WHO CAN BE A REPRESENTATIVE PLAINTIFF UNDER ONTARIO'S *CLASS PROCEEDINGS ACT, 1992*?

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I. Introduction

Despite the voluminous case law on certification of class actions under the Ontario *Class Proceedings Act, 1992* (*"CPA"*)[1], surprisingly little of it considers the qualities of an appropriate representative plaintiff. What emerges clearly, however, is that the threshold for appointing a suitable class representative has been set fairly low as courts apply the criteria listed in s. 5(1)(e) of the *CPA*:

> (i) there is a representative plaintiff who would fairly and adequately represent the interests of the class;
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> (ii) the representative plaintiff has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and

[1] S.O. 1992, c. 6

(iii) the representative plaintiff does not have, on the common issues for the class, an interest in conflict with the interests of the other class members.

It appears that, in most cases, the proposed representative plaintiff will be subject to little scrutiny and certification will be granted and the proposed representative plaintiff appointed so long as the remaining four certification criteria set out in s. 5(1) of the *CPA* are met.[2]

The decision of the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*[3] (along with two other Supreme Court of Canada decisions on class actions, referred collectively to as the "class actions trilogy", in which that Court recognized class actions even in jurisdictions without legislation governing class actions[4]) articulated the following three factors to be considered to ensure that the proposed

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[2] Those criteria are as follows:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;

(c) the claims of the class members raise common issues; and

(d) a class proceeding would be the preferable procedure for the resolution of the common issues.

[3] [2001] 2 S.C.R. 534

[4] The other two cases in the class actions trilogy are: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158; and *Rumley v. British Columbia*, [2001] 3 S.C.R. 184

representative plaintiff will "adequately represent the class" and "vigorously and capably prosecute the interests of the class": motivation of the representative plaintiff; competence of class counsel; and capacity of the representative plaintiff to bear the costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally).[5]

Together, these factors address the policy objectives of class actions, which are: judicial economy; access to justice (for plaintiffs); and behaviour modification (of defendants). The Supreme Court of Canada class actions trilogy has confirmed that class action legislation should be interpreted generously and in a purposive manner to give effect to these policy objectives. The Court must strike a balance between efficiency and fairness, that is, it should take into account the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause.[6] Therefore, the determination of who will be a suitable class representative should be considered in that context.

II. Requirements of a representative plaintiff

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[5] *Western Canadian Shopping Centres Inc. v. Dutton, supra* note 3, at 555

[6] *Western Canadian Shopping Centres Inc. v. Dutton, supra* note 3, at 549-550, 556; and *Hollick v. Toronto (City), supra* note 4

(a) Generally

Class proceedings are often different from typical litigation in which a lawyer is approached and retained by a specific party to commence an action. In class proceedings, it is often the case that the lawyer has identified a meritorious potential class action (arising out of a product liability or other mass tort claim, for example) but no representative plaintiff or has been approached by a potential representative plaintiff who the lawyer perceives to be unsuitable. The process of searching for an appropriate representative plaintiff has sometimes been referred to derogatively as "trolling". In fact, there is nothing inherently improper in advertising for or interviewing and seeking out a suitable class representative for a meritorious case. Plaintiffs' counsel must always remember that evidence of the origin of the class action and the motivation and commitment of the proposed representative may be put before the Court (by the defendant, for example, on a certification motion or settlement approval motion) for scrutiny. The courts play a vital role in preventing an abuse of process in their broad discretion under the *CPA*.[7] For

[7] Section 12 provides that the Court, "may make an order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate."

example, as the case law referred to below demonstrates, it is improper to commence a class action naming a "token" representative plaintiff simply to toll the limitation period while a suitable class representative is found. Nor will a court countenance a "trial and error" approach whereby a proposed representative plaintiff is put forward while there are other representatives available "just in case". Moreover, the Court will be alive to the possibility of a "strike suit" (an unmeritorious claim advanced for the sole purpose of pressuring the defendant to settle), or a case where the benefits to be achieved in a settlement flow only to counsel and not to class members.[8]

As a practical matter, plaintiffs' class counsel will want a representative plaintiff who meets all the requirements set out in the *CPA* *and* who is willing and able to assume the various obligations and responsibilities associated with acting as a representative of the entire class, including some or all of the following:

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[8] *Epstein v. First Marathon Inc.*, [2000] O.J. No. 452 (S.C.J.)

