr, "Modeling Class Counsel" (2003) 81 *Neb L Rev* 1397; Geoffrey P Miller, "Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard" (2003) *U Chicago Legal F* 581; Susan D Carle, "How Should We Theorize Class Interests in Thinking About Professional Regulation?: The Early NAACP as a Case Example" (2003) 12 *Cornell JL & Pub Pol'y* 571; Nancy J Moore, "Who Should Regulate Class Action Lawyers?" (2003) 5 *U Ill L Rev* 1477; David J Kahne, "Curbing the Abuser, Not the Abuse: A Call for Greater Professional Accountability and Stricter Ethical Guidelines for Class Action Lawyers" (2006) 19 *Geo J Legal Ethics* 741.
  9. Paul Perell, "Class Proceedings and Lawyers' Conflicts of Interest" (2009) 35 *Adv Quarterly* 202; Gérald Tremblay, Shaun Finn & Phelps Turner, "Breathing in the Vital Air: Advocating an Ethics-Based Approach to Attorney Fees in the Class Action Context" (2008) 5 *Can Class Action Rev* 98; Allan C Hutchinson, "Who Are the 'Clients'? (And Why It Matters)" (2005)

usual codes of conduct to class proceedings has not been the subject of discussion either at the regulatory level or among bar associations.<sup>10</sup> This relative paucity of critical analysis may be due in large part to the more recent pedigree of class actions in Canada. It is perhaps also a manifestation of a generally more belated focus on legal ethics as a subject of academic study.<sup>11</sup>

What are the peculiarities of representative actions that give rise to ethical challenges? To answer this question, I turn to both US and Canadian writing on the subject. There are significant similarities between US and Canadian class action models. Indeed, the OLRC's proposed statute, which was almost entirely reflected in the Ontario legislation enacted ten years later, was modelled on the US federal class action regime. The US literature on the ethical challenges presented by class action lawyering is, therefore, worthy of some serious consideration.<sup>12</sup> Additional insights are gleaned from Ontario class actions judges themselves, specifically those who took part in a series of interviews for this study. Seven judges in three Ontario cities who are currently, or were formerly, designated class action judges met with me in 2010 and 2011 to discuss legal ethics and class actions.<sup>13</sup> Their candid views about class actions are helpful in understanding

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84 Can Bar Rev 411; Michael PA Carabash, "Ethical Conduct for Class Counsel in Ontario" (2006) 3 Can Class Action Rev 617; Cara Faith Zwibel, "Settling for Less? Problems and Proposals in the Settlement of Class Actions" (2004) 1 Can Class Action Rev 165; Michael P Abdelkerim, "Class Counsel's Ethical Obligations" (2004) 18 Windsor Rev Legal Soc Issues 105.

10. There is one narrow exception. In August 2000, the Canadian Bar Association issued "Guidelines for Lawyers Acting for Survivors of Aboriginal Residential Schools" in response to third party reports of misconduct on the part of lawyers in western Canada. See Canadian Bar Association, "Guidelines for Lawyers Acting for Survivors of Aboriginal Residential Schools" (CBA Resolution 00-04-A, carried as amended by the Council of the Canadian Bar Association at the Annual Meeting held in Halifax, 19-20 August 2000) [CBA Guidelines], online: [http://www.cba.org/cba/sections\\_abor/main/00\\_04\\_a.aspx](http://www.cba.org/cba/sections_abor/main/00_04_a.aspx). The CBA Guidelines sought to ensure that rules of conduct adequately protected particularly vulnerable class members—the survivors of Aboriginal Residential School abuse. Subsequently, the LSUC issued its own guidelines, modelled after the CBA guidelines, to address recruiting tactics, lack of competence, and inappropriate fee arrangements. See The Law Society of Upper Canada, *Guidelines for Lawyers in Cases Involving Claims of Aboriginal Residential School Abuse*, Toronto: LSUC, 2003, online: [http://rc.lsuc.on.ca/pdf/equity/guideline\\_aboriginal\\_res.pdf](http://rc.lsuc.on.ca/pdf/equity/guideline_aboriginal_res.pdf). Not all law societies adopted the protocol.
11. Adam M Dodek, "Canadian Legal Ethics: Ready for the Twenty-First Century at Last" (2008) 46 Osgoode Hall LJ 1. In particular, Dodek notes that class actions are an underdeveloped area of legal ethics scholarship (*ibid* at 45-46).
12. Nevertheless, it is important not to assume that the same features and dangers of class proceedings described in the US commentary have been imported here wholesale.
13. Three judges were interviewed in person, the rest by telephone. The judges formally

judicial approaches to the ethical questions that arise in this litigation. For ease of analysis, I have grouped the distinguishing features of class proceedings into three general categories: the entrepreneurial litigation problem, the adversarial void problem, and the absent client problem.

#### A. THE ENTREPRENEURIAL LITIGATION PROBLEM

There is no question that class actions are entrepreneurial in nature.<sup>14</sup> The viability of class actions rests on the willingness of lawyers to take on group claims that individually would be uneconomical to prosecute, but which in their aggregate may yield significant damage or settlement awards. Class proceedings legislation in both the United States and Canada provides for contingency fees based on a multiplier (or lodestar, as it is known in the United States), or percentage of fee calculation, or both.<sup>15</sup> The economic incentives built into class action regimes are said to increase access to justice.<sup>16</sup> Given their entrepreneurial nature, however, plaintiffs' counsel have a heightened financial self-interest in the timing and content of the settlement of any action.<sup>17</sup> They can avoid the risk of no fee recovery and maximize hourly returns by settling early in the litigation, particularly when the contingency fee is calculated on a percentage of recovery basis (rather than a multiplier applied to hourly rates times the number of hours docketed).

It could be argued that contingency fees actually encourage ethical conduct because they ensure counsel maximizes recovery for the class. This argument, however, is subject to three criticisms. First, it is premised on the notion that counsel fees will always be calculated as a percentage of a very large sum of money that is otherwise distributed to the class. However, counsel can still obtain a substantial fee in coupon settlements (where coupons that can be used toward the purchase of the defendant's products are distributed to class members)

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consented to be interviewed on the condition of anonymity in accordance with the University of Windsor's Research Ethics Board approval of this project. Any information that may tend to identify the judges has been excluded from this article, and the judges themselves are referred to as Respondents. All interview notes are on file with the author.

14. *Fantl v Transamerica Life Canada* (2009), 95 OR (3d) 767 at para 66 (CA) [*Fantl*, CA].

15. See e.g. *CPA*, *supra* note 4, ss 33(1), (4).

16. *Fantl*, CA, *supra* note 14 at para 67.

17. In one of the earliest and most frequently cited decisions on the criteria for settlement approval, Sharpe J (as he then was) referred to class counsel's "obvious" and "significant financial self-interest in having the settlement approved." *Dabbs v Sun Life Assurance Corp* (1998), 40 OR (3d) 429 at para 32 (Gen Div). One of the interviewed judges put it this way: "A lawyer with a healthy self-interest will naturally try to maximize his fee. The judge has to be vigilant that the class's interests are not compromised." Interview of Respondent 7 (23 February 2011) [Respondent 7].

and *cy près* distributions to charities (where the settlement funds are paid to charitable institutions that are not parties to the litigation). Both of these types of distributions take the place of direct monetary compensation to the plaintiff class and confer only nominal (if any) benefits on the class members. The fee may also be divorced entirely from the funds ultimately distributed to class members by way of a claims process that results in modest take-up by the class, so that recovery-maximization is not tied to lawyers' remuneration at all. It is not accurate to say, therefore, that if class members *get nothing*, the lawyer *gets nothing*. While an individual client may still be victimized by an unscrupulous lawyer who overcharges for her services, unlike most class members the individual client has the power to terminate the retainer agreement. Individually, class members and representative plaintiffs cannot use the threat of termination as leverage; neither of them has to support a proposed settlement for it to be approved by the court,<sup>18</sup> and neither may unilaterally remove counsel.<sup>19</sup>

Second, the timing of the settlement may still be a source of conflict between counsel and class members. Early resolution may be attractive to a lawyer but less than optimal for the class, or vice versa.<sup>20</sup> Most commentators (but fewer judges) recognize that it is class counsel, not the representative plaintiff or class members, who control the litigation.<sup>21</sup> The timing and form of settlement, therefore, is largely dictated by counsel, not the class, and thus theoretically could be driven more by economic self-interest and risk aversion than the best interests of the class members. Moreover, as just noted, a class action settlement need not have the approval of class members or even the representative plaintiffs. Conversely, in

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18. Support of the settlement proposal by the representative plaintiff is but one factor in a long list of criteria considered by the judge at a fairness hearing. *Gilbert v Canadian Imperial Bank of Commerce* (2004), 3 CPC (6th) 35 at paras 9-11 (Ont Sup Ct).
19. Although representative plaintiffs may not unilaterally terminate their relationship with class counsel, they may seek a court order achieving the same ends. See *Lau v Bayview Landmark Inc* (2004), 50 CPC (5th) 113 (Ont Sup Ct) [*Lau*]. *Lau* is a rare case in which one of two representative plaintiffs successfully moved for the removal of class counsel who had failed to prosecute the claim with diligence. In ordering the removal of counsel, Cullity J commented that such an order "must be considered to be an extraordinary exercise of the powers conferred by section 12 of the *CPA*. It should be made only when the circumstances compel it" (*ibid* at para 38). Two other such cases are discussed in Part II.
20. Susan P Shapiro, *Tangled Loyalties: Conflict of Interest in Legal Practice* (Ann Arbor: University of Michigan Press, 2002) at 13.
21. *Haney Ironworks Ltd v Manufacturers Life Insurance* (1998), 169 DLR (4th) 565 at para 30 (BC SC) ("...the reality is that these actions are to a large extent driven by counsel..."). But see *Fantl, CA*, *supra* note 14 at para 44 where Winkler CJ stated, "The representative plaintiff in a class action lawsuit is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report."

traditional litigation, an action can only be settled with the consent and instructions of the client. In light of class counsel's role as "financier," "creditor," and "joint-venturer,"<sup>22</sup> the stakes are simply too high for counsel to relegate control of the litigation to a plaintiff with a nominal interest and zero risk. How class counsel finances the litigation is not a matter of disclosure either to the court or to the client based on existing rules of conduct.<sup>23</sup> Yet, one can imagine how pressure exerted by bankers, private lenders, or law partners might influence class counsel's strategy and decision making.

