WINDFALLS OR JUST REWARDS: CLASS ACTION FEE RATIOS IN ONTARIO

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Class counsel fees and their relationship to class member compensation are among the most important—and most controversial—statistics used to evaluate the normative outcomes of the class action mechanism. The perception that class attorneys reap windfall rewards while the class 'gets nothing' is persistent among class action critics. The ratio of legal fees to settlement funds captures the critical trade-off between counsels' entrepreneurial incentives to pursue lucrative claims and the agency challenges endemic to these proceedings. In the most comprehensive analysis of Canadian class actions to date, the authors use new data and novel econometric methods to explore the nature of class action fee ratios in Ontario for both economics and legal audiences. To start, we calculate "all-in" fee ratios—lawyer fees plus disbursements divided by settlement amounts in Ontario—of 25.0% on average and at the median. Next, we show that judges are sensitive to windfall gains and sweetheart deals, problems associated with large awards, and adjust fees based on settlement size. These data and estimates contribute to a better understanding of judicial economy and access to justice in practice, the principal arguments in favour of class proceedings.

Les honoraires des conseillers juridiques d'une action collective et leur lien avec l'indemnisation des personnes inscrites au recours figurent parmi les plus importantes—et controversées—statistiques utilisées pour évaluer les résultats normatifs du mécanisme de recours collectif. La perception voulant que l'avocat obtienne de forts profits aléatoires en laissant les miettes aux personnes inscrites persiste auprès des critiques des recours collectifs. Le ratio entre les honoraires et les montants de règlement résume le troc vital entre le désir de profit qui meut le conseiller juridique dans sa recherche de recours lucratifs et les problèmes de pouvoir d'agir, endémiques dans ces procédures. Dans ce qui constitue l'analyse la plus exhaustive des recours collectifs au Canada à ce jour, les auteurs, à l'aide de nouvelles données et méthodes économétriques, étudient la nature des ratios des frais des recours collectifs en Ontario pour un public d'économistes et de juristes. D'abord, ils calculent les ratios des frais globaux : les honoraires plus les débours, somme divisée par les montants des règlements en Ontario, soit 25 % pour la

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moyenne et la médiane. Ensuite, ils démontrent que les juges sont sensibles aux profits aléatoires et aux ententes de faveur, ces problèmes étant associés aux montants de règlement élevés, et qu'ils ajustent les honoraires selon l'importance du règlement. Ces données et estimations contribuent à une meilleure connaissance de l'économie judiciaire et de l'accès à la justice dans la pratique, soit les principaux arguments pour les recours collectifs.

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I. Introduction

Almost since the inception of *Ontario's Class Proceedings Act* in 1993,[2] there have been calls for improved data collection and greater transparency.[3] One statistic in particular—the ratio of legal fees[4] to settlement amounts—is viewed as especially important when evaluating normative outcomes of the class action mechanism. Fee ratios capture the critical trade-off between counsels' entrepreneurial incentives to pursue lucrative claims and the agency challenges endemic to these proceedings. In addition, they are one metric for assessing the extent to which class actions deliver on their access

[2] *Class Proceedings Act, 1992*, SO 1992, c 6 [*CPA*]. The Act came into force on January 1, 1993.

[3] Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms: Final Report* (Toronto: Law Commission of Ontario, 2019) [LCO Report] at 13; Catherine Piché, "Class Action Value" (2018) 19:1 Theor Inq Law 263—264; Jonah B Gelbach and Deborah R Hensler, "What We Don't Know About Class Actions but Hope to Know Soon" (2018) 87 Fordham L Rev 65.

[4] Throughout we use the term fees to refer to lawyer's fees *and* disbursements in the amounts ultimately approved by the court and paid by the class. In Ontario, as elsewhere, both settlement agreements and class counsel fees are subject to court approval: *CPA*, ss 27.1 and 32.

to justice promise[5] and shed light on the merits of court review.[6] To this end, we build on earlier work by Alarie and Flynn,[7] Fitzpatrick,[8] Helland and Klick,[9] and Eisenberg and Miller[10] by contributing several new facts on the relationship between class action fees and settlements. Specifically, we bring new data and novel econometric methods to the topic, yielding the most comprehensive analysis of Canadian class counsel fees to date.

We demonstrate three primary results. First, we calculate the "all-in" fee ratios, that is, lawyer fees plus disbursements divided by settlement amounts in Ontario. These equal 25.0% on average and at the median of the distribution.[11] These headline numbers are inherently important. They suggest that roughly $1 in every $4 flows to the costs of bringing class actions. Judicial economy and access to justice are principal arguments in favour of class proceedings. Understanding the innate costs of complex litigation and the prospective gains for class members is critical to evaluating the class mechanism. Similarly, fee ratios are among the most important—and most controversial—statistics when appraising the entrepreneurial incentives for lawyers. Access to justice can be impugned if class members' legal fees are excessive; however, access to justice can also be stymied if counsel has insufficient incentive to hold defendants accountable. Of course, many elements factor into simple averages, so, as discussed below, we caution against over-interpreting this 25.0% estimate.

Second, we show that fee ratios decline as settlement awards increase; i.e., there is a *non-linear* relationship between the share of an award claimed by counsel and the overall monetary value of the settlement.[12] We

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5 Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (Canada: UBC Press, 2018) at 128—129 (Kalajdzic, *Class Actions in Canada*).

6 Stephen J Choi, Jessica Erickson, & A C Pritchard, "Working Hard or Making Work? Plaintiffs' Attorney Fees in Securities Fraud Class Actions" (2020) 17 J Empirical Leg Stud 438—465.

7 Benjamin Alarie and Peter Flynn, "Accumulating Wisdom: An Updated Empirical Examination of Class Counsel's Fees in Ontario Class Actions" (2014) 9(2) Can Class Action Rev 355.

8 Brian Fitzpatrick, "An Empirical Study of Class Action Settlements and Their Fee Awards" (2010) 7(4) J Empirical Leg Stud 811.

9 Eric Helland and Jonathan Klick, "The Effect of Judicial Expedience on Attorney Fees in Class Actions" (2007) 36(1) J Leg Stud 171—87.

10 Theodore Eisenberg and Geoffrey P Miller, "Attorney Fees in Class Action Settlements: An Empirical Study" (2004) 1(1) J Empirical Leg Stud 27—78.

11 If we exclude disbursements and taxes from the cost ratio, the average fee-to-settlement ratio equals 24.1%, while the median is 23.2%.

12 The median elasticity of all-in cost ratios with respect to settlement is -0.19. What this statistic means is that, at the median of the data, for every 10% increase in the total settlement amount, counsel's share of the settlement declines by roughly 2%. The median settlement approval in Ontario equals $6,900,000. Increasing this award by

also model how this elasticity varies across the entire fee distribution—that is, we show how the fee ratio changes as settlement values increase—to illustrate how the decline in fee ratios is greater at the low end of the distribution compared with larger settlement awards. The results also suggest that judges are reluctant to decrease counsel fees below some threshold ratio, even as awards grow. As highlighted in previous studies and discussed below, this finding offers clues that the class mechanism is loosely aligned with its normative objectives. Class actions may be working as intended.