- instructing counsel;

- reading the Statement of Claim;

- participating in oral and documentary discovery (as required under s. 15 of the *CPA*);

- submitting to examination before the hearing of a motion or application, if necessary (as required under s. 16 of the *CPA*);

- giving notice of certification (as required under s. 17 of the *CPA*), although this is ordinarily done by counsel under the supervision of the Court;

- accepting the liability for costs [s. 31(2) of the *CPA*] subject, of course, to any funding provided by the Class Proceedings Fund or an indemnity offered by class counsel; and

- communicating with the media.

In only a few cases has the representative plaintiff been compensated for time spent in prosecuting the action on behalf of class members.[9]

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[9] *Windisman v. Toronto College Park Ltd.* (1996), 28 O.R. (3d) 29 (Gen. Div.)*; Mondor v. Fisherman; CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman,* [2002] O.J. No. 1855; *Scott v. Ontario Business College (1977) Ltd.*, [2004] O.J. No. 1749 (S.C.J.)

(b) Requirements under s. 5(1)(e) of the *CPA*

(i) there is a representative plaintiff who would fairly and adequately represent the interests of the class

This rather vague requirement has received little judicial comment but seems to refer to the personal characteristics of the proposed representative plaintiff and involves a consideration of whether there is anything that would make her/him unsuitable. It appears likely that the Court will consider the proposed representative plaintiff's "motivation" - a criterion referred to by the Supreme Court of Canada in the class actions trilogy - under this branch of the test.

The requirement that the representative plaintiff "fairly and adequately" represent the interests of the class obviously means that the proposed representative plaintiff must be a member of an identifiable class which is capable of being represented by one person.[10] Under the comparable British Columbia, Newfoundland, and Saskatchewan legislation, the Court may appoint a person who is not a representative of the class, but only if it is

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[10] *Bellaire v. Independent Order of Foresters*, [2004] O.J. No. 2242 (S.C.J.)

necessary to do so to avoid a substantial injustice to the class.[11]

The Ontario case law has provided the following limited guidance on whether a proposed representative plaintiff will "fairly and adequately" represent the interests of the other members of the class.

The characteristics of the representative plaintiff need not be exactly the same as those of the other members of the class where most of the facts pertaining to the issues to be tried are common to all and economy favours single representation[12].

Nor will a proposed representative plaintiff be disqualified for having a less than complete knowledge of the intricacies of the civil litigation process or of the legal issues involved in the action and the proposed class proceeding so long as he or she has a more than adequate understanding of the issues in the litigation, his or her concerns are typical of the concerns of

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[11] In *Metera v. Financial Planning Group,* [2003] A.J. No. 468 (Q.B.), the Court stated at para. 61, "this is undoubtedly to cover the situation where some or all class members are under age, or... are medically disabled from prosecuting the action themselves." See *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 2(4); *Class Action Act*, S.N.L. 2001, c. C-18.1, s. 3(4); *The Class Actions Act*, S.S. 2001, c. C-12.01; *Class Proceedings Act*, S.A. 2003, c. C-16.5, s. 2(4); *Class Proceedings Act*, C.C.S.M. c. C130; *An Act Respecting the Class Action*, R.S.Q., c. R.-2.1. It appears that in Alberta and Quebec the representative plaintiff may be a non-profit organization.

[12] *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.) at 682-684

other members of the class, and he or she is clearly able to instruct counsel[13].