The third and most obvious response to the ethical justification for contingency fees is that the lawyer's financial stake in the class action is out of all proportion to any individual class member's interest. Rarely is this the case in traditional, individual litigation, even if prosecuted on a contingency fee basis. Whatever the temptation to prefer one's own interests in the usual solicitor-client relationship, the temptation is far greater in class action litigation—if not "almost irresistible."<sup>24</sup> Whether or not one would go so far as Charles Wolfram in stating that professional ethics are at greatest risk in class actions or that ethical conduct in class actions is "beyond reform," it is undoubtedly true that, as he writes, "the riches of Croesus are held out as the reward to any lawyer with the client, money, skill, and pluck to try."<sup>25</sup>

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22. Charles Silver, "Merging Roles: Mass Tort Lawyers as Agents and Trustees" (2003) 31 Pepp L Rev 301 at 302, quoting John C Coffee, "Kutak Symposium: Professional Responsibility and the Corporate Lawyer" (2000) 13 Geo J Legal Ethics 331 at 340.
  23. As Michael P Abdelkerim has pointed out, the duty of disclosure owed to clients when advising them refers only to matters affecting the client's financial interests, not the risks affecting the lawyer's interests. See "Class Counsel's Ethical Obligations" (2004) 18 Windsor Rev Legal Soc Issues 105. The extent of third party financing of class actions is unknown, but it has existed since the first class action settlement was approved in 1995. In that case, the judge approved a consortium of third party investors, but the details of the arrangement remain under seal. See *Nantais v Telectronics Proprietary (Canada) Ltd* (14 September 1995), Windsor 95-GD-31789 (Ont Gen Div). See also Valerie Lawton, "Investors betting lawsuits will bring big payoffs: Lawyer helps to finance class action cases," *Toronto Star* (22 February 1998) A3. Only very recently has a handful of plaintiffs' lawyers sought court approval of funding agreements with an Irish commercial funder. See *Metzler Investment GMBH v Gildan Activewear Inc* (2009), 179 ACWS (3d) 765 (Ont Sup Ct) [*Metzler*]; *Dugal v Manulife Corporation* (2011), 105 OR (3d) 364 (Sup Ct) [*Dugal*].
  24. Louis W Hensler III, "Class Counsel, Self-Interest and Other People's Money" (2004) 35 U Mem L Rev 53 at 69 ("The class action mechanism places counsel in a position of almost irresistible temptation").
  25. "Mass Torts—Messy Ethics" (1995) 80 Cornell L Rev 1228 at 1233.

## B. THE ADVERSARIAL VOID PROBLEM

An adversarial void is created when defence and class counsel agree on a settlement and jointly seek the court's blessing of the proposal. That is, neither counsel for the class nor counsel for the defendant has any incentive to contest the merits of the proposed settlement, and they are no longer adversaries. Our justice system, however, is premised on partisan lawyers submitting opposing arguments and evidence to judges who decide which of the competing positions is the most persuasive. The adversarial void present in class action settlement approval hearings creates a systemic risk of collusive behaviour between opposing counsel to the potential disadvantage of class members.

Class action legislation attempts to guard against the risks to absent class members by requiring that the parties seek court approval of the proposed settlement.<sup>26</sup> As judges charged with assessing the fairness of proposed settlements or the reasonableness of a class counsel fee have readily admitted, however, they have a very difficult task.<sup>27</sup> They are institutionally ill-equipped to act as inquisitors, culturally uncomfortable with departing from their traditional position as neutral arbiters,<sup>28</sup> and unable to act as advocates for the class.<sup>29</sup> In the United States, the Judicial Conference Committee on Rules of Practice and Procedure explicitly recognizes that the fairness hearing “lacks the illumination brought by an adversary process.”<sup>30</sup> As a consequence, some US courts have stated that the role of the

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26. *Fantl v Transamerica Life Canada* (2008), 166 ACWS (3d) 1045 at para 53 (Ont Sup Ct) [*Fantl*, Sup Ct] (“One reason for requiring Court approval of abandonments, discontinuances, and settlements in certified or uncertified class proceedings is to ensure that the interests of class members have not been sacrificed to the interests of the representative plaintiff and, or class counsel” [*sic*]).
  27. *Smith Estate v Money Mart* (2010), 94 CPC (6th) 126 at para 33 (Ont Sup Ct).
  28. Such discomfort is not limited to the class action context. In a study of attitudes and practices regarding judicial interviewing of children in the family law setting, fewer than half of the Ontario judges surveyed had ever interviewed a child, and those who had done so expressed concern about their lack of training for undertaking such an activity. See e.g. Nicholas Bala & Rachel Birnbaum, “Why judges should meet kids more often,” *The Lawyers Weekly* (2 July 2010) 9 at 12 (“It is clear that the ‘culture of the court’ affects judicial attitudes and practices”).
  29. In a discussion of the inadequacies of the adversarial system vis-à-vis class actions and the need to adopt an inquisitorial approach, Howard M Erichson argues that “the settlement class action fairness inquiry ... must be undertaken with a level of independent judicial scrutiny—and an unwillingness to rely solely on the litigants’ presentations—that is strongly suggestive of inquisitorial justice.” See “Mass Tort Litigation and Inquisitorial Justice” (1999) 87 *Geo LJ* 1983 at 1995.
  30. Hensler, *supra* note 24 at 92, n 248, quoting *Report of the Judicial Conference Committee on Rules of Practice and Procedure* 8 (September 2002) at 3.

judge at a fairness hearing is that of “fiduciary” to the class,<sup>31</sup> a view not shared by Canadian courts. However, both Canadian and US judges and scholars, including the judges I interviewed, agree that our courts are designed to function in an adversarial process, not to engage in inquisitorial investigations.<sup>32</sup> As one of the interviewed judges unambiguously stated, “We spend all of our professional lives engaged in an adversarial process. [Presiding over class actions] is the only time in my judicial life where I have encountered an inquisitorial function.”<sup>33</sup> The inability, or unwillingness, of judges to be true inquisitors on behalf of the class raises the possibility that unethical conduct may remain unchecked.

### C. THE ABSENT CLIENT PROBLEM

In representative litigation involving mass harm, lawyers do not know, let alone have regular contact with, their clients. The absent client phenomenon compounds the difficulties that exist in ordinary litigation in monitoring a lawyer’s conduct. As suggested above in Part I(A), class counsel are effectively in control of the litigation and are free to make all of the important decisions in the case to a far greater extent than is expected or acceptable in non-representative litigation.

The absent client problem manifests itself in many ways, starting with the fundamental ethical rule that lawyers communicate with their clients and seek instructions.<sup>34</sup> In a class action, however, it is usually impossible to consult with each class member, let alone to seek and follow each member’s instructions. In turn, class members cannot perform the traditional client’s role of monitoring the lawyer’s conduct.<sup>35</sup> A lack of communication compounds the ethical dangers of financial self-interest and other conflicts of interest and also “diminishes

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31. *Reynolds v Beneficial National Bank*, 288 F3d 277 at 279-80 (7th Cir 2002).

32. Hensler, *supra* note 24 at 98-99. See also Catherine Piché, “A Critical Reappraisal of Class Action Settlement Procedure in Search of a New Standard of Fairness” (2010) 41 *Ottawa L Rev* 25. Piché promotes a more inquisitorial role for the reviewing judge.

33. Interview of Respondent 3 (23 June 2010) [Respondent 3]. Respondent 6 put it differently, stating, “We struggle to look for what is not there that should be there. To do this, we must ask questions. That is not inquisitorial, but it is being proactive. Unlike other litigation, there is no adversary on a settlement approval. All of us miss that.” Interview of Respondent 6 (5 November 2010) [Respondent 6]. Respondent 7 spoke of being “worried about what’s not being said” at the approval hearing, stating that “we have to probe and make sure we’re getting the straight goods.” Respondent 7, *supra* note 17.

34. *Rules*, *supra* note 5, r 2.01. Rule 2.01 defines a “competent lawyer” as one who communicates “at all stages of a matter in a timely and effective manner that is appropriate to the age and abilities of the client.”

35. Association of the Bar of the City of New York, *supra* note 8 at 436.

community notions of justice.”<sup>36</sup> If counsel can recommend a settlement over the objection of the representative plaintiff, the rule requiring lawyers to obtain instructions from their client before proceeding is devoid of any real power.

Apart from the absent client phenomenon, there is also the peculiar dynamic between representative plaintiffs and class counsel. Representative plaintiffs are often recruited by class counsel rather than self-identified. They are usually indemnified by class counsel against the risk of an adverse cost award, and they typically have very small damage claims. Having been invited to participate, and with little to gain and nothing to lose, representative plaintiffs almost never challenge the decisions of their counsel. This view has been endorsed emphatically by, among others, Alon Klement: “Named representative plaintiffs have proven to be merely figureheads: ineffective, passive, unsophisticated, and completely disregarded by both courts and class attorneys.”<sup>37</sup> Judges in the United States have similarly remarked that “the primary feature that distinguishes [such lawsuits] is there’s no client. It’s the rare case where a real plaintiff takes an interest. Most of the time, the clients are purely nominal and cases are driven entirely by lawyers.”<sup>38</sup> One judge interviewed for this article observed that in some cases, the representative plaintiff is “a nominal plaintiff and the lawyers are driving the litigation.”<sup>39</sup> In contrast, in ordinary litigation those with interests in the action are usually active participants<sup>40</sup> with a correlative incentive to monitor the manner in which the litigation is conducted.

Applying the usual rules of professional conduct in this context—where the client is both figuratively and literally absent—is highly problematic. By way of example, conflicts of interest between class members are common, especially in actions involving very large numbers of individuals with varying degrees of harm and whose legal claims vary in strength. Such a conflict is best illustrated by class members who have negligence claims, some of which fall outside the limitation period.<sup>41</sup> The class members whose claims are initiated within the limitation

36. Kenneth R Feinberg, “Lawyering in Mass Torts” (1997) 97 Colum L Rev 2177 at 2179.

37. *Supra* note 8 at 27-28. See also Susan P Koniak & George M Cohen, “In Hell There Will be Lawyers Without Clients or Law” (2001) 30 Hofstra L Rev 129; Jonathan R Macey & Geoffrey P Miller, “The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform” (1991) 58 U Chicago L Rev 1; Wolfram, *supra* note 25; Hazard, *supra* note 8.

38. US District Court Judge Vaughn Walker, quoted in Lynne Bolduc, “A Case Without a Client: The Private Securities Litigation Reform Act of 1995” (1996) 43 Fed Law 33 at 35.

39. Respondent 7, *supra* note 17.

40. *Fantl*, Sup Ct, *supra* note 26 at para 49.

41. This was the scenario in *Richard v British Columbia* (2007), 159 ACWS (3d) 340 (SC) [*Richard*, 2007, SC], leave to appeal to BCCA granted, 162 ACWS (3d) 893. The appeal was

period have a stronger legal position and would benefit from excluding the weaker claims (particularly at the settlement negotiation stage). A lawyer representing a class comprised of both groups of claimants would be faced with a clear conflict. Rules governing conflicts, however, are premised on clients providing informed consent to a course of action in order for the lawyer to be able to proceed.<sup>42</sup> Such consent is simply not attainable in class actions, where class members are diffuse and numerous, if not altogether unidentifiable.<sup>43</sup> More critically, as will be developed in Part II, it is unclear both who the client is in a class proceeding and from whom instructions ought to be obtained. In the event of conflicting instructions, it is neither practical nor desirable for class counsel simply to withdraw representation altogether as the *Rules* command.<sup>44</sup>

Another area of tension exists regarding fees. Courts assessing the reasonableness of a fee request by class counsel have relied upon the usual list of factors<sup>45</sup> enumerated in the Canadian Bar Association's *Code of Professional Conduct*, which includes "any relevant agreement between the lawyer and the client."<sup>46</sup> Such reliance leads to the court's deference to the terms of the fee agreement.<sup>47</sup> As I have argued elsewhere,<sup>48</sup> however, deference to the parties' freedom of contract is misplaced in the class action context. The fee agreement entered into by the proposed representative plaintiff is fundamentally different from the retainer agreement usually entered into by non-representative clients for at least two reasons. First, it is unlikely that representative plaintiffs, especially those recruited

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ultimately abandoned. The case is discussed in Part II of this article.