In addition to these two main results, we provide supplementary information and graphs on the distributions of settlements and fees in Ontario. These data are inherently interesting as they supply a picture of the overall financial implications of class actions in the province. As an example, in a 30-year period and using data from a mere 139 cases (less than 10% of all cases initiated in that span), more than $13.8 billion was transferred from defendants to plaintiffs via Ontario's class action mechanism. Appreciating the scope and scale of the mechanism is a first step towards understanding who reaps its benefits. It also presents an entry point for a range of other important issues such as carriage battles, deterrence, and the implications of recent updates to Ontario's legislation.

This paper complements the small number of studies that have empirically evaluated the class action mechanism in Canada. As mentioned, we build on earlier research by both Canadian[13] and American scholars to examine the relationship between fees and settlements. Their objective was to aid judges seeking to make fee approval decisions, so they focused on the discrete components that sum to an "all-in" or "combined" cost amount. We likewise emphasize combined costs of fees and disbursements and use updated data, but our goals and methods are different. To start, we aim to estimate the fee ratio settlement elasticity, emphasizing how this elasticity varies non-linearly with settlement amounts. Much of the debate over counsel compensation relates to windfall gains and sweetheart deals, problems more acute with large awards. We show that judges are sensitive to these concerns and adjust fees based on settlement size. This is an important conclusion about the flexibility of the class procedure and the importance of judicial oversight, one that echoes research from the US. Our findings also confirm what has been largely assumed by counsel.

$690,000 would decrease plaintiff counsels' share of increase in settlement amount by 25.0%*1.9%=0.05%. This works out to foregoing $3,450 on the 25%*$690,000=$172,500 increase. So, total costs on the $7,590,000 suit (i.e., $6,900,000 + $690,000) would equal $1,894,050 rather than $1,897,500. As settlement sizes grow into the multimillions, the differences become more material.

[13] Benjamin Alarie, "Rethinking the Approval of Class Counsel's Fees in Ontario Class Actions" (2007) 4(1) Can Class Action Rev 15.

Still, as with all matters of law and policy, offering empirical proof of the true costs of class actions is necessary, particularly when the question of class counsel fees continues to attract media and judicial scrutiny.

This paper represents the most complete analysis of Canadian class actions to date. Our data come from the Law Commission of Ontario (LCO), who, in turn, compiled the information from three sources: data from the Ministry of the Attorney General; case law databases such as CanLII, Quicklaw, and Westlaw; and informal records provided to the LCO by law firms.[14] With some important caveats, the data represent the most complete empirical account of class actions in Ontario available. The LCO estimated that there had been 1,500 class actions initiated in Ontario between 1993 and February 2018. Approximately 73% of contested certification motions were granted, in whole or in part. No data were available on the percentage of actions settled, dismissed, tried, or discontinued. While information regarding settlement amounts and fee awards was available to the LCO, it was neither analyzed nor reported. In this way, this paper represents an important addition to the LCO's empirical contribution.

Our paper proceeds in three parts. First, we discuss our methodology, followed by our data and then comment on the results. While we do make important observations in part IV that will be of particular interest to lawyers and judges, this is a data heavy paper. We are presenting empirical calculations based on the best information available and thus, parts II and III necessarily rely heavily on economic terminology. Our objective is to be transparent with respect to our methodology and the limitations of this information. Our data are not perfect but provide the best information to date about the costs of class action litigation. In part III we present our main results on the relationship between fee ratios and settlements. These findings confirm what has been reported anecdotally (or assumed)—that on average class counsel fees are a quarter of settlements and that there is an inverse relationship between the size of the settlement and the percentage taken by counsel. That long-held assumptions are borne out by the data is important and reassuring in its own right. As the LCO stated, "[t]he lack of empirical data means that policy-makers and stakeholders discussing class action issues very often rely on anecdotes or personal experience rather than statistics or data. Personal experience, while obviously important, is not a substitute for data."[15] Finally, in part IV we offer commentary on these results and on recent fee approval decisions.

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14 LCO Report, *supra* note 3 at 14.

15 *Ibid* at 13.

II. Methodology

A) Background on Data Collection

Given the inherent information gaps in the Canadian class action record, it is important to describe how we assembled our data as this highlights their limitations and subsequent study. The starting point for our analysis was the long list of cases assembled by the LCO.[16] The Commission identified roughly 1,500 class actions initiated in the Province of Ontario from 1993 to February 2018, from which we worked with a small subset: those that have published settlements and fee approval decisions. Limiting the actions to those with reported decisions yielded 236 cases of which 15 were adjourned or abandoned. This left 221 settlement and fee approval decisions spanning 1993-2018.[17] Of these 221 settlement approval decisions, quantitative, monetary data are available for 189 settlements. Of those 189 settlements, data on approved fees are available for 139 cases. There are 97 documents containing disbursement amounts and 121 approvals for which we have fee, disbursement and tax information. Importantly, the three sets of observations—reported cases with settlements and fees, cases with settlements and disbursements and cases with settlements plus the combination of fees, disbursements and taxes—do not fully overlap. For example, in *Robinson v Rochester et al,*[18] the judge disclosed the combined value of fees plus disbursements plus taxes, whereas for *Rowlands v Durham Region Health,*[19] only data on fees are available.

We work with three distinct samples. First, we perform the analysis using the fee-to-settlement ratio as this offers the largest number of observations. Next, disbursements are added to fees. We are able to link settlements to fees plus disbursements for 96 observations; that is, we were able to obtain information on both settlement approval and cost (fees plus disbursements) approval *for the same case* in 96 class actions. Finally, we study the ratio of fees plus disbursements plus taxes to settlements in 121 actions. To put these sample sizes into context, we were only able to obtain matched, monetary fee and settlement information for a paltry 8% of the class actions on the long list assembled by the LCO. Fortunately, however, most of the observations in this sample are clustered in recent years, offering a clearer picture of Ontario class actions in the late 2010s.

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16 *Ibid* at 14—16.

17 Several settlement approval decisions are available prior to 1999. Of the ones we uncovered, all omit monetary amounts. Thus, our data begin with *Ontario New Home Warranty Program v Chevron Chemical Co.*, released in June 1999.

18 2010 ONSC 463.

19 2011 ONSC 719.

Reassuringly, disbursements and taxes tend to be small compared with fees, so differences between the three samples are small.

All published settlement and fee approval decisions were retrieved from Westlaw Canada or CanLII. Each was reviewed and, if possible, the aggregate settlement amounts and corresponding fees, disbursements and taxes were recorded. All data were hand coded by research assistants and audited fully by us. Six comments are warranted on the data coding protocol.

First, many settlement and fee approval records fail to include unambiguous dollar amounts; rather, they required imputation and judgment to determine which values to record (or even whether the settlement should be included in the final dataset). We worked from court documents and not the records of claims administrators as the latter are not publicly available. Notably, the LCO faced the same challenges in obtaining take-up rate information and for this reason, recommended that the parties be statutorily required to file outcome reports that would include take-up rates, counsel fees and other costs.[20] In the absence of such reports, settlement values must be gleaned from judges' reasons approving a settlement, but these textual documents frequently omit explicit or precise statements about the magnitude of a settlement or fee award. In other words, judgment was required by both us and the research assistants because the published documents were imprecise with respect to aggregate amounts, offered a range of prospective payouts or included in-kind awards. *Wong v Sony Corp.* provides an example of such a case.[21] There, the class members could recover their repair costs for the defective Sony product or a $40 voucher. No estimated value for the overall settlement was listed in the judge's endorsement approving the deal, nor was there publicly available reporting on class members' participation (or 'take-up') in the settlement. For this reason, the case was not included in the dataset. In contrast, we did include *Griffin v Dell*,[22] an uncapped settlement for repair costs that ranged from $400-800, depending on the model year of the computer in question, plus a *cy près* payment. Based on the estimated class size disclosed in the judge's reasons, we could calculate a reasonable estimate of the compensation to be paid by the defendant, and so used that amount in our calculations.