The representative can be more or less sophisticated than the average class member and need not be "typical"; however, the greater the number of differences between the representative plaintiff and other class members, the greater the likelihood for a conflict to arise or that there will be doubt that the representative plaintiff will fairly and adequately advance the class claims as their interests diverge.[14] As Winkler J. stated in *Carom v. Bre-X Minerals Ltd.*[15]:

> ...In the present case, the trading activity of the representative plaintiff is idiosyncratic. This has two consequences: first, it produces no common issues; second, the representative plaintiff may not be able to meet the test of being able to adequately and fairly represent the class. While a representative plaintiff need not be typical, he or she cannot be so distinctive, in the face of the class definition, as to produce a result in law flowing from a common issue trial which could be more adverse to class members than an individual trial would be. Where the cause of action, or the common issues proposed, depend on individual

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[13] *Maxwell v. MLG Ventures Ltd.* (1995), 7 C.C.L.S. 155 (Ont. Gen. Div.) at para. 10

[14] *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div. Ct.) at 464-465, 506-507, 554

[15] (1999), 44 O.R. (3d) 173 (S.C.J.) at 223

> characteristics of the plaintiff rather than a commonality within the class, then the approval of a distinctive plaintiff as the class representative works a manifest unfairness to the plaintiff class. This is the raison d'etre of the requirement for commonality which is the underpinning of the statute.

A long-standing animosity between the proposed representative plaintiff and the defendant will not compromise the ability of the proposed representative plaintiff to fairly and adequately represent the interests of the class or create an interest in conflict with the interests of the other class members[16]; however, where the proposed representative plaintiff has demonstrated a strong antipathy towards a substantial majority of members in the proposed class, he or she is not a suitable representative plaintiff[17].

The proposed representative plaintiff must also be credible in the sense that he or she has not been "caught out" in an inconsistency between his or her affidavit and cross-examination evidence. In one case, it was suggested that the other class members might not want to be represented

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[16] *Ewing v. Francisco Petroleum Enterprises Inc.* (1994), 29 C.P.C. (3d) 212 at para. 10 per Haines J.

[17] *Nixon v. Canada (Attorney General)* (2002), 21 C.P.C. (5th) 269 at paras. 10-11 per Malloy J.

by someone whose credibility with the Court was suspect.[18]

In addition, the law in Ontario (as distinct from the law in British Columbia[19]) is that, for any defendant there must be at least one representative plaintiff who has a reasonable cause of action disclosed in the pleadings against that defendant. That principle is established in the following cases.

In *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.*[20], the house of one of the plaintiffs was destroyed and her daughter and brother killed in a fire caused by an unextinguished cigarette allegedly manufactured by defendant Imperial Tobacco. Two proposed representative plaintiffs brought an action under the *CPA* against Imperial Tobacco as well as two other cigarette manufacturers. The essence of the plaintiffs' claim was that all three of the defendants manufactured an inherently dangerous product when they knew how to manufacture a safer product that had a reduced

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[18] *Shaw v. BCE Inc.* (2003), 42 B.L.R. (3d) 107 at para. 25 per Farley J.

[19] See p. 15 of this paper

[20] (2000), 51 O.R. (3d) 603 (S.C.J.) at paras. 14-60 per Cumming J.

propensity for igniting upholstered furniture and mattress fires. The defendants moved under Rule 21.01(1)(b) to strike the pleading on the ground that it disclosed no reasonable cause of action. Cumming J. found that, because the *CPA* is merely a procedural statue and cannot create substantive rights, the pleading could not survive a Rule 21 motion where defendants were named against whom the representative plaintiff had no cause of action:

> In my view, and I so find, it is not sufficient in a class proceeding, for the purpose of meeting the requirement of rule 21.01(1)(b), if the pleading simply discloses a "reasonable cause of action" by the representative plaintiff against only one defendant and then puts forward a similar claim by a speculative group of putative class members against the other defendants.
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> At the earlier point in time of the rule 21.01(1)(b) motion, the representative plaintiff is the only plaintiff party to the pleading. The putative class members cannot be considered parties until certification is granted by the court. In addition, in the case at hand there cannot be any certainty that there are any persons with a cause of action against [the other two tobacco manufacturers]. There cannot be a cause of action against a defendant without a plaintiff who has that cause of action. In my view, for every named defendant there must be a party plaintiff with a cause of action against that defendant to meet the Rule 21 threshold.
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> ... Until there is a plaintiff who has such a cause of action, it is entirely speculative as to whether there is anyone with such a claim. A defendant should not be made subject to a speculative claim which presumes that one or more unknown persons

> possibly has a cause of action. It would be wrong to put a defendant to the expense of the litigation process if there is no reasonable cause of action against that defendant on the face of the pleading.[21]

The decision of the Ontario Court of Appeal in *Hughes v. Sunbeam Corp. (Canada) Ltd.*[22] is now considered to be the leading authority propounding the principle first established in *Ragoonanan*. The plaintiff purchased an ionization smoke alarm, which he claimed was defective and unreliable. He began a class action on behalf of all persons in Canada who bought ionization smoke alarms manufactured by several defendants, whom he alleged had designed, manufactured, tested, and promoted the smoke detectors and then placed them into the stream of commerce, knowing they were defective. The defendants brought a motion under Rule 21.01(1)(b) to strike out the statement of claim as disclosing no reasonable cause of action. The Court of Appeal found that the representative plaintiff could advance a cause of action against only the manufacturer of the ionization smoke alarm he purchased. It echoed the words of Nordheimer J. in another case[23] that, for each defendant who is named in a class action, there must

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[21] *Ibid.* paras. 54-56

[22] (2002), 61 O.R. (3d) 433 (C.A.)

[23] *Boulanger v. Johnson and Johnson* (2002), 14 C.C.L.T. (3d) 233 (S.C.J.) as

be a representative plaintiff who has a valid cause of action against that defendant.

The *Ragoonanan* principle was considered in a somewhat different context in *Boulanger v. Johnson and Johnson Corp.*,[24] in which the plaintiffs brought an action on behalf of all persons in Canada and their relatives who used the prescription drug Prepulsid, which was manufactured and distributed by the defendants and was alleged to have been associated with cases of heart rhythm abnormalities and death. The proposed class action claimed damages and advanced claims based upon the subrogated interests of the Ontario Health Insurance Plan ("OHIP") and the provincial health insurance plans for class members residing outside Ontario. The defendants relied upon the decision in *Ragoonanan* in asserting that the representative plaintiff could not advance a claim for relief under the laws of other provinces because she had no claim under those laws as she had received no medical treatment outside Ontario.

Nordheimer J. stated that he agreed with Cumming J.'s decision in

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referred to in *Hughes v. Sunbeam Corp. (Canada) Ltd., ibid.*

[24] *Supra* note 23

Ragoonanan, however, he stated that the claims in this case were different because,

> [t]hey involve the consideration of whether a defendant, who is the subject of a proper claim by the representative plaintiff arising from a valid cause of action, can also be subject to claims for different forms of relief that the representative plaintiff herself does not have ... In other words, this is not a situation like in *Ragoonanan* where defendants were named in an action although the representative plaintiff had no actual claim against them. Here, there is a valid cause of action against the named defendants. *The question is the scope of the relief that may be claimed against them*.[25]
>
> [Emphasis added]

Further, Nordheimer J. noted that s. 2(1) of the *CPA* states that "one or more members of a class of persons may commence a proceeding in the Court on behalf of the members of the class" and that the use of the words "on behalf of" suggest that it was intended under the *CPA* that the representative plaintiff would advance claims for class members which the representative plaintiff might not have in his or her own personal capacity. Moreover, s. 6 of the *CPA* provides that, *inter alia*, the Court shall not refuse to certify a class proceeding solely because the relief claimed relates to separate contracts involving different class members and different remedies are sought for different class members.