42. See *e.g. Rules*, *supra* note 5, r 2.02. The solution in some instances has been to appoint separate class counsel for subclasses at the settlement stage.
43. The communication problem is made impossible in cases involving class members outside of Canada. See *e.g. Hinton v Canada (Minister of Citizenship and Immigration)*, [2009] 1 FCR 476 (CA), *aff'd* in part [2008] 4 FCR 391. The Federal Court of Appeal certified the action on behalf of those who paid processing fees to the Department of Citizenship and Immigration Canada with respect to various immigration visas.
44. *Rules*, *supra* note 5, r 2.04(3).
45. *Garipey v Shell Oil* (2003), 123 ACWS (3d) 949 at para 13 (Ont Sup Ct) (listing eight factors to be considered, including the "client's expectation as to the amount of the fee").
46. The Canadian Bar Association, *Code of Professional Conduct*, ch XI "Fees," online: <[www.cba.org/CBA/activities/pdf/codeofconduct06.pdf](http://www.cba.org/CBA/activities/pdf/codeofconduct06.pdf)>. See also *Rules*, *supra* note 5, r 2.08.
47. See *e.g. Cassano v Toronto Dominion Bank* (2009), 98 OR (3d) 543 at para 63 (Sup Ct) [*Cassano*]. See also *799376 Ontario Inc (Cob Lonsdale Printing Services) (Trustee of) v Cascades Fine Papers Group* (2008), 173 ACWS (3d) 695 at para 6 (Ont Sup Ct) [*Cascades*] (where Leitch J was "prepared to approve this fee request because it is consistent with the retainer agreement entered into with the representative plaintiff").
48. Jasminka Kalajdzic, "Access to a Just Result: Revisiting Settlement Standards and *Cy Près* Distributions" (2010) 6 Can Class Action Rev 215.

by class counsel, have any incentive to engage in rigorous negotiations of the appropriate fee, nor the leverage with which to do so effectively. Second, even if they did, the agreement binds class members who are not parties to it.<sup>49</sup>

This example illustrates the essence of what is different about class actions, namely the identity of the client and the nature of her relationship with the lawyer. While courts recognize that class members are owed some ethical duties, the general view remains that a traditional solicitor-client relationship exists between class counsel and the representative plaintiff, with the attendant traditional duties. The more one views the representative plaintiff as a traditional client, the more likely an operating assumption exists that traditional duties are owed to that representative plaintiff. But this ignores the elephant(s) in the room: What about the class members? Further, what about the pre-certification, putative class members? And what about the post-certification class members? Ultimately, determining which ethical duties are owed depends in large part upon who we see as the client. It is to that fundamental question that we now turn.

## II. WHO IS THE CLIENT?

The ethical risks peculiar to, or more pronounced in, class action litigation that have been recounted above are common to both the US and Canadian regimes. Class action legislation in both countries shares many similarities, especially its entrepreneurial orientation, and gives rise to the same incentives and ethical risks. In both jurisdictions there appears to be widespread acknowledgment that class action litigation is different and produces inherent conflicts of interest and other ethical considerations. Most pronounced in both countries is the recognition that class counsel's financial self-interest conflicts with the best interests of the class.

A close reading of the jurisprudence on both sides of the border, however, reveals a fundamental divergence in views on a key normative issue: They differ as to the status of the class representative as a "genuine plaintiff." Canadian

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49. There is an altogether different justification for deferring to the terms of the retainer agreement rooted in economics: Plaintiffs' lawyers decide to pursue a particular action after having assessed the risks of going forward—risks which are reflected in the contingency fee contemplated by the retainer agreement. Class action lawyers, the argument goes, need the certainty and predictability of being paid in accordance with that fee, or else they will be incapable of providing access to justice in all but the easiest of cases. Whatever the merits of this argument, it is independent of any justification for respecting the contractual freedom of representative plaintiffs and their counsel, for assuming that representative plaintiffs generally have real bargaining power, or for employing the usual factors for assessing an ethically appropriate and reasonable counsel fee.

jurisprudence clings to the notion of the representative plaintiff as a genuine client. Accordingly, to date in Canada, rules of conduct have been held to apply to class actions with only minor modifications.

Class action litigation may be unique in many ways, but in Canadian case law the role and duties of class counsel are still largely perceived in terms of the traditional lawyer-client relationship. With little variation, the traditional client paradigm continues to reign, affecting not only how judges view the ethical duties that flow from this paradigm, but also how judges interpret class proceedings legislation. The case law betrays an internally contradictory view of class actions as a legal process. On the one hand, there is a ready willingness to see the peculiar dynamics at play, such as when a judge rejects the fiction that it is the plaintiff, not her counsel, seeking a costs award<sup>50</sup> or when courts refuse to accept that a proposed, uncertified class action is just “any old action,” but rather is a case “with ambition.”<sup>51</sup> On the other hand, judges have relied on the traditional solicitor-client paradigm to help resolve disputes between competing class counsel by stating that “the prosecution of the action rests squarely with the representative plaintiff. The representative plaintiff in a class action lawsuit is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report.”<sup>52</sup> Two recent judgments—arguably the most important decisions to date in Canada on questions of class action ethics—illustrate the tension between the recognition of the unique features of class action of litigation and an adherence to a very traditional view of litigation and lawyering.

#### A. THE GENUINE PLAINTIFF FIRES CLASS COUNSEL: *FANTL*

In *Fantl v Transamerica Life Canada*,<sup>53</sup> the law firm representing the pre-certification class dissolved, and the lawyer who had primary responsibility for Mr. Fantl’s action formed his own firm while his three former partners formed a firm of their own. Mr. Fantl served a notice of change of solicitors on lead counsel, having chosen to stay with the three-partner firm.<sup>54</sup> The former lead counsel sought

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50. *McCracken v Canadian National Railway*, [2010] OJ no 4650 (QL) at paras 7-12 (Sup Ct) [*McCracken*].

51. *MacKinnon v National Money Mart* (2004), 33 BCLR (4th) 21 at para 33 (CA).

52. *Fantl*, CA, *supra* note 14 at para 44.

53. *Fantl*, Sup Ct, *supra* note 26.

54. In opposing the change of solicitors, class counsel argued that Mr. Fantl was motivated solely by his personal friendship with a lawyer at the new firm. Mr. Fantl countered that class counsel was committing professional misconduct by not accepting the change of solicitors, but did not dispute that his close friendship with the other lawyer was the principal reason for the change. *Ibid* at para 38.

an order requiring the representative plaintiff to accept him and his new firm as solicitors of record or, alternatively, to replace Mr. Fantl as proposed representative plaintiff with another class member. The judge at first instance, Justice Paul Perell of the Ontario Superior Court of Justice, dismissed the application, thus allowing the representative plaintiff to sever his relationship with the lawyer who had, for a number of years, prosecuted the action.

The respondents resisted the application on the basis that well-established principles governing a client's right to have a lawyer of his own choosing applied to the class action context in exactly the same way as they would in a regular individual proceeding and that lead counsel therefore did not even have standing to bring the application.<sup>55</sup> Justice Perell rejected the argument, noting that the "dynamics of the lawyer client relationship in an ordinary action are different from the dynamics of that relationship in a class action."<sup>56</sup> He acknowledged that it may be necessary to "adjust carefully the historical rules that govern the relationship between lawyer and client for the imperatives of a class proceeding" and held that this adjustment preserves the court's jurisdiction to consider whether the proposed representative plaintiff's choice of counsel was adequate.<sup>57</sup> Nevertheless, he held that the court should defer to the plaintiff's choice unless that choice is "inadequate" and that "[t]he test of representation for the class in a class action is one of adequacy not of superiority and it is not a test of what is in the best interests of the class or proposed class."<sup>58</sup> Such a conclusion flows from his operating paradigm and the following chain of logic:

- "the *Class Proceedings Act, 1992* is designed to have a genuine plaintiff with an individual claim against the defendant";<sup>59</sup>
- "there is a genuine lawyer and client relationship between the representative plaintiff and the solicitor of record";<sup>60</sup>
- "[o]ne implication from the presence of a genuine plaintiff is that the traditional rules that govern the relationship between a lawyer and a plaintiff should be the starting point";<sup>61</sup>
- "the Court should not alter the traditional rules of this solicitor

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55. *Ibid* at paras 43-48, 60.

56. *Ibid* at para 49.

57. *Ibid* at para 8.

58. *Ibid* at para 108.

59. *Ibid* at para 61.

60. *Ibid*.

61. *Ibid* at para 68.

and client relationship, unless there is some reason arising from the particular needs of the *Class Proceedings Act, 1992*;<sup>62</sup>

- after certification, “there is a solicitor and client relationship with attendant duties between the solicitor of record and both of the representative plaintiff and the class”;<sup>63</sup>
- prior to certification, there is a “*sui generis* relationship between lawyer and potential class members, and the Court has the jurisdiction to protect the interests of the proposed class members.”<sup>64</sup>

The Court of Appeal for Ontario affirmed Justice Perell’s decision and endorsed this reasoning.<sup>65</sup>

Who is this genuine plaintiff? The *CPA* and other provincial statutes do not speak of a genuine plaintiff. Rather, they speak of a representative plaintiff who is able to “fairly and adequately represent the interests of the class.”<sup>66</sup> The three usual factors considered when determining adequate representation are (1) the plaintiff’s motivation to prosecute the claim; (2) her ability to bear the costs of the litigation; and (3) the competence of her counsel.<sup>67</sup> At a time when indemnity agreements between counsel and client, or between representative plaintiff and the Class Proceedings Fund, are ubiquitous,<sup>68</sup> the second factor in the adequacy test is moot. The third factor, competence of counsel, is undoubtedly crucial in the certification analysis but is unhelpful as a determinant of just how genuine the plaintiff is. This leaves us with motivation—can a plaintiff only be genuine if properly motivated to prosecute the claim? If so, what is proper motivation, and how does a judge determine if the plaintiff has it?

One can imagine any number of motivations that would instinctively be considered improper, rendering a person both inadequate as a class representative and insufficiently genuine as a plaintiff. The person may be motivated by the promise of favourable treatment as compared to other class members. She could be acting under duress or prosecuting an action under false pretences to blackmail the defendant, for

62. *Ibid* at para 69.

63. *Ibid* at para 81.

64. *Ibid* at para 80.

65. *Fantl, CA, supra* note 14.

66. *CPA, supra* note 4, s 5(1)(e)(i).