Due to these choices in the data recording process—the fact that we needed to exercise judgement—reasonable parties may start from the

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20 LCO Report, *supra* note 3 at 65—68. The LCO's recommendations were adopted in the amended *CPA* at section 27.1(16).

21 2009 CanLII 47, 2009 CarswellOnt 17 (SC).

22 2011 ONSC 3292.

same raw files and compile a slightly different dataset. Throughout, we adopted a consistent approach to data coding and believe any aberrations are minor. Less discretion is required for more recent decisions, those from approximately 2007 onward, as judges appear to have demanded greater clarity on settlements and fees. In general, when uncertainty arose between a larger versus smaller quantum, the larger amount was recorded.

Second, our analysis is based on approved settlement amounts. Depending on the structure of the settlement, actual amounts paid to class members may differ from these sums. Take-up rates may be lower than expected, for example. The lack of public reporting by claims administrators makes it impossible to determine precisely how much defendants ultimately paid in a given case. *Waddell v Apple Computer Inc.* provides an illustration.[23] In this settlement, Apple offered a $45 store credit to each class member with an estimated maximum value $4,700,000 based on the number of persons who bought the product at issue in the action. Take-up information was not ordered by the settlement approval judge and is not publicly available. It seems unlikely to us that more than 100,000 class members obtained their $45 voucher. In situations where the actual settlement amount is excessively uncertain (i.e., we have a very poor sense for even the order of magnitude of how much the defendants actually paid), we opt to exclude the claim from our settlement data and regression analysis. When we calculate fee ratios, we work from the best available settlement award information, leaning towards the higher end of imprecise ranges. This means that, if anything, we are *under-estimating* fee ratios due to this feature of data collection. In *Waddell*, because we were able to calculate an aggregate settlement amount, we did include it in our fees analysis, but we do not have information on disbursements or taxes.

Third, the total value of monetary compensation to the class may not be available. Rather, the defendants may have been required to take some action that has an imprecise monetary analogue. For example, in *Elliott v Currie*, the defendants were required to pay $155,000 plus forfeit "all local assets … [net of] all local debts,"[24] while in *Al-Harazi v Quizno's Canada Restaurant Corporation*, the defendants were required to refund 50% of the franchise fee and pay a credit of $26,630 for equipment.[25] If possible, we recorded an estimated total settlement; otherwise, if reasonable estimates of aggregate amounts were too uncertain, we omitted them from

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23 2008 CanLII 39440, 2008 CarswellOnt 4674 (SC).

24 [2001] OJ No 1958; 105 ACWS (3d) 599 (SC).

25 2007 CanLII 27977, [2007] OJ No 2819 (SC). Both *Elliott v Currie* and *Al-Harazi v Quizno's Canada Restaurant Corp.* are included in our analysis.

our analysis. By omitting costly, but imprecise, settlements that may still provide some value to class members, our fee ratios will be *over-estimated*.

Fourth, in several situations a range of settlement values was presented. In these instances, we use the midpoint between the lower and upper bounds. *Mignacca v Merck Frosst Canada Ltd.* is an example.[26] The settlement award is listed as between $21,806,250 to $36,881,250, which we record as $29,343,750.

Fifth, the settlement figures do not differentiate between cases wholly financed by class counsel and those funded by either the Class Proceedings Fund or a private litigation funder. The involvement of non-counsel funders has two offsetting implications. First, external funding reduces the risk to class counsel, since it is the funder, not class counsel, who is responsible for any adverse costs awards. This increases the likelihood that claims will be brought and, therefore, increases the probability that class members received compensation for harms. Second, external funders increase the true cost of the litigation to class members, because, when the action is successful, the funder's levy, or return on investment, must be paid by the class.[27] We do not, however, have any information about the cost of funding or its impact on fees. We do not view this as especially problematic as the relative number of class actions funded by third parties is small; the Class Proceedings Fund estimates that it funded fewer than 10% of Ontario class actions up to 2017,[28] and private funding is still relatively rare (albeit growing). Moreover, there are challenges in collecting this information because the Class Proceedings Fund does not report which cases it has funded. To only count those cases where fee, settlement *and* funding information is available would reduce the data set significantly. In any event, the fee ratio analysis is useful without funding information because our analysis is on completed and successful cases. That is, it is conditional on both an action being brought and obtaining an approved settlement, whereas external funders typically influence decisions at the initiation stage.

Finally, information is missing from the public docket for several settlements. The public record for *Minnema v Archer Daniels Midland Co.*,[29] for instance, does not include the appendices which contain the details regarding monetary amounts in the settlement. We were not able to obtain appendices in such cases.

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26 2012 ONSC 4931.

27 For an overview of class action funding, see LCO Report, *supra* note 3 at 86-87 and Warren Winkler et al, *The Law of Class Actions in Canada* (Canada: Canada Law Book, 2014) at 386—395.

28 LCO Report, *supra* note 3 at 80.

29 2003 CarswellOnt 8552 (SC).

For these reasons, it is obvious that our data are measured with error. This means that the variables we observe equal their true, but unobserved, values plus a term that represents the difference between the true and observed value. Measurement error influences the properties of statistics and regression models and comes in several flavours. Classical measurement error in the dependent variable, for example, tends to increase the standard errors of regression coefficients, but does not introduce bias into estimation.[30] It also means that calculated averages are correct, but variances, the spread of observations around that average, are wider than otherwise. Fortunately, statistical methods have been developed to overcome measurement error challenges. To address potential biases that may arise from measurement error in this study, we take several steps. Namely, we supplement our main regression models by applying a classic groups means instrumental variable approach.[31] Instrumental variable methods are a conventional statistical method to deal with measurement error. Using this method that explicitly addresses measurement error, we find that estimates attenuate slightly but are very similar to our non-instrumented estimates, an encouraging result.

B) Empirical Methods

Our objective is to measure the relationship between lawyer fees and settlement amounts. This section describes key technical details of our empirical methodology. Little is lost if less technically inclined readers wish to skip directly to the results in Part III.

Throughout, most of our regression results emphasize medians and specific quantiles rather than average values. Medians and quantiles better reflect the "typical" or standard class settlement in the province. A "quantile" is a statistical threshold point, representing the share of observations that are less than or greater than that specific rank. For example, when we make a statement about the 20th percentile of the

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30 This means that estimated coefficients represent their true values (on average), but that it is more challenging to reject a null hypothesis that an estimate is statistically different from zero. That is, classical measurement error is a problem of precision rather than bias. In contrast, measurement error in right-hand side variables (i.e., settlement amounts) is conventionally referred to as errors-in-variables. Under standard statistical assumptions, errors-in-variable tends to attenuate estimates. Thus, estimated parameters are nearer to zero than they should be.