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[25] *Supra* note 23, at para. 22

Although the Divisional Court confirmed both Nordheimer J.'s result and reasoning, unfortunately, its dicta confused the distinction Nordheimer J. made between a cause of action and the scope of relief being sought[26]. The Divisional Court said that Rule 21.01(1)(b) must be read in light of s. 35 of the *CPA* and s. 66(3) of the *Courts of Justice Act*[27] and stated that the Court must bear in mind that the legislature has specifically approved of a plaintiff asserting causes of action which are not that plaintiff's personal causes of action which are asserted by the plaintiff on behalf of class

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[26] (2003), 64 O.R. (3d) 208 (Div. Ct.)

[27] *Ibid.* at 215-218

Section 35 of the *CPA* states, "[t]he rules of court apply to class proceedings".

Section 66 of the *Courts of Justice Act*, R.S.O. 1990, c. 43 provides for the Rules of Court, stating:

> 66.(1) Subject to the approval of the Lieutenant Governor in Council, the Civil Rules Committee may make rules for the Court of Appeal and the Superior Court of Justice in relation to the practice and procedure of those courts in all civil proceedings, including family law proceedings.
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> (2) The Civil Rules Committee may make rules for the courts described in subsection (1), even though they alter or conform to the substantive law, in relation to,
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> (a) conduct of proceeding in the courts ...
> (e) pleadings ...
> (x) any matter that is referred to in an Act as provided for by rules of court.
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> (3) Nothing in subsection (1) or (2) authorizes the making of rules that conflict with an Act, but rules may be made under subsection (1) and (2) supplementing the provisions of an Act in respect of practice and procedure.

members:

> ... [t]he scheme of the *CPA* demonstrates the legislature's intention to permit a representative plaintiff, prior to the certification motion, to plead causes of action which are not the representative plaintiff's personal causes of action but which are the causes of action of members of the class, asserted by the plaintiff in a representative capacity[28].

It found that the claims by members of the class on behalf of their provincial health insurers were fundamentally the same claims and that, as a result, claims advanced by the representative plaintiff on behalf of class members, including claims advanced on behalf of their provincial health insurers, were very similar to the claims advanced by the representative plaintiff personally, which included her claim on OHIP's behalf. Therefore, it could not be said for the purposes of Rule 21.01(1)(b) that the claims plainly and obviously did not have some chance of meeting the "common issues" criterion for certification.

At first instance, Nordheimer J. also considered the practical effect of the defendants' position on the manageability of national class actions:

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[28] *Ibid.* at 216

> I would observe, in passing, that this challenge to the pleading involves to some degree a challenge to the existence of national class actions themselves because, if the defendants' contention is correct, then in a number of situations in order to have a national class action it would be necessary to have so many representative plaintiffs for the purpose of directly covering the various forms of relief that may arise in the ten provinces and three territories, that the action would practically become unworkable. Indeed, the defendants' position, taken to its extreme, would require, in every national class action, the presence of a representative plaintiff from every province and territory where any member of the putative class resided since the basis for the challenge to the right to claim different forms of relief is one that can be made regardless of whether the relief arises from provincial legislation or from common law. I would note that, to date, the presence of national class actions has been generally recognized and accepted[29].

One could postulate that the Ontario rule may, indeed in some cases, make a proposed class action too unwieldy for certification where there are multiple defendants, requiring multiple representative plaintiffs. One court has found that this problem cannot be remedied by use of a defendants' class. In *Lupsor Estate v. Middlesex Mutual Insurance Co.*[30], Winkler J. stated that *Hughes v. Sunbeam Corp. (Canada)* established the clear principle that, in a proposed class action, there must be a representative plaintiff with a claim against each defendant and that this principle is to apply with equal

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[29] *Supra* note 23, at para 23

[30] [2003] O.J. No. 3745 (Div. Ct.)

force and effect to a defendant class. Otherwise, it would be effectively nullified because a plaintiff could circumvent it merely by asserting a defendant class, as opposed to naming each defendant individually, thus avoiding the necessity of having a plaintiff for each defendant against which the cause of action is asserted. He found that a plaintiff could not do indirectly what it could not achieve directly[31].