67. *Western Canadian Shopping Centres Inc v Dutton*, [2001] 2 SCR 534 at para 41.

68. *Drady v Canada (AG)* (2008), 164 ACWS (3d) 32 (Ont Sup Ct). In this case, Cullity J commented that “it is almost unheard of ... for there to be no agreement, or understanding, between plaintiffs and class counsel in respect of the payment of costs if the action is unsuccessful” (*ibid* at para 57).

example. It would be a rare case, however, where a judge would have sufficient facts and evidence to ground an inference of fraudulent intent or duress.

The genuine or real plaintiff is described only sporadically in the case law. Such a plaintiff must have “an interest the same as others in the class” and must not be impecunious.<sup>69</sup> In *Fantl*, Justice Perell did not explain why he found Mr. Fantl to be a genuine plaintiff or how he arrived at that determination. Rather, he expressed Mr. Fantl’s qualifications in the negative: Mr. Fantl was “not a place-holder plaintiff for the entrepreneurial interests of the lawyer or law firm that has so much at stake in the class action.”<sup>70</sup> That Mr. Fantl was recruited by the original law firm to act as representative plaintiff did not make him a place-holder. That he had had limited communication with former lead counsel about the litigation also did not affect his status as genuine plaintiff.<sup>71</sup> Yet these very same facts have disqualified other potential representative plaintiffs. In both British Columbia and Ontario, courts have held that recruitment of a representative plaintiff for an action that was the product of the lawyers’ research strongly evidenced a lack of necessary interest, independence, and incentive on the part of the plaintiff to fulfill her duties to the class.<sup>72</sup>

The judges interviewed for this article echoed similar skepticism about the ability of a recruited plaintiff to represent the interests of the class independently. According to one judge, “There are cases where it’s a joke, frankly, to think the client is doing anything. The client was recruited and just accepts instructions.”<sup>73</sup> Conversely, another judge disagreed with the assertion that solicitation alone signalled that a plaintiff is not genuine. Rather, what is key is that “they have a stake in the resolution of the common issues.”<sup>74</sup> This same judge, however, queried whether, by reason of the existence of indemnification against adverse costs, a plaintiff would ever have “a real stake.”<sup>75</sup>

The extent of a representative plaintiff’s involvement in the action is also not a reliable measure of genuineness. In *Chartrand v General Motors*,<sup>76</sup> Justice

69. *Smith v Canadian Tire Acceptance Ltd* (1995), 22 OR (3d) 433 at para 71 (Gen Div).

70. *Fantl*, Sup Ct, *supra* note 26 at para 104.

71. *Ibid* at para 38.

72. *Chartrand v General Motors* (2008), 173 ACWS (3d) 694 (BCSC) [*Chartrand*]; *Singer v Schering-Plough Canada Inc* (2010), 87 CPC (6th) 276 (Ont Sup Ct); *Poulin v Ford Motor Co of Canada* (2006), 153 ACWS (3d) 30 at para 85 (Ont Sup Ct) [*Poulin*]. In *Poulin*, the plaintiff was described as a “pawn” of the counsel who recruited him and ultimately found not to be an adequate representative plaintiff (*ibid* at para 85).

73. Interview of Respondent 1 (15 June 2010) [Respondent 1].

74. Interview of Respondent 2 (23 June 2010) [Respondent 2].

75. *Ibid*.

76. *Supra* note 72.

DJ Martinson concluded that the plaintiff was inadequate because she had been recruited by class counsel and was too passive. Although familiar with the basic elements of the lawsuit, Ms. Chartrand had not taken part in the decision to amend the claim other than to “discuss” it<sup>77</sup> and was not familiar with either the litigation plan or the financial arrangements between her counsel and the US attorneys who were involved.<sup>78</sup> In another action involving automobile deductibles, however, the representative plaintiffs had an “incomplete understanding of their obligations with respect to costs” but nevertheless were found to be adequate.<sup>79</sup> After reviewing the transcripts of the plaintiffs’ cross-examinations—in which their limited understanding of a representative plaintiff’s cost exposure was made plain—Justice Haines noted,

It should perhaps be remembered in cases such as these that no representative plaintiff will have much of a stake in the ultimate outcome since the potential recoveries are so modest. Therefore reality dictates that the test for adequacy of the representative plaintiff is in large part a test of the capacity of class counsel to properly pursue the action in the best interests of the members of the class.<sup>80</sup>

*Fantl* brought the question of whether the client or the lawyer controls class action litigation to the attention of the mainstream media.<sup>81</sup> Justice Perell concluded that the representative plaintiff is the client and as such can hire and fire class counsel so long as counsel was adequate but irrespective of the best interests of the class.<sup>82</sup> Justice Perell also concluded that if the representative plaintiff is genuine he controls the litigation, and class counsel is accordingly ethically bound to accept the change in solicitors. The case law, however, is at best unclear—perhaps even inconsistent—on the fundamental question of what constitutes a genuine plaintiff. The only meaningful criterion offered to determine genuineness is whether the plaintiff is properly motivated to prosecute the action. Yet as we have

77. *Ibid* at para 78.

78. *Ibid* at paras 102, 107, 110-11.

79. *Segnitz v Royal & Sun Alliance Ins Co of Canada* (2003), 126 ACWS (3d) 394 at para 7 (Ont Sup Ct) [*Segnitz*]. The class action was ultimately dismissed as a result of the insurer’s successful summary judgment motion. See *David Polowin Real Estate v Dominion of Canada General Insurance* (2005), 76 OR (3d) 161 (CA).

80. *Segnitz*, *supra* note 79 at para 14.

81. Sandra Rubin, “Who’s driving the bus here?,” *National Post* (13 May, 2008), online: <<http://www.reportonbusiness.com/servlet/story/RTGAM.20080513.wlawmain0513/BNStory/robLawPage/home/>>.

82. Interestingly, the provisions of r 23 of the US *Federal Rules of Civil Procedure*, as amended in 2003, compel a different result. “If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.” Fed R Civ P 23(g)(2).

seen, not all judges view recruitment, lawyer-initiated class actions, and plaintiff participation as determinative of motivation. The lack of consensus renders the next question even more complicated: Does the genuine plaintiff enjoy a traditional lawyer-client relationship with class counsel? In contrast to much of the US case law, Canadian courts almost universally answer in the affirmative. The *Richard v British Columbia*<sup>83</sup> decision exemplifies this approach.

## B. CLASS COUNSEL FIRES THE GENUINE PLAINTIFF: *RICHARD*

In *Richard*, Mr. McArthur, one of two representative plaintiffs, applied to remove class counsel and appoint new lawyers for the class on the grounds that class counsel had acted unethically. The claim had been initiated in 2002 by the law firm Poyner Baxter against the province on behalf of all living persons who were sexually, physically, emotionally, and psychologically abused while they were residents in Woodlands School (a government operated residential facility for persons with mental and psychiatric disabilities). The action was certified in 2005. Several months later, the British Columbia Court of Appeal released its decision in *Arishenkoff v British Columbia*,<sup>84</sup> another residential schools case, which was critical to the *Richard* case on a point of law. The Court of Appeal held that the Crown could not be liable for torts committed prior to 1 August 1974, the date on which the *Crown Proceedings Act*<sup>85</sup> came into force. Mr. McArthur had been a resident at Woodlands prior to August 1974, while the other representative plaintiff, Mr. Richard, had been a resident of and abused at Woodlands after that date.

Within a year, after protracted negotiations with class counsel—negotiations that the lawyers had agreed not to disclose to Mr. McArthur—the defendant provincial government delivered a final offer of settlement that provided compensation to the post-August 1974 class members, but which did not recognize any right of action for those abused prior to that date. The settlement offer was disclosed to Mr. McArthur, who retained independent legal counsel. Mr. McArthur then instructed Poyner Baxter to reject the offer. Contrary to those instructions, class counsel first brought an application for an order that two subclasses be created, with Mr. McArthur representing the pre-August 1974 subclass. The application was denied.<sup>86</sup> Class counsel then sought to amend the class definition to narrow the class to post-August 1974 Woodlands residents, removing

83. *Richard*, 2007, SC, *supra* note 41.

84. (2005), 47 BCLR (4th) 1 (CA), leave to appeal to SCC refused, [2005] SCCA No 556.

85. SBC 1974, c 24.

86. *Richard v British Columbia* (2006), 152 ACWS (3d) 1004 (BCSC) [*Richard*, 2006].

Mr. McArthur as a representative plaintiff altogether. Mr. McArthur applied concurrently for an order removing Poyner Baxter as counsel for the plaintiffs.

Justice Butler granted Mr. McArthur's application and denied the motion to amend the class definition. At paragraph seventeen of his reasons, the judge recounted the allegations of conflict of interest and breach of duty of loyalty proffered by Mr. McArthur.<sup>87</sup> Class counsel negotiated with the defendant in secret, did not follow instructions to reject the settlement, applied to create subclasses without instructions, filed affidavits that stated Mr. McArthur did not qualify as a settlement class member under the terms of the proposed settlement agreement, and took the position at the hearing of the earlier motion that Mr. McArthur had no right of action. Poyner Baxter did not contest these facts. Indeed, the firm admitted that had these same steps been taken in the context of representing an individual client, they would be "contrary to the Professional Conduct Handbook."<sup>88</sup> When acting as class counsel, however, "other considerations must be taken into account."<sup>89</sup> Class counsel argued that it owed its duty of loyalty and other obligations as a solicitor to the class as a whole and that "the system can only work on this basis."<sup>90</sup>

Justice Butler held that, after certification, class counsel clearly has *all* the duties and obligations that arise under a solicitor-client relationship and that these are owed to the class as a whole.<sup>91</sup> Relying on *R v Neil*,<sup>92</sup> Justice Butler cited three dimensions to the duty of loyalty: avoidance of conflicting interests, duty of zealous representation, and the duty of candour with clients on matters relevant to the retainer. Given these duties, Poyner Baxter could "not ignore the wishes of the class representatives in making fundamental litigation decisions and [could] not prosecute [the] action with unfettered discretion."<sup>93</sup> Justice Butler reached this conclusion notwithstanding his finding that Poyner Baxter was motivated only by its views as to what was best for the class as a whole and by its assessment that Mr. McArthur was providing instructions on the basis of his own personal interests.<sup>94</sup> Interestingly, soon after Justice Butler released his decision, the proposed settlement was revoked, and the defendant moved to amend the class definition to exclude persons who suffered abuse prior to August 1974. The motion was

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87. *Richard*, 2007, SC, *supra* note 41.

88. *Ibid* at para 18.

89. *Ibid*.

90. *Ibid* at para 28.

91. *Ibid* at paras 23, 42.

92. [2002] 3 SCR 631.

93. *Richard*, 2007, SC, *supra* note 41 at para 42.