31 M S Bartlett, "Fitting a Straight Line When Both Variables Are Subject to Error" (1949) 5(3) Biometrics 207—12; James Durbin, "Errors in Variables" (1954) 22 Review of the International Statistical Institute 23—32; Susanne M Schénnach, "Quantile Regression with Mismeasured Covariates," (2008) 24(4) Econometric Theory 1010—1043; Abraham Wald, "The Fitting of Straight Lines if Both Variables Are Subject to Error," (1940) 11(3) The Annals of Mathematical Statistics 284—300.

settlement distribution, what we we are saying is that we have ordered the settlements from smallest to largest and, at the 20th percentile, 20% of the settlements are smaller than that value while 80% are larger than that value. A median then is the 50th percentile where half of the settlements are smaller than that median value and half are larger. The reason for focusing on medians and quantiles, rather than averages, is that these statistics better characterize the range of class action settlements in Ontario. Ontario has experienced a handful of very large settlement awards. The approved settlement in *Parsons v Canadian Red Cross Society*, for instance, approached $2 billion,[32] while 2.1 billion was paid by Volkswagen in the "clean diesel" litigation,[33] and over $3.24 billion was distributed under the Indian Residential Schools Settlement.[34] Very large awards are outliers, observations that exert an outsized influence on the calculation of means. Conditional averages, such as those obtained from least squares regression, may be well in excess of the "typical" action in province. Medians do not have this problem. Unlike averages, medians represent the ranked halfway point in settlement and fee distributions. Critically, medians (or any alternative quantiles) are said to be *robust* to outliers such as the *Parsons, Indian Residential Schools* and *Volkswagen* settlements, so better reflect the characteristic claim, providing a more accurate portrait of fees and awards in the province.

Our empirical analysis is based on regressions of the form:[35]

$$ln(FeeRatio) = \alpha + \beta ln(Settlement) + v \qquad \textbf{(1)}$$

The dependent variable in equation (1) is the natural logarithm of the fee ratio. Fee ratios are calculated by dividing approved fees (plus disbursements and taxes, when known) by approved settlement amounts. We were able to collect monetary data on 189 settlement awards and 139 fee approvals and 121 all-in fee awards. However, as mentioned in the previous section, we need information on both fees and settlements for the same case to estimate the regression. As a consequence, we estimate equation (1) using the maximum number of observations for which we could match settlements to fees. We do this for separate and non-overlapping samples. Our parameter of interest is β. β represents how much our dependent variable, the log of the feet ratio, changes when we

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[32] *Parsons v Canadian Red Cross Society*, 2000 CanLII 22386, [2000] OJ No 2374 (SC).

[33] Deborah Hensler et al, *The Globalization of Mass Civil Litigation: Lessons from the Volkswagen "Clean Diesel" Case* (Santa Monica: Rand Corporation, 2021) at 36—37. *Quenneville v Volkswagen*, 2017 ONSC 3594.

[34] *Baxter v Canada (Attorney General)*, 2006 CanLII 41673, 2006 CarswellOnt 7879 (SC); Indian Residential Schools Settlement Agreement <https://tinyurl.com/4tpksrmt>.

[35] Another way to write (1) is $FeeRatio = A \cdot Settlement^{\beta} \cdot \varepsilon$, where $A = e^{a}$ and $\varepsilon = e^{\upsilon}$.

increase our main variable of interest, the natural logarithm of settlement amounts, by one unit. The advantage of using natural logarithms is that it enables us to interpret our variables and parameters in percentage terms and avoids relying on the units of measurement. β is, therefore, interpreted as an elasticity. It represents the percent change in the fee ratio resulting from a 1% change in the settlement amount.

We estimate (1) by applying a method known as quantile regression or least absolute deviations. Quantile regression is similar to the more familiar ordinary least squares regression. Where least squares minimizes the sum of squared residuals, quantile regression minimizes the sum of absolute deviations. There are several advantages of this approach. First, at measures of central tendency, such as the median, least absolute deviations is less sensitive to outliers than least squares. Outlying observations are obvious in our dataset and outliers can severely distort least squares estimates.[36] Second, we want to study our variable of interest, the fee ratio elasticity, along its conditional distribution as it varies with the outcome variable. To state more plainly, as settlement size grows, we want to investigate what happens to total fees and the fee ratio. Quantile regression facilitates this analysis.[37]

While the quantile regression results found by estimating (1) are the most important results, we also offer several additional models. First, as mentioned, we address potential bias due to measurement error by applying a group means instrumental variable approach within the quantile regression set-up of Chernozhukov and Hansen.[38] Our approach follows the steps described in Angrist and Pischke[39] for the Wald estimator but applies this in a quantile regression framework.

This method involves three steps. Step one orders the data according to the magnitude of logged settlement amounts. The case with the smallest settlement is assigned rank one, the second smallest settlement is assigned rank two, and so forth for all observations. Step two, then, splits the sample into three equally sized subsamples. An instrumental variable is assigned to each subsample, according to the rule:

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[36] William H Greene, *Econometric Analysis, Fifth Edition* (Prentice Hall: Upper Saddle River, 2003).

[37] It is worth underscoring that (1) suggests a non-linear relationship between costs and settlements.

[38] Victor Chernozhukov & Christian Hansen, "Instrumental Variable Quantile Regression: A Robust Inference Approach," (2008) 142(1) Journal of Econometrics 379-398.

[39] Josh D Angrist and Jörn-Steffen Pischke, *Mostly Harmless Econometrics: An Empiricist's Companion* (Princeton & Oxford: Princeton University Press, 2009).

$$z_i = \begin{cases} -1 \text{ if case } i \text{ is in subsample 1} \\ 0 \text{ if case } i \text{ is in subsample 2} \\ 1 \text{ if case } i \text{ is in subsample 3} \end{cases}.$$

Finally, we apply the algorithm described in Chernozhukov and Hansen[40] to obtain our median instrumental variable estimates.

We expect and find that our instrumental variable estimates are less precise than the uninstrumented models, although our coefficients of interest are still statistically significantly different than zero at conventional levels and are not statistically different from the unistrumented models. To reiterate, the reason for applying this method is to address measurement error in both our dependent and independent variables, (i.e., fee ratios and settlements). It is reassuring that the estimates from both the standard quantile and instrumental variable quantile regression methods are similar.

III. Results

We present our empirical results in three parts. First, we describe some basic summary statistics on Ontario class action settlements and fees. As mentioned, these raw numbers are inherently interesting as they illustrate the scope and reach of the class mechanism in Ontario. We next proceed to outline our main regression results, followed by a discussion of how fee ratios evolve over the settlement distribution.

Table 1 presents summary statistics while Figure 1 plots the basic relationship between fees and settlements. The headline number in Table 1 is that, over a nearly 30-year period ending in early 2018, roughly $13.8 billion was awarded to class members in Ontario. Counsel correspondingly received more than $468 million in fees and disbursements. To reiterate, these sums are from the 139 cases on which we could collect matched data, far shy of the 1500 court files identified by the Law Commission of Ontario.[41]

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40 Chernozhukov & Hansen, *supra* note 38.

41 Assuming that the 139 cases are a representative sample of those for which data are missing implies that the true sums should be multiplied by approximately 10. Thus, more than $130 billion has been awarded through Ontario's class action mechanism with total fees equal to $4.6 billion. Beyond the reasons discussed in the main text, there are at least three additional reasons why this ten-fold estimate would represent an overestimate. First, we do not adjust for inflation. As we observe a larger number of awards in more recent years, we expect nominal values to be smaller during periods with scant data. Second, anecdotal evidence suggests that the early class actions involved notable learning with respect to prospects, measurements of damages and procedure. Incentives for entrepreneurial firms were likely directed towards demonstrating proof-of-mechanism,

Table 1 also shows that the average successful action in Ontario resulted in an award of $77.2 million and $3.4 million in fees. A key theme of this research is that a small number of outliers, infrequent cases with large settlements and small fee ratios, are exerting excessive influence on these simple averages. Indeed, a single large award in *Parsons v Canadian Red Cross Society* represents more than 13% of the aggregate settlement sum. As is evident in Figure 1, the majority of claims settle for less than $15 million. These large awards are the reason we opt to use quantile regression—i.e., to mitigate this outsized role of a handful of large claims.