[31] *Ibid. at* para. 8

This is one area where the jurisprudence in Ontario and British Columbia have diverged, despite the similarities in the class actions legislation. British Columbia courts have permitted a proposed class action to proceed against defendants against whom no representative plaintiff has a claim.[32] The British Columbia Supreme Court remarked recently in *Mackinnon v. National Money Mart Co.* as follows:

> The defendants say that they should not be forced to defend an action when no plaintiff having a contract with that particular defendant has made a claim. With respect, the same argument applies to all class proceedings: only one person has made a claim, so why should a defendant have to deal with more than that person's claim? The answer, of course, is that the Act allows it. Similarly, the Act allows a class action where there is a cause of action and does not require that a representative plaintiff have a personal cause of action against each defendant. To impose such a requirement is simply to impose a procedural hurdle. It does not advance the policy or purpose of the Class Proceedings Act...[33]

However, as Winkler J. observed in *Hughes v. Sunbeam Corporation (Canada) Ltd.*[34], none of the British Columbia cases was analogous since they were not decided within the context of a motion to strike the statement of

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[32] See, for example, *Furlan v. Shell Oil Co.*, [2000] B.C.J. No. 1334 (C.A.); *Campbell v. Flexwatt*, [1997] B.C.J. No. 2477 (C.A.); and *Mackinnon v. National Money Mart Co.*, [2004] B.C.J. No. 176 (S.C.); leave granted (2004), 44 C.P.C. (5th) 72 (B.C. C.A.)

[33] *Ibid.,* at para. 8

[34] *Supra* note 22, at 440

claim as disclosing no reasonable cause of action. The result is that the Ontario principle appears to be more analytically sound. The jurisprudence in British Columbia may not yet be settled as this matter is currently before that province's Court of Appeal.[35]

(ii) the representative plaintiff has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding.

This requirement is tied to the requirement, under s. 5(1)(d) of the *CPA*, that the Court must be satisfied that a class proceeding is the "preferable procedure" for resolution of the common issues. The litigation plan is typically prepared by plaintiffs' counsel and, therefore, has little to do with the characteristics of the proposed representative plaintiff. The production of a workable litigation plan serves two useful purposes: it assists the Court in determining whether a class proceeding is indeed the preferable procedure; and it allows the Court to determine whether the litigation itself is manageable in its constituted form[36].

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[35] *Mackinnon v. National Money Mart Co., supra* note 32

[36] *Carom v. Bre-X Minerals Ltd., supra* note 15, at 203

As both Ontario Courts and counsel have become more experienced with class actions, they have become better able to articulate the requirements of a good litigation plan, recognizing that the level of detail required will depend upon the complexity of the matter. It cannot simply be a recitation of the steps that would occur in any litigation.

Some matters that may be required for an acceptable litigation plan are as follows:

- what investigations have been or are to be undertaken;

- details as to the knowledge, skill, and expertise of the class counsel involved;

- an analysis of the resources required to litigate the class members' claims to conclusion and an indication that the resources available are sufficiently commensurate given the size and complexity of the proposed class and the issues to be determined;

- the steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence;

- the collection of relevant documents from members of the

class as well as others;

! the exchange and management of documents produced by all parties;

! ongoing reporting to the class;

! mechanisms for responding to inquiries from class members;

! whether the discovery of individual class members is likely and, if so, the intended process for conducting those discoveries;

! the method for dealing with the claims of extra-provincial plaintiffs, if they are included in the class;

! the need for experts and, if needed, how those experts are going to be identified and retained;

! if individual issues remain after the determination of the common issues, what plan is proposed for resolving those individual issues; and

! a plan for how damages and other forms of relief are to be assessed or determined after the common issues have been

decided.[37]

If all other requirements for certification are met, the Court may adjourn the certification motion to permit the plaintiff to prepare a better litigation plan or certification may be granted on a conditional basis[38].