94. *Ibid* at paras 43-44.

granted<sup>95</sup> in what was described as “the inevitable outcome” of *Arishenkoff*.<sup>96</sup> A settlement agreement was approved for the post-1974 class members in 2010.<sup>97</sup>

The traditional lawyer-client paradigm drives the result in *Richard*. Yet, Justice Butler was aware of the different dynamics and obligations that operate in the class action context. Indeed, he cited a number of US authorities that challenge the application of the traditional paradigm to class actions. In one case cited by Justice Butler, the US Court of Appeals for the Fifth Circuit stated definitively that “it is inappropriate to import the traditional understanding of the attorney-client relationship into the class action context by simply substituting the named plaintiffs as the client.”<sup>98</sup> In another case, the same court commented that the “duty owed to the client sharply distinguishes litigation on behalf of one or more individuals and litigation on behalf of a class.”<sup>99</sup> Despite these authorities—and a recognition that the authorities were relevant to the BC class action regime and the case at hand—Justice Butler maintained the position that Poyner Baxter was obligated to follow the instructions of the representative plaintiff and was precluded from continuing to act by reason of its conflict of interest and breach of duty of loyalty to Mr. McArthur.

Had Justice Butler not viewed the representative plaintiff through the traditional client lens, another outcome might have been possible. If, as will be explored below, the client in the class action is the class, Justice Butler could have decided the motion in a manner that maintained fidelity to the *Neil* principles while at the same time recognizing that it is inappropriate to import the traditional understanding and analysis of the solicitor-client relationship into the conduct

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95. *Richard v British Columbia* (2008), 165 ACWS (3d) 817 (BCSC), aff'd (2009), BCLR (4th) 87 (CA), leave to appeal to SCC refused [2009] SCCA No 274.

96. *Richard v British Columbia*, [2010] BCJ no 1363 (QL) at para 10 (SC).

97. *Ibid.* The settlement is, by all accounts, very favourable to the class members. Under a claims process, class members submit their claims in writing and can present evidence not ordinarily admissible. Compensation is comparable to tort damages and is not affected by limitations defences. The class members need not adduce evidence of harm, only evidence concerning the event which caused the injury. There is no ceiling to the settlement fund. A robust notice campaign was also devised. Whether this settlement is superior to the one Poyner Baxter was prepared to submit for court approval is unknown.

98. *Pettway v American Cast Iron Pipe*, 576 F (2d) 1157 (5th Cir 1978), cert denied, 439 US 1115 (SC 1979) [*Pettway*].

99. *Parker v Anderson*, 667 F (2d) 1204 at 1211 (5th Cir 1982). Commentary to r 23 by the Advisory Committee echoes this view: “[T]he primary responsibility of class counsel ... is to represent the best interests of the class. The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients.” Fed R Civ P 23(g)(1)(B) *Notes of Advisory Committee on Rules* (2003), online: Legal Information Institute, <<http://www.law.cornell.edu/rules/frcp/ACRule23.htm>>.

of class actions. Justice Butler was quite rightly concerned about class counsel prosecuting the action “with unfettered discretion.”<sup>100</sup> One need not impose the traditional client-lawyer relationship and its attendant duties, however, in order to avoid limitless discretion. Class counsel’s discretion is fettered by his obligations to the class as a whole and by the strictures of the *CPA*. That is, he must satisfy the judge that the proposed settlement is in the best interests of the class. A representative plaintiff truly invested in the action and able to advance the interests of the class independently would presumably be in a position to object to the fairness of the settlement. If meaningful objections are few and far between,<sup>101</sup> then it is time to revisit and revise the objection process; it is not an argument for importing wholesale the duties of loyalty and candour that flow from non-representative client representation.

### C. IMPACT OF THE UNRESOLVED CLIENT QUESTION

Both *Fantl* and *Richard* have implications beyond the interests of the lawyers and parties in those two cases. Determinations of the rights of representative plaintiffs to select and then discharge class counsel, irrespective of the best interests of the class or the investment of time and money by the original class counsel, are significant for all stakeholders in class action litigation.

The cases also highlight the need to reconcile the absent client problem discussed in Part I with the continuing centrality of the genuine plaintiff in class action litigation. The concept of genuine plaintiff requires more clarity and precision not only because it determines the ethical duties of class counsel but also because it influences class proceedings at key stages. It dictates, for example, Chief Justice of Ontario Warren K. Winkler’s conclusion that the “representative plaintiff in a class action lawsuit is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report.”<sup>102</sup> It has a direct bearing on the adequacy of representation analysis at the certification hearing. The genuine plaintiff paradigm also impacts judicial approaches to fee approval. In a number of cases, judges have placed great weight on the fee agreement signed by the representative plaintiff when assessing the fairness of the requested counsel fee.<sup>103</sup>

100. *Richard*, 2007, SC, *supra* note 41 at para 42.

101. Empirical support for this statement and for the institutional disincentives for rigorous objections is explored in Kalajdzic, *supra* note 48 at 232-36.

102. *Fantl*, CA, *supra* note 14 at para 44.

103. See *e.g.* *Cassano*, *supra* note 47 at para 63, where the court stated

They had accepted their retainers on the basis of a fee calculation that would vary directly according to the degree of success that was achieved. ... [T]here was nothing in the manner in which the proceeding was conducted that, in my judgment, would

In one recent decision, the court went so far as to describe its role at the fee approval stage as “not to fix a fee by consideration of all the evidence but to decide whether the [retainer] agreement operates reasonably in the context given the fee proposed.”<sup>104</sup> In other cases, however, judges place little weight on the fee agreements<sup>105</sup>—which entitle class counsel to the amounts requested—on the basis that in class actions there is an “absence of a client who will be directly affected and concerned with the level of fees claimed.”<sup>106</sup> The case law is simply not clear as to when a fee agreement, even if entered into with an absent client, attracts deference and when it is merely one factor of many to be considered. Similarly, the genuine client paradigm necessarily impacts the value a judge will place on the representative plaintiff’s endorsement of a proposed settlement—even if the endorsement comes by way of a pro forma affidavit.

Continued insistence on the genuine plaintiff paradigm further complicates the status of the other class members. The nature of the relationship between putative class members and class counsel is still largely undefined. Early Canadian jurisprudence did not treat class members as clients of class counsel prior to certification,<sup>107</sup> a view that was shared by commentators and the Chief Justice of Ontario.<sup>108</sup> Since then, more nuanced approaches have emerged. Various courts refer to the relationship as *sui generis*—a potential solicitor and client relationship exists prior to certification, and it attracts some responsibilities on the part of counsel.<sup>109</sup> For example, class counsel cannot prejudice the interests of pre-certification class members, and it is for the court to ensure that those interests are

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justify a refusal to approve a fee determined in accordance with the terms on which the retainers were accepted.

See also *Cascades*, *supra* note 47 at paras 6, 9.

104. *Parsons v Coast Capital Savings Credit Union*, [2009] BCJ no 711 (QL) at para 9 (SC), citing *Commonwealth Investor Syndicate Ltd v Laxton* (1994), 94 BCLR (2d) 177 at para 47 (CA).

105. *Martin v Barrett* (2008), 168 ACWS (3d) 643 at para 48 (Ont Sup Ct).

106. *Ibid* at para 52.

107. *Pearson v Inco* (2001), 57 OR (3d) 278 at para 18 (Sup Ct). More recently, Sigurdson J took the same view: “It appears that generally, the solicitor-client relationship prior to the certification proceedings is between the solicitor and the representative plaintiff, not the solicitor and the putative class members.” *Burnett Estate v St Jude Medical Inc* (2008), 165 ACWS (3d) 245 at para 48 (BCSC).

108. See *e.g.* Warren K Winkler & Sharon D Matthews, “Caught in a Trap: Ethical Considerations for the Plaintiff’s Lawyer in Class Proceedings,” online: Court of Appeal for Ontario <<http://www.ontariocourts.on.ca/coa/en/ps/speeches/caught.htm>>. The authors posit that since there is no actual “class action” before certification, no relationship can exist.

109. *Ward-Price v Mariners Haven Inc* (2004), 71 OR (3d) 664 (Sup Ct) [*Ward-Price*]; *Fantl*, Sup Ct, *supra* note 26.

protected.<sup>110</sup> There is some support for the notion that communications between the potential class member and counsel must be protected by confidentiality,<sup>111</sup> but how this might be reconciled with the weightier duties of loyalty and candour owed to the representative plaintiff has not yet been explained. Indeed, even the most experienced class action judges admit that the status of, and responsibilities of class counsel toward, class members before certification is uncertain and a work in progress.<sup>112</sup>

The post-certification status of class members is a bit clearer. Virtually all courts recognize that a solicitor-client relationship exists between class counsel and the class at that point in the litigation.<sup>113</sup> The scope of that relationship, however, remains amorphous and “an area under development.”<sup>114</sup> One judge has held that class counsel is not an agent of the class and that there is not a contractual relationship between them—even if counsel owes fiduciary duties to class members.<sup>115</sup> According to another judge, however, the class *is* the client, to which is owed all of the obligations that flow from a traditional lawyer-client relationship.<sup>116</sup> The case law has not yet explained how the full panoply of these obligations can be met vis-à-vis a large, diffuse group of people with potentially conflicting interests, many of whom may not even be known to counsel.

For all of these reasons, clarity and consensus regarding the identity of the client in a class action is needed. Given its entrepreneurial and representative nature, this form of litigation compels a normative shift vis-à-vis all of its participants. The named plaintiff is no ordinary client. The lawyer’s clients include persons not named in the title of proceedings. The judicial role takes on aspects of inquisitorial legal systems. And the lawyer is zealous advocate, venture capitalist, and private attorney general in equal measure.

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110. *Coleman v Bayer Inc* (2004), 47 CPC (5<sup>th</sup>) 346 at paras 30-36 (Ont Sup Ct).

111. One of the judges in this study insisted emphatically that the solicitor-client privilege applied to all communications, even those conducted with pre-certification class members. Interview of Respondent 5 (19 October 2010) [Respondent 5]. See also Hutchinson, *supra* note 9; Abdelkerim, *supra* note 9. For a contrary view, see “The Attorney-Client Privilege in Class Actions: Fashioning an Exception to Promote Adequacy of Representation”, Note, (1983) 97 Harv L Rev 947 (arguing that confidentiality is detrimental to the interests of the class members as it impedes oversight of lawyers’ conduct).

112. Perell, *supra* note 9. A judge interviewed for this project questioned what *sui generis* even means in this context. Respondent 3, *supra* note 33.

113. See e.g. *Ward-Price*, *supra* note 109; *1176560 Ontario Ltd v Great Atlantic & Pacific Co of Canada* (2003), 121 ACWS (3d) 426 (Ont Sup Ct).

114. Perell, *supra* note 9 at 213.

115. *Martin v Barrett*, [2008] OJ No 3813 (QL) at para 32 (Sup Ct).