Table 1: Summary Statistics

	Obs.	Mean	Std Dev.	Min.	Max.	Sum
Settlement ($)	187	77,275,830	314,589,454	8,000	2,105,000,000	13,832,373,248
Fees ($)	138	3,392,586	4,947,892	0	26,000,000	468,176,832
Disburse-ments ($)	96	315,900	525,596	2,385	2,619,536	30,326,402
All-in Costs ($)	112	4,654,648	10,085,346	0	92,500,000	563,212,352
Fee-Settlement ratio	132	0.24	0.32	0	3.75	
All-in Fee ratio	116	0.25	0.16	0	1	

Despite the usefulness of an aggregate award value for fixing intuitions about the scope of class actions in Ontario, we stress that class members did not receive $13.8 billion. This is for two reasons. First, our data are imperfect. Several settlement awards, especially early in the tenure of Ontario's *Class Proceedings Act*, are not disclosed. Excluding these early settlement awards means that we are undercounting the aggregate value. Second, approved settlement awards do not translate dollar-for-dollar into transfers to class members (or, alternatively, distributed *cy-près*). For example, in *Wong v Sony Corp*, class members may have neither repaired nor replaced their defective chips nor redeemed their voucher, implying that Sony paid a smaller quantum in damages. Hence, in many cases, the aggregate approved sum over-represents the amount paid by defendants in the province. Nonetheless, $13.8 billion is a large amount, suggesting that class actions have yielded economically meaningful transfers from

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even if that meant foregoing potential fees and/or settlement amounts. Finally, very large settlements (e.g., those greater than a billion dollars) tend to be disclosed and these represent a disproportionate share of the aggregate estimates.

defendants to class members.[42] It also demonstrates the impact that the class mechanism can have on economic activity in the province.

The most interesting number in Table 1 is the average fee to settlement ratio. Class counsel obtains 24% of total settlement value in the average case for payment of their legal fees. This figure, of course, does not equate to counsel's rate of return for at least three reasons. First, there is substantial variation around this estimate. The standard deviation equals 32%, implying a coefficient of variation equal to 1.33. The mean all-in fee ratio (fees plus disbursements) equals 25% with a standard deviation of 16%. Further, the largest fee ratio was four times greater than the settlement value, while the smallest is effectively zero. Second, this analysis focuses on observed settlements and fees, and does not take into account the portfolio of class actions which would be included in calculating counsel's return on investment. For instance, many claims are abandoned prior to settlement and fee approval, implying that these claims have *negative* fees for the entrepreneurial firms. Cases are also lost—in carriage battles, at summary judgment, at certification and, of course, at trial—and counsel would recover no fees in those lawsuits, and may well have to pay the costs of the opposing party.[43] Finally, in addition to abandoned actions and unsuccessful ones, counsel invest heavily in investigating potential class actions, most of which do not ultimately advance past the research stage.[44] Because we do not observe these abandoned or unsuccessful cases, there is little scope to understand their magnitude, or to determine the return on class actions for plaintiff counsel as an enterprise. Whatever the return might be on initiating a claim, it is certainly less than 25%.

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[42] Several large settlements are not included in the data because they were approved after February 2018. For example, *Brown v Canada (Attorney General),* 2018 ONSC 3429, additional reasons at 2018 ONSC 5456 (the Sixties Scoop class action), resulted in over $500 million payable to the class and $75 million in fees. A $100 million settlement was approved in *MacDonald et al v BMO Trust Company et al,* 2021 ONSC 3726, along with $20 million in fees. Recent settlements at the Federal Court level, however, dwarf these numbers. In 2023 alone, a $283 million settlement was reached on behalf of veterans in *Manuge v His Majesty the King* (Court file no. T-119-19), a $2.8 billion settlement was approved in the Band Reparations action (*Tk'emlúps te Secwépemc First Nation v Canada*, 2023 FC 327) and $23 billion was approved in the First Nations child welfare class action (*Moushoom v Canada (Attorney General),* 2023 FC 1533).

[43] Unlike four other Canadian provinces and the US, Ontario has a two-way costs regime under which the unsuccessful party is liable for some portion of the successful party's legal fees and disbursements. In class actions, the risk of these costs is usually borne by class counsel, who provide an indemnity to the representative plaintiff. See: LCO Report, *supra* note 3 at 80; Kalajdzic, *Class Actions in Canada*, *supra* note 5 at 24—25.

[44] Kalajdzic, *Class Actions in Canada, supra* note 5 at 19.

Figure 1 adds context to the estimates in Table 1 by offering a graphical depiction of our main result. Three graphs are contained in this figure. The northwest quadrant shows a histogram of plaintiff counsel fees. Immediately evident is that the vast majority of fees are at the low end of the distribution, with almost all of the mass below the $5 million threshold. The corresponding graph for settlements is in the southeast quadrant. As with fees, this histogram shows that the majority of settlements involve values of less than $25 million. This mass below $25 million can be contrasted with the average value of $77 million in Table 1. Overlaid on both the fee and settlement histograms is a kernel density curve, a nonparametric approximation to the empirical distribution. Both fees and settlements have long tails, again re-emphasizing the role that outliers play in calculating averages. (The data in these figures are censored at a settlement value of $100 million to help with exposition. This means that very large settlements are omitted from this figure, although they are retained in our regression analysis.) The northeast quadrant of Figure 1 illustrates our main result. This graph includes a scatterplot of fees against settlements along with a trend line.

Figure 1: Relationship Between All-in Costs and Settlements

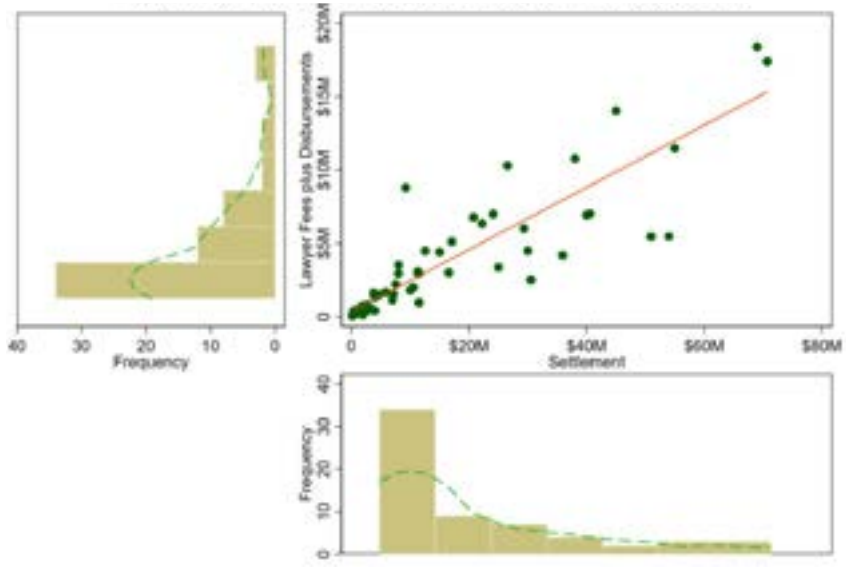

Figure 1 conveys three points. First, the bulk of class actions are clustered near the origin. In other words, the majority of settlements and fee awards are smaller than average. Most Ontario class action activity deals with smaller compensable harms, not the large cases that draw media headlines.