For obvious reasons, a litigation plan will not be required if certification is sought for the purpose of enabling the Court to approve a settlement agreement between the parties which will bind all members of the class pursuant to s. 29(2) of the *CPA*.[39] Instead, the Court will have to be satisfied that the proposed settlement sets out a workable method for administering the proceeds of settlement.[40]

(iii) the representative plaintiff does not have, on the common issues for the class, an interest in conflict with the

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[37] *Carom v. Bre-X Minerals Ltd.*, *supra* note 15, at 203; *Pearson v. Inco Ltd.,* (2002), 33 C.P.C. (5th) 264 (Ont. S.C.J.) at para. 144 per Nordheimer J.*; Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.) at para. 78 per Winkler J.; and *Bellaire v. Independent Order of Foresters, supra* note 10, at para. 53 per Nordheimer J.

[38] s. 5(4) *CPA*; *Caputo v. Imperial Tobacco Ltd., supra,* at para. 79 per Winkler J.; and *Segnitz v. Royal & Sun Alliance Insurance Co. of Canada* (2003), 66 O.R. (3d) 238 per Haines J.

[39] *Coleman v. Bayer*, [2004] O.J. No. 1974 (S.C.J.) per Cullity J.

[40] *McKrow v. Manufacturers Life Insurance Co.* (1998), 9 C.C.L.I. (3d) 161 (Ont. Gen. Div.) at para. 8

interests of the other class members

The Court must consider each case on its facts to determine whether there is a disqualifying conflict between the proposed representative plaintiff and the other class members. This is an issue that appears to be raised by defendants frequently on certification motions. Some general principles have emerged from the case law.

The alleged conflict cannot merely be hypothetical. In a case where the Court considered that a potential conflict could arise depending upon whether settlement negotiations take place and on proposals then under consideration, it was not prepared to disqualify the proposed representative plaintiff, bearing in mind that the Court must approve any settlement.[41]

However, where those differences may result in the possibility that the proposed representative plaintiff and the other class members will have an interest in a different resolution to the proposed class action and so long as there is evidence to support that possibility, there is a potential for conflict which will disqualify the proposed representative plaintiff. In *Pearson v. Inco*,

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[41] *Kranjcec v. Ontario* (2004), 69 O.R. (3d) 231 (S.C.J.) at 255 per Cullity J.

the defendant operated a metal refinery, which the plaintiffs alleged continuously emitted hazardous substances into the environment which were alleged to have caused severe damage to the physical and emotional health of the proposed class members and extensive damage to their lands, homes, and businesses. Nordheimer J. found that the proposed representative plaintiff was from the community that was alleged to have been the most affected by the contamination and, therefore, would have one of the largest claims. He described the potential conflict to which this gave rise as follows:

> The members of that community likely have an interest in pursuing these claims in a much more aggressive fashion, and to a much greater extent, than would individuals who are less affected by the contamination. Put another way, those individuals who live in areas where the level of contamination is much lower, and who would, as a result, more likely have very small claims, might well be amenable to a resolution of those claims of a much different character than would the individuals with the larger claims. It seems to me, therefore, that there is an obvious potential for conflict between these two groups[42].

Without a mechanism to deal with conflicts if they were to arise, the Court determined that the plaintiff was not an adequate representative of the class.