116. Respondent 2, *supra* note 74.

### III. REGULATING CLASS ACTION ETHICS

#### A. RULES OF CONDUCT

As discussed above in Part I, US scholars are virtually unanimous in their view that existing rules of professional conduct do not fit neatly within the class action paradigm. As Carrie Menkel-Meadow succinctly puts it:

[C]urrent ethical rules ... were not drafted with the special issues of mass tort class action settlements in mind, and do not, in my view, provide adequate guidance for how these issues should be resolved. Our legal system, and ethical rules, must confront the tensions between our ideals of individual justice and the reality of a need for “aggregate” justice.<sup>117</sup>

A range of responses to this reality is apparent in the US literature. Commentators have variously proposed that an entirely new code of conduct be drafted to govern class action litigation,<sup>118</sup> that existing rules be revised,<sup>119</sup> or that additional commentary be added to the rules, thereby leaving the bulk of any reform to judicial interpretation.<sup>120</sup> As part of this discussion, a number of theoretical models have been offered with respect to the class action client. Examples include conceptualizing the class as an entity client<sup>121</sup> and treating class members analogously to incompetent clients<sup>122</sup> or as quasi-clients.<sup>123</sup>

Apart from the many individual calls by legal ethicists for special attention to class actions, there have also been a number of collective and governmental efforts in the United States to address the perceived “lawlessness” of class action practice.<sup>124</sup> The Judicial Conference Committee on Rules of Practice and Procedure began an intensive study of class actions in the early 1990s, culminating in

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117. “Ethics and the Settlements of Mass Torts: When the Rules Meet the Road” (1995) 80 Cornell L Rev 1159 at 1172.

118. Koniak & Cohen, *supra* note 37.

119. Menkel-Meadow, *supra* note 117.

120. Moore, *supra* note 8 at 1481.

121. *Ibid* at 1484.

122. Hazard, *supra* note 8 at 1399.

123. Association of the Bar of the City of New York, *supra* note 8 at 440, noting that “[c]lass members might be considered quasi-clients, owed those duties to the extent consistent with the law and practicalities of class actions.” Allan Hutchinson makes the same suggestion in his brief discussion of class actions. *Supra* note 9.

124. Koniak & Cohen, *supra* note 37 at 114.

recommendations for amendments to rule 23 in 1996<sup>125</sup> and 2001.<sup>126</sup> The *Private Securities Litigation Reform Act of 1995*<sup>127</sup> was passed to address widespread abuses in securities class actions (principally those related to so-called professional representative plaintiffs and strike suits).<sup>128</sup> In 1997, the American Bar Association created the Commission on the Evaluation of the Rules of Professional Conduct to undertake a comprehensive review of the *Model Rules of Professional Conduct*.<sup>129</sup> In a series of hearings and written submissions, the Commission was urged to adopt a separate class action ethics rule.<sup>130</sup> The *Class Action Fairness Act of 2005*<sup>131</sup> was then enacted to “amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants.”<sup>132</sup> The Federal Trade Commission has considered the subject of consumer class actions and legal ethics, and various law schools have held conferences devoted to the subject.<sup>133</sup>

US scholarship reflects the richness of these debates. Much has been written about the unique ethical dimensions of representative litigation. Various theories have been offered regarding how best to conceptualize the class action client(s). On one point, however, there is virtual unanimity. Readers would be hard-pressed to find a US scholar, lawyer, or judge who maintains that the American Bar Association’s *Model Rules of Professional Conduct* apply comfortably to class

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125. For a detailed account of the Committee’s work and proposed amendments, see John K Rabiej, “The Making of Class Action Rule 23—What Were We Thinking?” (2004) 24 *Miss CL Rev* 323 at 345-68, n 119, citing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Civil, and Criminal Procedure* 45 (1996). As Rabiej explains, the Committee ultimately declined to pursue most of the proposed amendments because support for reform was fractured within both the defence and plaintiff’s bar, and the committee has historically resisted implementing any rule amendments that did not enjoy broad consensus (*ibid* at 367).
126. Proposed revisions were published for comment in 2001. Almost all of the proposals were promulgated by way of amendments to r 23 in 2003. See *ibid* at 368-90.
127. 15 USC § 78u-4 (2004).
128. Hensler, *supra* note 24 at 81-82.
129. Center for Professional Responsibility, *Model Rules of Professional Conduct*, Chicago: American Bar Association, 2001.
130. Moore, *supra* note 8 at 1479. The Commission ultimately declined to adopt separate ethics rules.
131. Pub L No 109-2, 119 Stat 4.
132. *Ibid*, Preamble. For a discussion of the statute and its intended goals, see William V Sasso & Jacqueline A Horvat, “*Class Action Fairness Act of 2005: A Canadian Perspective*” (2005) 2 *Can Class Action Rev* 63.
133. The proceedings of one such conference, held at Georgetown University, have been published at (2004) 18 *Geo J Legal Ethics* 1161. For the Federal Trade Commission’s workshop papers, see online: <<http://www.ftc.gov/bcp/workshops/classaction>>.

action lawyering. By way of example, Charles Wolfram,<sup>134</sup> Susan Koniak,<sup>135</sup> Gerald Cohen,<sup>136</sup> Carrie Menkel-Meadow,<sup>137</sup> Nancy Moore,<sup>138</sup> Geoffrey Miller,<sup>139</sup> and Geoffrey Hazard<sup>140</sup>—all highly regarded legal ethicists—have argued forcefully that “the usual rules of legal ethics simply cannot apply to the class action context.”<sup>141</sup> While there is great variance between such scholars regarding how best to theorize class actions and whether reform should be driven by professional rules committees or class action jurisprudence, there is at least consensus on the irreconcilability of traditional ethical rules with class action praxis. US case law reflects the same conclusion. In the oft-cited *Corn Derivatives* decision by the Third Circuit Court of Appeals, for example, Judge Adams wrote that “courts cannot mechanically transpose to class actions the rules developed in the traditional lawyer-client setting context.”<sup>142</sup>

To date, there have been no such organized efforts to evaluate legal ethics in the Canadian class action context, despite the similarities between the ethical rules and the class action regimes in both jurisdictions. The LSUC and its various subcommittees have not discussed—let alone offered commentary or proposed amendments to rectify—the disjunction between various rules of conduct and the realities of class proceedings.<sup>143</sup> Legal commentators and judges alike have assumed that the *Rules of Professional Conduct* apply, even if only as a “starting point.”<sup>144</sup> Why has there been so little discussion in Canada of the application of ethical rules to class action litigation as compared to our southern neighbours?

One possible reason is that we have not seen the same degree of publicly

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134. *Supra* note 25.

135. Koniak & Cohen, *supra* note 37.

136. *Ibid.*

137. *Supra* note 117.

138. *Supra* note 8.

139. *Supra* note 8 at 582 (“courts have not articulated coherent principles to guide their analysis. . . . Nor have the rules of professional responsibility made up for the deficit: ethics rules relating to conflicts of interest are predicated on a notion of client consent that is unworkable in the context of class litigation”).

140. *Supra* note 8 at 1402 (“[n]one of the rules governing the ordinary client-lawyer relationship works very well when applied to class counsel”).

141. Coffee, *supra* note 22 at 340.

142. *In Re Corn Derivatives Antitrust Litigation*, 748 F (2d) 157 at 163 (3d Cir 1984). See also *Pettway*, *supra* note 98.

143. Confirmed by way of email correspondence and telephone conversation with Jim Varro, Policy Counsel, Law Society of Upper Canada (17 June 2010).

144. Carabash, *supra* note 9 at 618.

scandalous behaviour on the part of class action lawyers.<sup>145</sup> In the absence of widespread concern over class action abuse, there is scant motivation to debate the application of legal ethics and rules. Some judges share this view, with an important caveat, as expressed by one interviewed judge: “I don’t get the impression that there is a lot of immoral conduct out there—but how would you know?”<sup>146</sup> A lack of highly publicized examples of blatantly unethical conduct is a weak justification for not engaging in the kind of analysis and dialogue this article encourages. Ethical rules are not solely aimed at remedying prior acts of misconduct; they also exist to guard against the potential risks of such misconduct. More broadly, legal ethics can be aspirational.<sup>147</sup> In any event, the absence of scandal does not prove that unethical practices, even on a small scale, do not take place.

A second possible explanation for the lack of academic, regulatory, and public interest in class action ethics is that Canadian industry, insurers, and both sides of the class action bar may be less well-funded and influential than their US counterparts, who lobbied the Republican and Democratic parties heavily in the mid-1990s and early 2000s when tort and litigation reforms were high on Congress’s agenda.<sup>148</sup> Yet another possible reason is that the various law societies, to the extent that issues of class action ethics are raised, may have concluded that the designated class action judges of each province are better positioned to formulate rules.

In my view, however, an equally plausible explanation is a normative one. As explored in the previous Part, Canadian jurisprudence continues to subscribe to the view that the representative plaintiff is a genuine client of class counsel, to whom all of the usual duties are owed. Evident in both my discussions with class action judges and their written judgments is a deep reticence to admit that the rules which govern the usual solicitor-client relationship do not apply in the class action context. Whatever ethical issues may arise in class actions, the dominant thinking is that the usual professional codes of conduct will address them. To

145. Only one Canadian class action lawyer appears to have attracted some notoriety. See Jonathan Gatehouse, “White man’s windfall,” *Macleans* (4 September 2006), online: <[http://www.macleans.ca/article.jsp?content=20060911\\_133025\\_133025](http://www.macleans.ca/article.jsp?content=20060911_133025_133025)>. The byline reads, “The biggest winner in the residential schools settlement is not a native. He’s a lawyer named Tony Merchant, and his firm’s take could hit \$100 million. No wonder he has so many critics.”

146. Respondent 1, *supra* note 73.

147. Alice Woolley, “Introduction to Legal Ethics” in Alice Woolley et al, eds, *Lawyers’ Ethics and Professional Regulation* (Markham: LexisNexis Canada, 2008) at 7 (“Lawyers’ ethics ... addresses the moral or ethical aspirations of the practising lawyer—the type of decision-making processes and decisions which an ethical lawyer will employ and make”).

148. For a journalistic account of these events, see Patrick Dillon & Carl M Cameron, *Circle of Greed* (New York: Broadway Books, 2010).

the extent that such rules are deficient or unhelpful in class proceedings, judges will fill the gap. At least one US commentator agrees with this approach on the basis that class action judges, not ethics code drafters, are qualified to determine the appropriate relationships between class counsel, the representative plaintiff, and the rest of the class.<sup>149</sup> It is not clear whether the same rationale has produced a deliberate policy choice in Canada to defer to jurisprudential fashioning of class action ethical rules. In the absence of advancements in rules of conduct, it nevertheless becomes *necessary* for judges to fill the void.

In Part III(B), below, I examine instances of this judicial rule making. Such a case-by-case approach is favoured by some of the class action judges I interviewed for this project. Whether we can do better than this incremental and at times haphazard development of ethical guidelines for class action litigation is a discussion that I hope this article will generate. As has been stated elsewhere,<sup>150</sup> case law is a limited source of guidance on what is required for lawyers to be ethical, in part because cases tend to address specific facts rather than general principles. More crucially, case law does not generally fulfill the aspirational objectives of legal ethics. Thus, I offer suggestions for possible regulatory reform in the final section of this article.