Second, as settlement values increase, the noise in legal fees also increases. That is, there is more variation in fees for larger settlements, than there is for smaller settlements.[45] The dots "fan-out". This could be a consequence of the relatively smaller number of large settlements. Alternatively, it could reflect the joint effects of the riskiness of large cases combined with a selection mechanism determining which actions are pursued. On the one hand, cases with potentially large payoffs increase the incentives of entrepreneurial counsel to pursue these claims. Conversely, the risk and uncertainty associated with these cases creates a disincentive for these actions.

Finally, the figure clearly demonstrates that fee ratios decline with settlement awards. This is the main result of our research. The slope of the trend line is less than one (i.e., the trend line is flatter than a 45° line in the Northeast quadrant). This declining fee ratio is often interpreted as an argument in favour of class proceedings' access to justice function.[46]

We next turn to our main results. Table 2 shows estimates from the quantile regressions. Table 2 contains results from six separate regressions, presented in three separate "Panels". Values in the first column are estimated using standard quantile regression models. Those in the second column use instrumental variable methods to address potential measurement error problems. The Panels—labelled Panel A, Panel B, and Panel C—provide estimates for different samples of the data. Panel A uses the all-in fee ratio, Panel B is for the fees-only ratio (legal fees divided by settlement amounts without including disbursements or taxes), while Panel C is for fees plus disbursements divided by settlement amounts. As discussed, the three samples are non-overlapping, so we present results for each. Fortunately, the results are consistent across models.

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45 This pattern is referred to as heteroscedasticity in econometrics.

46 Kalajdzic argues that access to justice concerns are engaged in at least two ways in respect of class counsel fees. First, compensation must be proportionate to risk in order to encourage counsel to take on difficult cases. Second, overcompensation reduces the funds available to compensate harmed class members but also negatively impacts public perception of the social utility of class actions. See: Kalajdzic, *Class Actions in Canada, supra* note 5 at 128.

Table 2: Effect of Settlement Size on Cost and Fee Ratios

	(1)	(2)
Panel A		
Dependent variable: Log(All-in Cost Ratio)		
Constant	1.43**	1.31**
	(0.17)	(0.53)
Log(Settlement)	-0.18***	-0.17***
	(0.04)	(0.03)
Est. Method	Quant Reg	IV Quant Reg
N	78	78
Panel B		
Dependent variable: Log(Fee Ratio)		
Constant	1.01***	1.12**
	(0.27)	(0.45)
Log(Settlement)	-0.18***	-0.17***
	(0.02)	(0.03)
Est. Method	Quant Reg	IV Quant Reg
N	131	131
Panel C		
Dependent variable: Log(Fees + Disbursements)		
Constant	1.93***	2.02***
	(0.50)	(0.64)
Log(Settlement)	-0.21***	-0.22***
	(0.03)	(0.04)
Est. Method	Quant Reg	IV Quant Reg
N	69	69

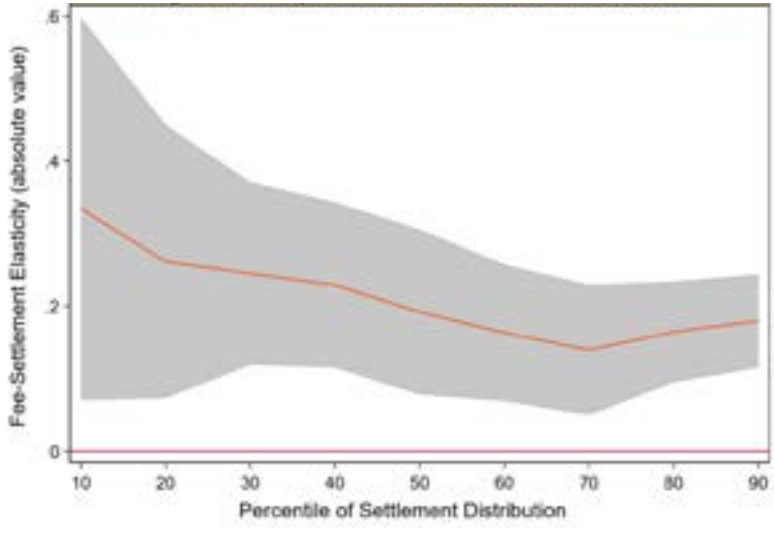
***, ** represent statistical significance at a <1% and <5% levels, respectively. Standard errors corrected for heteroskedasticity.

The numbers of interest in Table 2 are in the rows labelled Log (Settlement). These values indicate the percent change in the fee ratio that results from a 1% change in the settlement amount at the conditional median. So, in column (1) of Panel A, a 10% increase in the settlement value, for example, say, increasing from $10M to $11M, yields a 1.8% decrease in the ratio. Fees still increase but do so at a slower rate than settlements.

The corresponding estimate in column (2) of Panel A looks applies the alternative methodology designed to accommodate measurement error. This estimate is nearly identical, equalling -0.17. What this means is a 10% increase in the settlement value from $10M to $11M, yields a 1.7% decrease in the cost ratio.

Panel B and Panel C illustrate very comparable results. The estimates in columns (1) and (2) for Panel B show elasticity estimates of -0.18 and -0.17, corresponding to those in Panel A. The values in Panel C are slightly larger (in absolute value), suggesting marginally lower fees for every dollar increase in settlement amount. The elasticities in Panel C equal -0.21 and -0.22, respectively, for columns (1) and (2). Finally, all estimates are significantly different from zero at conventional levels.

Figure 2: Elasticity Estimates Across the Settlement Distribution



The results in Table 2 are for medians. Medians represent the middle point of a given distribution. Half the values are less than the median, and half are greater. While median fee ratios are a particularly useful and intuitive statistic for discussing the relationship between fees and settlements, we are not limited to medians. We can replicate the statistical analysis at a range of different quantiles of the settlement distribution. Examining how the relationship between fee ratios and settlements changes as the magnitude of the settlements increases offers insight into how judges approach fee approvals. That is, because we observe how fee ratios, and hence fee approvals, vary with the size of settlements, we can show that

judges treat fees for large and small settlements disproportionately—up to a point.

Figure 2 shows the quantile estimates across the settlement distribution. Figure 2 should be interpreted as follows. The vertical axis is the absolute value of the coefficient from a quantile regression model. For example, column (1) in Table 2 shows an estimate of -0.18 on the log(settlement) variable at the median. This estimate is plotted as a positive 0.18 at the point along the horizontal axis where it indicates 50, or the median. The horizontal axis, then, shows the rank order of settlements by quantiles. So, 10 means that 10% of settlements are below this threshold, while 90% are above. The coefficient, shown on the vertical axis gives the elasticity of the cost ratio at that quantile (which is approximately the absolute value of -0.37 in this case). There are two essential takeaways from Figure 2. First, fee ratio elasticities decline as settlements grow until roughly the 70th percentile. This reinforces the main point: as settlements increase, fees paid to lawyers, as a share of those settlements, decrease. The second point in Figure 2 adds some colour to this insight, however. There appears to be a minimal fee ratio below which judges are reluctant to breech. Put differently, judges appear to approve roughly the same 20% fee ratio for settlements above approximately the $10 million threshold. Indeed, 20% of a settlement's value acts as a floor for fee ratios. These results are particularly interesting given the recent guidance offered in *Moushoom v Canada (AG)*,[47] discussed below.