## B. JUDICIALLY CONSTRUCTED RULES

US literature is replete with suggestions for reform to curb class action abuse including, for example, court-appointed private monitors, independently represented plaintiff committees, and the use of academics as Special Masters. In Canada, however, very little serious consideration has been given to adopting new tools with which to confront class actions, despite the fact that the adversarial context that normally operates in a Canadian courtroom does not occur to the same degree in representative actions. Notwithstanding the discomfort with their role at the settlement approval hearing expressed by all of the interviewed judges—described by two interview subjects as “the loneliest job in the world”<sup>151</sup>—no sustained academic or legislative reform debate has taken place to address the problems faced by class action judges.<sup>152</sup> Invariably, the solution to any particular

149. Moore, *supra* note 8 at 1501.

150. Woolley et al, *supra* note 147 at 8.

151. Respondent 2, *supra* note 74; Respondent 3, *supra* note 33.

152. A handful of commentators have addressed different facets of the ethics problem. Garry Watson has proposed the appointment of a monitor charged with protecting class members' interests and having full rights of discovery (as described in Zwibel, *supra* note 9 at 190-91). Kalajdzic, *supra* note 48, and Piché, *supra* note 32, have also argued for reform of judicial approaches to the settlement approval process.

ethical problem is described as resting squarely with the class action judge, who is expected to weed out unsavoury behaviour, protect the interests of the class, and address conflicts of interests as they arise.

The judges interviewed for this study all pointed to the strictures of the *CPA* as a source of ethical guidance. It is true that various sections of the *CPA* contemplate judicial oversight as a check against unethical conduct. For example, section 5(1)(e) requires that the certification hearing judge be satisfied that the representative plaintiff does not have a conflict of interest with other class members in order to be certified as appropriate. Section 12 gives the case management judge wide jurisdiction to make any order necessary for the proper conduct of the action; pursuant to this section, judges may determine how best to resolve conflicts as they arise. Section 29 compels the fairness hearing judge to approve the proposed settlement, and sections 32 and 33 require court approval of the class counsel fee. These approval processes have developed under the case law to require more than a rubber stamping by the judge, though there is a wide spectrum of approaches and varying degrees of scrutiny.<sup>153</sup> According to one judge, “the mere existence of the rule requiring settlement approval is what is important. If you removed the settlement approval factor, you would open the gates for people to be totally self-serving.”<sup>154</sup>

Pursuant to their oversight functions under the *CPA*, judges supervising class actions have attempted to resolve a number of ethical ambiguities insufficiently addressed by the *Rules*. Some of these decisions concern the relationship between class counsel and the representative plaintiff. For example, some communication with the representative plaintiff is required, though how much is not entirely clear.<sup>155</sup> More recently, Justice Cullity confirmed that class counsel must disclose the risks of adverse costs to a potential representative plaintiff if counsel is not

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153. Compare Winkler J’s statement in *McCarthy v Canadian Red Cross Society* (2001), 106 ACWS (3d) 193 at para 21 (Ont Sup Ct) (“The Court is *not equipped*, nor should it be required, to engage in a forensic investigation into the material or *to mine the record to inform itself*. Counsel must direct the Court to all relevant information that would impact on the Court’s determination” [emphasis added]) to that of Sharpe J in *Dabbs v Sun Life Assurance*, [1998] OJ no 1598 (QL) at para 21 (Gen Div) (“In view of the fact that the purpose of the exercise is to ensure that the interests of the unrepresented class members are protected, *the court is called upon to play a more active role* than is called for in strictly adversarial proceedings” [emphasis added]). Sharpe J’s approach mirrors that of some US courts, including the Ninth Circuit Court of Appeals, which has stated that “in order to protect the rights of absent class members, the court must assume a far more active role than it typically plays in traditional litigation.” *Epstein v MCA, Inc*, 50 F (3d) 644 at 667 (1995), rev’d on other grounds (*sub nom Matsushita Electric Industrial v Epstein*) 516 US 367 (1996).

154. Respondent 1, *supra* note 73.

155. *Richard*, 2007, SC, *supra* note 41.

indemnifying the client against those costs.<sup>156</sup> Class counsel's indemnity has been held not to violate ethical prohibitions relating to champerty and maintenance.<sup>157</sup>

On the question of financial self-interest, judges have clarified that it is not unethical for class counsel to negotiate a settlement and their proposed fee simultaneously, despite the "divided loyalties" such negotiation entails.<sup>158</sup> Subsequent decisions have specified, however, that for ethical reasons the proposed settlement agreement cannot be conditional upon the court's approval of the proposed fee.<sup>159</sup>

Courts have also attempted to mitigate the dangers of conflict of interest between the representative plaintiff and other class members. Some judges have held that the representative plaintiff must not be related to class counsel,<sup>160</sup> though others have departed from the rule.<sup>161</sup> One judge has denied a representative plaintiff compensation for work performed in researching and vetting appropriate *cy pres* recipients on the basis that it would be unseemly for the representative plaintiff to receive compensation when other class members get nothing.<sup>162</sup> Another judge has held to the contrary.<sup>163</sup>

Financial self-interest for both plaintiff's counsel and the defendants may lead to an improvident settlement or sloppy claims process. To guard against these risks, there is growing acceptance of the need for judges to supervise settlements even after their formal approval,<sup>164</sup> a role clearly envisioned by the *CPA*<sup>165</sup> and contemplated

156. *Attis v Ontario (Minister of Health)* (2010), 323 DLR (4th) 309 (Ont Sup Ct).

157. *Holmes v London Life Ins Co of Canada* (2007), 40 CPC (6th) 167 (Ont Gen Div).

158. *Dabbs v Sun Life Assurance* (1998), 38 OR (3d) 781 at para 8 (Gen Div), Winkler J.

159. *Stewart v General Motors of Canada Ltd* (2008), 172 ACWS (3d) 572 at para 22 (Ont Sup Ct); *Garland v Enbridge Gas Distribution* (2006), 152 ACWS (3d) 397 (Ont Sup Ct) [*Garland*, Sup Ct], varied on consent (2008), 162 ACWS (3d) 891 (Ont CA).

160. *Kerr v Danier Leather* (2001), 108 ACWS (3d) 773 (Ont Sup Ct) at paras 68-73, rev'd on other grounds 77 OR (3d) 321 (CA), rev'd [2007] 3 SCR 331; *Bourgoin v Bell Canada*, [2007] JQ no 14560 (QL) at paras 49-52 (Que Sup Ct) (where the representative plaintiff was rejected for being the brother of class counsel).

161. *Cassano*, *supra* note 47 at para 58 (Sup Ct). At the fairness hearing, Cullity J held the marital relationship between the representative plaintiff and one of the lawyers on the plaintiff's counsel team was not a factor to be considered in setting the fee since the representative plaintiff had been approved as an appropriate representative plaintiff. There was no discussion of this possible conflict of interest in the certification decision.

162. *Sutherland v Boots Pharmaceuticals PLC* (2002), 21 CPC (5th) 196 at para 22 (Ont Sup Ct).

163. *Garland*, Sup Ct, *supra* note 159.

164. *Baxter v Canada (AG)* (2006), 83 OR (3d) 481 at para 12 (Sup Ct) ("The court has an obligation under the Class Proceedings Act ... to protect the interests of the absent class members, ... in ensuring that the administration and implementation of the settlement are done in a manner that delivers the promised benefits to the class").

165. *CPA*, *supra* note 4, s 26(7).

by the OLRC.<sup>166</sup> Nevertheless, judges do not regularly order counsel to report take-up rates of settlement distribution schemes in order to determine the extent of the benefit realized by the class.<sup>167</sup>

Taken as a whole, these developments point to the weakness of relying on a case-by-case development of ethical rules. Generally, judges will address ethical issues only if counsel intentionally or inadvertently bring them to the judges' attention. It is quite possible, therefore, that judges see only the tip of the iceberg. Where judges have addressed ethical issues in the face of situations in which it is difficult to apply the usual codes of conduct, the formulation of ethical guidelines has been at best unpredictable and at worst inconsistent.

The judges interviewed for this article agreed that the judiciary plays a key role in identifying possible unethical conduct,<sup>168</sup> yet they also universally admitted that this function is difficult to execute in light of the absent client and adversarial void phenomena. All judges interviewed had contemplated, at one point or another, appointing a third party expert to help analyze a proposed settlement. One judge indicated that the nature of the action may dictate the appointment of sophisticated counsel to "act as the judge's sounding board."<sup>169</sup> Another judge who no longer presides over class actions went further and said, "If I were still doing this, I would not conduct a fairness hearing without having the class separately represented."<sup>170</sup> Such views find favour with US judges; indeed, the Federal Judicial Center's Pocket Guide for Judges recommends that they allow non-profit entities, government bodies, and state attorneys general to participate actively in fairness hearings to provide assistance to the court.<sup>171</sup> In the spring of 2011, the Court of Appeal for Ontario for the first time signalled an

166. *OLRC Report* vol 1, *supra* note 2 at 168 (recognizing that because "class lawyers, acting out of self-interest, may occasionally attempt to make a settlement that is unfair to class members," the judiciary must be given effective discretion to supervise all settlements).

167. Jasminka Kalajdzic, *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario* (LLM Thesis, University of Toronto Faculty of Law, 2009) at 131-33, online: <[https://tspace.library.utoronto.ca/bitstream/1807/18780/6/Kalajdzic\\_Jasminka\\_200911\\_LLM\\_Thesis.pdf](https://tspace.library.utoronto.ca/bitstream/1807/18780/6/Kalajdzic_Jasminka_200911_LLM_Thesis.pdf)> (noting results of a class counsel survey, in which many of the respondents indicated they did not or could not calculate take-up rates and observing that judicial orders to provide take up information are uncommon in the case law, though they do exist).

168. For example, Respondent 4 stated that while the *CPA* speaks of the representative plaintiff and class counsel guarding the interests of class members, ultimately it is "the role of the judge to look out for the class's interests." Interview of Respondent 4 (24 June 2010) [Respondent 4].

169. *Ibid.*

170. Respondent 3, *supra* note 33.

171. Barbara J Rothstein & Thomas E Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* (Washington: Federal Judicial Center, 2009) at 15.

openness to the involvement of an *amicus*, court-appointed monitor, *guardian ad litem*, or independent counsel in class action fee approval hearings.<sup>172</sup>

Despite the lack of public discussion (or controversy) surrounding class actions in Canada, some class action judges hold surprisingly strong views about the ethics of class actions as a legal institution. One judge said, “This is not real access to justice. It’s a business. . . . It’s not supposed to be lawyers championing for profit.”<sup>173</sup> As noted by the interviewed judges, however, such philosophical objections to the entrepreneurial orientation of class action praxis do not necessarily equate with a view that class action lawyers generally act unethically. To the contrary, one opined that “the overwhelming majority of lawyers are honourable and have integrity.”<sup>174</sup> Nevertheless, the interviewed judges see a “need to discuss what it means to act ethically” in the class action context,<sup>175</sup> even absent the kind of scandals described in US scholarship and the popular press. As a result, the time has come for law societies<sup>176</sup> to provide clearer guidance to lawyers and judges alike in several key areas, which I discuss below.

### C. BEGINNING THE DISCUSSION: PROPOSALS FOR REFORM

The judges I interviewed were unanimous in their view that there is a void of ethics regulation in the context of class actions and that it is appropriate to begin a discussion of the issues raised in this article. As the class action bar grows and new lawyers enter the field, it is all the more pressing that the conversation ensues and that clear guidelines for conduct are set.<sup>177</sup> Such guidelines should emanate not only from case law, as has occurred to date, but also from law societies. The latter have the advantage of being able to formulate rules that give counsel an opportunity to consider their ethical obligations *ex ante* and thereby avoid unnecessary and expensive court proceedings.<sup>178</sup> Of course, *ex ante* regulation

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172. *Smith Estate v National Money Mart* (2011), 199 ACWS (3d) 1077 at paras 20-40 (Ont CA) [*Smith*, CA]. Interestingly, the Court of Appeal also suggested that a motion judge could invite intervention from the LSUC itself “in regard to the interpretation of its Rules of Professional Conduct” (*ibid* at para 38).

173. Respondent 4, *supra* note 168.

174. Respondent 1, *supra* note 73.

175. *Ibid.*

176. Three interview subjects stated that the LSUC, not judges, should have the primary responsibility in formulating ethical rules and norms. Respondent 2, *supra* note 74; Respondent 5, *supra* note 111; Respondent 6, *supra* note 33.

177. Respondent 6, *ibid.*

178. Examples abound. One can imagine how many resources were expended by the original plaintiff’s lawyers in *Richard*, 2007, SC, *supra* note 41, before they were removed as class counsel, or the cost of retaining independent counsel to pursue appeals of the class counsel

also has the distinct advantage, at least in theory, of preventing professional misconduct, inadvertent or otherwise.

To begin ethical reform, definitional clarity on the identity of the client in class proceedings is needed as an organizing principle. The scope of other duties, including loyalty, confidentiality, and the avoidance of conflicts of interest, is directly connected to the client question. “The more ephemeral the client, the more abstract and ultimately empty the lawyer’s duty to that client will be. . . . The law needs to make the class client coherent by explicating how its parts fit together and how they are designed to interact with the lawyer.”<sup>179</sup>

The definition of client in the class action context would undoubtedly be layered. The Commentary to the *Rules* might specify that pre-certification class members are clients in a limited sense; in that event, class counsel would owe a duty of loyalty that prohibits taking steps that prejudice the litigation rights of the pre-certification class. Class counsel would also be obligated to maintain reasonable communications with the pre-certification class about the progress of the case and the fee arrangement entered into with the named plaintiff. Confidentiality might not be warranted in all circumstances, but, as discussed below, rule 2.03 could make clear that counsel would be obligated to inform class members that communications between them are not subject to solicitor-client confidentiality.

The same duties could be owed to the named plaintiff pre-certification. In addition, rules 2.02 (Quality of Service) and 2.04 (Conflicts of Interest) could specify that financial self-interest always impairs the lawyer’s ability to give candid advice. At the retainer stage, therefore, the rule could require that the plaintiff obtain independent legal advice before signing the fee agreement and describe the process for obtaining that advice: who engages independent counsel, who pays their fee, and the extent of the due diligence required of independent counsel.<sup>180</sup> Given the dynamics of many, if not most, plaintiff-class counsel relationships, it should not be assumed that plaintiffs have the sophistication or bargaining power to contract for these protections. The Canadian Bar Association guidelines that were adopted for representation of Aboriginal residential school survivors<sup>181</sup> similarly presumed class members to be unsophisticated, albeit for different reasons.

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fee decisions in *Smith, CA*, *supra* note 172.

179. Koniak & Cohen, *supra* note 37 at 167.

180. In my view, the fee agreement should be given little, if any, weight when the judge assesses fair and reasonable compensation for class counsel. Nevertheless, the representative plaintiff would benefit from independent legal advice about the nature of her obligations to the class, her rights vis-à-vis class counsel, and her exposure to adverse costs if class counsel has not provided her with an indemnity.

181. CBA Guidelines, *supra* note 10.

The LSUC might also want to address the growing trend of obtaining third party financing of class actions and to assess its possible impact on lawyers' decision making—a matter of extensive discussion and debate in the United States<sup>182</sup> that has received minimal judicial or public attention in Canada.<sup>183</sup> The broader issue of fee-splitting, of which third party financing is but a subset, is likely to become more pressing as the trend toward higher adverse costs awards against representative plaintiffs (in reality, against class counsel) continues.<sup>184</sup> The contexts in which it is ethical for class counsel to split their fee could usefully be explored by the LSUC. Indeed, judges have already expressed an interest in hearing from regulators on such issues. In *Garland v Enbridge Gas Distribution*, for example, at the request of the motion judge, counsel sought advice from the LSUC on the propriety of fee splitting with the representative plaintiff (the LSUC declined on the basis that it did not provide legal opinions).<sup>185</sup>

In the United States, the American Law Institute has added commentary to the sections related to the representation of organizations that reflect class considerations.<sup>186</sup> Ontario's rule 2.02 (1.1) could similarly be amended, if it is helpful to conceive of the class as an entity client. It should be borne in mind that, on at least one important issue, it is not: Whereas conflicts of interest can typically be resolved by reporting up the ladder of organizational clients, no such hierarchy exists within the class.

Rule 2.03 (Confidentiality) is complicated both by the nature and the various stages of the class proceeding. Consistent with the law of solicitor-client privilege that treats pre-retainer communications with lawyers as protected, communications with pre-certification class members, who have no formal retainer agreement

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182. The literature is vast. For a recent and critical perspective, see US Chamber Institute for Legal Reform, *Selling Lawsuits, Buying Trouble: Third Party Litigation Funding in the United States* (2009), online: <<http://www.instituteforlegalreform.com/images/stories/documents/pdf/research/thirdparty litigation financing.pdf>>. See also Julia H McLaughlin, "Litigation Funding: Charting a Legal and Ethical Course" (2007) 31 Vt L Rev 615. A discussion of the particular ethical arguments for and against third party financing is beyond the scope of this article.

183. Metzler, *supra* note 23; Dugal, *supra* note 23.

184. Perell J rejected the fiction that representative plaintiffs are actually exposed to the risk of adverse costs: *McCracken*, *supra* note 50 at para 7. The trend toward higher adverse costs orders against class plaintiffs has been noted in a number of articles. See e.g. Jasminka Kalajdzic, "Consumer (In)Justice: Reflections on Canadian Consumer Class Actions" (2011) 50 Can Bus LJ 356 at 372-74.

185. (30 December 2006), Toronto 94-CQ-50711 (Ont Sup Ct) (inviting submissions or legal opinion by the LSUC on the interpretation of r 2.08(8)(a)).

186. The American Law Institute, *Principles of the Law: Aggregate Litigation* (Washington: American Law Institute, 2010).

with the plaintiff's lawyer, might enjoy a comparable right in legal ethics. In order to establish the necessary evidentiary record for certification and for the merits of the action, however, class counsel may need to rely on information and documents that originate with the named plaintiff or putative class members. Rule 2.03 could stipulate a default rule that communications are held in confidence and that it would be incumbent upon class counsel to obtain written confirmation from the plaintiff or class member where disclosure of such communications is necessary for the conduct of the action.

Rule 2.08 (Fees and Disbursements) could be revised since in class proceedings reasonableness is already the subject of judicial scrutiny. The commentary might include an iteration of the relevant criteria for determining reasonableness; in addition to existing factors, the public benefit of the litigation ought to be considered. A similar criterion has been employed in the United States where judges consider the "benefits to a class of people very much in need of help" and "society[s] stake in assuring that cases which are important but which are not, from a lawyer's perspective, particularly desirable, are nevertheless undertaken."<sup>187</sup> While the *Rules* should not dictate how judges exercise their discretion under sections 32 and 33 of the *CPA* when approving counsel fees, the commentary to rule 2.08 could appropriately delineate the acceptable manner of negotiating a retainer agreement with the representative plaintiff and the factors that ought to be addressed within the agreement.

Finally, the *Rules* ought to make explicit the duty of counsel to the court to make full disclosure of all matters relevant to the proposed certification, settlement, or trial of the action, including the presence of third party funding arrangements, indemnity agreements, and any other business arrangements that give rise to financial self-interest. The duty of full disclosure is necessary if we are to continue to rely as heavily as we do on judges to oversee the proper prosecution of these claims on behalf of absent clients. In this regard, the principles developed on *ex parte* procedures are instructive.<sup>188</sup>

187. *Bowling v Pfizer*, 922 F Supp 1261 at 1281-82 (SD Ohio 1996), aff'd 102 F (3d) 777 (6th Cir 1996).

188. In addition to the jurisprudence on *ex parte* motions, which universally confirms a duty on the part of moving counsel to bring all material facts to the attention of the presiding judge (e.g. *United States of America v Yemec* (2003), 67 OR (3d) 394 (Sup Ct), aff'd (2005), 75 OR (3d) 52 (Div Ct)), the Commentary to rule 4 of the *Rules* stipulates that "[w]hen opposing interests are not represented, for example, in without notice or uncontested matters or in other situations where the full proof and argument inherent in the adversary system cannot be achieved, the lawyer must take particular care to be accurate, candid, and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled." *Rules, supra* note 5, rule 4.01(1) Commentary.

The possible reforms of the *Rules* proposed here are intentionally minimalist. A detailed reform agenda requires consultation with the bar, the bench, and government representatives. Ideally, it should also have an empirical foundation, informed by the realities of class action praxis. Qualitative and quantitative investigations of class actions, like the discussion of their ethical dimensions, are in their infancy in Canada. This article is a call for greater attention to both.

#### IV. CONCLUSION

The unique aspects of class actions, as opposed to individual or joint client representation, have been discussed repeatedly in US academic circles. In many respects, the Canadian commentary on the ethical dimensions of class actions, though less prolific, replicates the US critiques. Potential conflicts between class members, between the representative plaintiff and class members, and between class counsel and the class are readily acknowledged in both literature and case law. So, too, is the risk of collusive behaviour between class and defence counsel, who would both benefit from settling an action at bargain-basement sums for the class and sizeable fees for counsel. While judges and scholars alike point to the protection afforded by a legislatively mandated court approval process for certification, settlement, and fees, most also recognize the judge's difficult task in effectively scrutinizing the merits of the cases or probing the paper record. Yet, on the question of the application of the ordinary rules of conduct to this unique form of litigation, Canadian courts—unlike their US counterparts and in contrast to a vast body of literature on the subject—have largely maintained that the representative plaintiff is a genuine client to whom the usual ethical duties are owed.

The lack of engagement by law societies with the question of applying ordinary ethical rules to class actions has resulted in inconsistent development of judicial principles. Normative confusion persists because the authorities have not clearly addressed the question of who is the client in a class action and which specific duties are owed to that client. Lawyers and class members alike would benefit from a fulsome discussion of these issues and a concerted effort to reform professional conduct rules so that they reflect class action praxis. Until then, judges are left with the unenviable task of building a body of ethical rules and norms piecemeal. Counsel's self-interest, the public interest, and the interests of the absent client demand better.