IV. Discussion

The relationship of fees and settlements occupies a unique place in class action policy debates. To this point, we have minimized discussing the prospective implications of the results of our study for class counsel, judges or defense counsel. Yet, these estimates suggest some interpretations about the structure of the class action mechanism.

The Ontario data confirms what several American studies have shown: judges are sensitive to windfall concerns and adjust fees based on settlement size. Fitzpatrick, for example, studied 444 federal class action settlements in 2006–2007 and found that the "fee percentage is strongly and inversely associated with settlement size among all cases."[48] Eisenberg

[47] 2023 FC 1739 [*Moushoom*].

[48] Fitzpatrick, *supra* note 8 at 837. We emphasize that our data do not include several recent mega-fund settlements, cases that had billion dollar payouts and smaller fee ratios. These mega-fund settlements would change the distribution at higher qualities. Fitzpatrick also reported that awards ranged from 3% to 47% of settlement, but that the average award was 25.4% and median was 25%, figures that are almost identical to what we have reported in our study (*ibid* at 833).

and Miller similarly studied 370 cases reported in Westlaw and found a "scale effect" where attorney fee shares decrease with settlement awards.[49] They state that "the overwhelming determinant of fee is the amount of the recovery for the class,"[50] argue that this relationship "provide[s] empirical support for the normative justification underlying class actions"[51] and that the scale effect "can be interpreted as supporting the underlying theory for class actions."[52] By aggregating smaller claims into a single action, class actions facilitate economies of scale in legal services, achieving judicial economy and access to justice objectives. Based on this argument, both our results and those from Fitzpatrick, Eisenberg, and Miller emphasize that class counsel share the rewards of the class mechanism.[53]

Take-up rate information would, of course, better inform our understanding of the trade-offs between counsels' entrepreneurial incentives to pursue lucrative claims and the agency challenges endemic to class actions. For example, if few class members ultimately claim their share of settlement funds but class counsel's fee is based on a much larger fixed sum (with the unclaimed funds reverting to the defendant or distributed *cy près*), class counsel's financial interests and incentives to design accessible settlements and ensure proper notice are misaligned. Unfortunately, take-up rate data is simply not publicly available. We have been sensitive to the effect of class member participation wherever possible, however, by not including in our dataset those cases lacking information about the ultimate figure paid by the defendant, and by taking the mid-range figure where estimated take-up information is disclosed in the settlement approval decision.

The inverse relationship between the size of the settlement and the percentage return to counsel exhibited by the data is consistent with the LCO's 2019 recommendations regarding fees. The LCO analyzed class counsel fees through the lens of access to justice, noting that fees are a lightning rod of controversy and can "generate considerable cynicism and public distrust of class actions, plaintiff counsel and the justice system generally."[54] The LCO agreed with judicial sentiment that "[w]indfalls

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49 Eisenberg & Miller, *supra* note 10.

50 *Ibid* at 58.

51 *Ibid* at 64.

52 *Ibid* at 78.

53 Helland & Klick, *supra* note 9 use the Eisenberg and Miller data to demonstrate a further relationship between court congestion and fees. Using filings per judgeship within a year, they find an elasticity of 0.08, which means that a 10% increase in filings increases average class action fees by 0.8%, all else constant. This result is robust to forum-shopping incentives.

54 LCO Report, *supra* note 3 at 71.

should be avoided because class action litigation is not a lottery."[55] On this basis, the LCO recommended that courts employ a sliding scale approach:

> As the size of settlements increases, the percentage of the recovery that the class counsel fee represents should not necessarily increase proportionately. At some point, the recovery by counsel ceases to have a rational connection to the effort expended. Even class counsel interviewed by the LCO who are not in favour of a codified sliding scale concede that applying a standard percentage to mega-fund settlements yields amounts that are "objectively excessive".[56]

Ultimately, the Attorney-General accepted the propriety of a sliding scale and codified the principle of proportionality in the amended CPA. Section 32(2.1) now requires that judges determine if a proposed fee is "fair and reasonable" having regard to, among other factors, "the proportionality of the fees and disbursements in relation to the amount of any monetary award or settlement funds."[57]

Although the LCO's concern about excessive compensation was directed to 'mega-fund settlements', the sliding scale of fee ratios exists across the dataset up to the apparent floor at 20%, which seems to be the (average) minimum that applies even to large settlements. Mega-fund settlements were first discussed in a line of cases where Justice Belobaba proposed a default 33% contingency fee rule in class actions.[58] He allowed for an exception to the one-third rule in mega-settlements—those exceeding $150 million—on the basis that a $50 million counsel fee may be "unseemly".[59] He rejected the predominant approach approach which involved an assessment of the work performed by counsel and the risks incurred, on the basis that the former was "irrelevant" and the latter "immeasurable".[60] He went on to ask rhetorically:

> Why should it matter how much actual time was spent by class counsel? What if the settlement was achieved as a result of "one imaginative, brilliant hour" rather than "one thousand plodding hours"? If the settlement is in the best interests of the class and the retainer agreement provided for, say, a one-third contingency

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55 *Ibid* at 76, referring to *Brown v Canada (AG),* 2018 ONSC 3429 at para 51.

56 LCO Report, *supra* note 3 at 76. Similarly, appellate courts in the United States direct judges to apply a sliding scale approach because "[i]n many instances the increase [in recovery] is merely a factor of the size of the class and has no direct relationship to the efforts of counsel." *In re Prudential*, 148 F 3d 283 at 339 (3rd Cir 1998) as cited in Kalajdzic, Class Actions in Canada, *supra* note 5 at 146.

57 *CPA*, *supra* note 2.

58 Justice Belobaba introduced the default rule in *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686.

59 *Ibid* at para 9.

60 *Ibid* at para 4.

> fee, and was fully understood and agreed to by the representative plaintiff, why should the court be concerned about the time that was actually docketed? This only encourages docket-padding and over-lawyering, both of which are already pervasive problems in class action litigation.[61]

Justice Belobaba's view of the incentives for 'make work' created by the lodestar method[62] is supported by at least one study that examined mega-settlements in shareholder class actions.[63] Without information about the hours docketed in each class action settlement, our study cannot test their hypothesis that higher-stakes litigation will encourage plaintiffs' attorneys to inflate their hours by doing unnecessary work.[64] Moreover, as the authors of the American study themselves acknowledge, using the presence of multiple lead counsel as a proxy for inflated hours has its limitations.[65] It is impossible to measure inefficiency or docket-padding without observation or review of individual files.

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61 *Ibid* at para 5, referring to *Ford v F Hoffman-LaRoche Ltd*, 2005 CanLII 8689 , [2005] OJ No 1117 (SC) at para 107.

62 The lodestar approach to fees is the product of the number of hours docketed in the file multiplied by the lawyers' normal hourly rate and some multiplier representing the premium, or the lodestar. In his 2007 study of 27 Ontario cases, Alarie found the average lodestar was 2.48; by 2014, the average lodestar or multiplier had decreased to 1.95, or about twice the billing lawyers' usual hourly rates. See Alarie, *supra* note 13; Alarie & Flynn, *supra* note 7.

63 Choi, Erickson & Pritchard, *supra* note 6.

64 One objection to the interpretation of the results is this paper is that costs are an imperfect proxy for lawyer fees. There is some merit to this argument. However, echoing Justice Belobaba's sentiment, there are several reasons to believe that all-in fee ratios are more informative. To start, for the large majority of settlement agreements, information on hours worked is absent. Thus, we cannot capture productivity. Marginal productivity is the relevant factor for entrepreneurial incentives. To see this, consider two claims. In Claim A, there are legal fees of $1,000,000 requiring 2500 hours of lawyer time. In Claim B, fees are $500,000 but the claim only requires 1000 hours. It is not straightforward to state which claim provides the larger entrepreneurial incentives. On the one hand, $1,000,000 is clearly greater than $500,000. Yet, the per hour return on Claim A is $400, while it is $500 on Claim B.

More directly, the judicial economy and access to justice objectives of the CPA require all-in costs. Class Members, for instance, obtain a value equal to the settlement less all-in costs. This is strictly less than the settlement less lawyer fees. From a policy perspective, we care about the total costs of a claim. Legal fees represent one piece of this cost—the piece that entrepreneurial firms are presumably most interested in—but there are other actors (e.g., experts, claims administration firms) involved as well. Judicial economy suggests that we seek to minimize the total costs, not just legal fees.

Finally, we are pragmatic with our approach. The text of settlement approvals frequently do not provide sufficient information to distinguish fees from disbursements in most cases. Thus, trying to focus exclusively on fees would shrink the dataset.

65 Choi, Erickson & Pritchard, *supra* note 6 at 464.

The LCO, scholars, and ultimately the Legislature, rejected the presumptive percentage fee recommended by Justice Belobaba and many class counsel. Section 32(2.1) codifies the common law test to fee approval that requires a judge to consider the results achieved for the class and the degree of risk assumed by counsel, as well as the new proportionality principle described above. Section 32(2.3) invites the court to cross-check one method of calculating a fee (for example, a percentage of settlement) against another (for example, the docketed time). The LCO had recommended the cross-check to ensure that "there is some relationship between the fees paid and the work performed."[66]

Two recent decisions confirm the courts' commitment to fixing a fee that provides counsel with an adequate economic incentive to pursue this type of risky litigation but that does not overcompensate counsel to the detriment of the class and the system as a whole. In the first decision, Justice Perell, the most senior class action judge in Ontario, stated that the "court must consider all the factors and then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession."[67] He confirmed that the CPA requires judicial scrutiny because of counsel's inevitable conflict of interest and the inherently champertous nature of a contingency fee arrangement, but admitted that the role of the approval judge is both difficult and unpleasant.[68] Due to the adversarial void present at settlement, judges must take on the unorthodox role of protector of the class and determine when a fee is justified and when it is champertous based on a host of factors, including a consideration of the integrity of the profession. "In the realm of class actions, the reputation of the profession is tarnished by a champerty that indicates that the class action is more for and about Class Counsel than about the class members."[69]

In the second decision, a Federal Court judge reduced the fee sought by class counsel – and agreed to by the defendant—from $50 million (exclusive of taxes and disbursements) to $40 million.[70] Despite the

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66 LCO Report, *supra* note 3 at 76.

67 *Fresco v Canadian Imperial Bank of Commerce*, 2023 ONSC 3335 at para 57. The decision is under appeal.

68 *Ibid* at paras 62—64.

69 *Ibid* at para 131.

70 *Moushoom, supra* note 47. Class counsel's initial fee request was $80 million, in accordance with a contingency fee retainer agreement. The defendant objected to this amount. After oral argument, and before the judge rendered her decision, the parties reached a settlement on the quantum of fees; Canada agreed to pay $50 million for fees up to the conclusion of the settlement agreement and another $5 million for work until the end of the distribution protocol. Justice Aylen held that "[t]he parties' agreement on the quantum of fees is clearly a relevant consideration. But it does not change the degree of

amount representing only 0.21% of the settlement, Justice Aylen found that "in a mega-fund settlement, a percentage-based fee is likely to result in an inappropriate windfall to counsel."[71] A fee of $160 million would still represent less than 1% of the actual recovery, but would be objectively excessive, illustrating "the fallacy of considering the percentage of recovery as a probative 'check and balance' for fee approval in the context of a mega-fund settlement.[72] Rather than relying on either a percentage or multiplier approach, Justice Aylen called for a principled determination of legal fees that starts with a holistic consideration of the reasonableness of the docketed fees, then applies a premium "that incentivizes class counsel to take on risky actions and to do them well, but that is fair and reasonable and maintains the integrity of the profession."[73] The predominant considerations will be the risk undertaken by counsel and the results achieved, bearing in mind that "there will come a point where the weight attributed to the result achieved (and the resulting adjustment) must plateau no matter how high the financial settlement achieved."[74]

V. Conclusion

The results of our study may provide some comfort to Justice Perell and to Justice Aylen as they and their colleagues on the bench undertake their difficult and "unpleasant" task. The average fee ratio in the dataset of 25% is well below the one-third contingency fee that is standard in other civil litigation and which Justice Belobaba proposed in the *Cannon* line of authorities. Moreover, our study confirms that fee ratios decline with the settlement, which suggests that lawyers and judges are sensitive to the optics of windfalls in both mega-fund and lesser value settlements. High fees are certainly an image problem, since class counsel will always make exponentially more than any single class member, but they continue to bear an objectively reasonable relationship to the size of settlements.

Whether a median fee ratio of 25% is 'too high' is a function of many considerations, beyond the net return to class members in a given case. As judges in Ontario have long recognized, fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well.[75] The fee must be sufficient to compensate for the pursuit of meritorious but risky claims, and to make up for high opportunity costs associated with a portfolio of such cases.

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scrutiny that the Court must apply in its assessment of whether the fees sought are fair and reasonable" (at para 10).

71 *Moushoom*, *supra* note 47 at para 97.

72 *Ibid* at para 99.

73 *Ibid* at paras 104—106.

74 *Ibid* at para 110.

75 *Gagne v Silcorp Ltd*, 1998 CanLII 1584, [1998] OJ No 4182 (CA).

That the prevailing fee ratios have been sufficient to provide such an incentive is perhaps proven by the increase in the size of the plaintiff class attorney bar.[76]

The clustering of cases in the low settlement value (Figure 1) confirms what one litigator has claimed is the optimal business model: it is financially more lucrative to do many small cases than a few mega settlements.[77] The recent spate of historically large settlements, however, including the $23.4 billion First Nations Caring Society settlement,[78] evidences a continued willingness on the part of some law firms to take on such cases. Economic incentives are needed for smaller and mega-settlements in order to fulfill class actions' access to justice promise.

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[76] While statistics on the number of class action lawyers are not maintained by the Law Society of Ontario, an increase in the number and size of firms in class action practice is supported anecdotally and by reference to the diversity of firms named in reported class action decisions.

[77] Kalajdzic, *Class Actions in Canada*, *supra* note 5 at 47: "[B]etter to take on smaller cases where the judge is unlikely to be shocked by a $2 million fee request, even if it represents a high multiplier."

[78] *Moushoom v Canada (Attorney General),* 2023 FC 1533.