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[42] *Pearson v. Inco., supra* note 38, at para. 146

There will be a conflict between the proposed representative plaintiff and the other class members if success for the representative plaintiff does not build in success for all class members. In *Carom v. Bre-X Minerals Ltd.*[43], Winkler J. found that conflicts arose because of the causes of action pleaded. In the main action, the plaintiffs advanced a claim in conspiracy against one of the categories of defendants but not against the other. However, proof of the conspiracy claim against the first category of defendants in the main action could very well serve as the defence to the claims against the second category of defendants. Winkler J. found that, in such circumstances, the representative plaintiffs advancing the separate claims could not help but have a conflict on the common issues.

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[43] *Supra* note 15, at 224

In *Nixon v. Canada (Attorney General*), the proposed representative plaintiff brought a motion for an order certifying the action as a class proceeding and appointing him as the representative plaintiff on behalf of all inmates on Range A of the Kingston Penitentiary on the evening that a number of fires were set by inmates on the range. One of the common issues raised by the action was whether the defendant and its representatives had adequate policies and practices in place to deal with the recurring problem of inmates setting fires. The proposed representative plaintiff had previously been charged and convicted of setting fires in the institution and, although there was no indication that he was involved in the fire at issue in the action, the Court found that his conduct on occasions before and after the fire could put him in conflict with other members of the class "in respect of how arsonists should be dealt with".[44]

It is not necessary for the proposed representative plaintiff to have identical interests with the other class members so long as they have no conflict on the common issues. In *Anderson v. Wilson*[45], for example, the proposed claim arose out of a possible link between the defendants' clinics

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[44] *Supra* note 17, at para. 10 per Molloy J.

that provided electroencephalogram tests and an outbreak of hepatitis B. Those persons identified as possible members of the class fell into two groups: the first was comprised of those who where infected by the virus and those who were carriers of hepatitis B; and the second included those who showed no symptoms and were uninfected. The two proposed representative plaintiffs fell into the first group in that one was infected and one was a carrier. The Court found that the common issues were the claim in tort for mental distress and nervous shock, which presumably had been experienced similarly by both uninfected and infected members of the class. The unique issues relating to the infected patients, such as whether the clinics met the appropriate standard of care for infection control, could be conveniently tried without significant involvement from the uninfected members of the subclass. The Court considered whether there was a possible conflict between the class representatives and the uninfected group:

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[45] (1999), 44 O.R. (3d) 673 (C.A.)

> Although the representative plaintiffs are infected patients, and the Act contemplates representatives that have the same complaints as the class, I cannot see any reality at this stage to the argument that they would not fairly and adequately represent the interest of all patients or that there is presently any conflict of interest. Most of the facts pertaining to the issues to be tried are common to all. If and when real problems arise, it will not be difficult to create separate representation. In the meantime, economy favours single representation[46].

Similarly, in *1176560 Ontario Limited v. The Great Atlantic & Pacific Company of Canada Limited*[47], the plaintiffs were franchisees of Food Basics, a discount grocery store chain operated by the defendant ("A&P"). All putative class members were parties, individually, to standard-form franchise agreements with A&P. The claim alleged that the agreements required A&P to pass on to them certain categories of rebates and allowances received by A&P, which were withheld. A&P advanced counterclaims against the plaintiffs and stated that, if the action was certified, it would assert counterclaims against every class member claiming repayment of alleged overpayments. The plaintiff sought certification of the action as a class proceeding, which was opposed by A&P for numerous

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[46] *Ibid.* at 684

[47] (2002), 62 O.R. (3d) 535 (S.C.J.) per Winkler J.; aff'd (2004), 184 O.A.C. 298 (Div. Ct.)

reasons, including that the proposed representative plaintiffs were in conflict with other members of the class. A&P's complaint was the admitted independence of the three proposed representative plaintiffs, who were prosperous and unencumbered by debt to A&P and were not intimidated by A&P's counterclaim against them. A&P contended that this distinguished them from the other class members and rendered them unsuitable as class representatives. Winkler J. found that a financially independent plaintiff could not be disqualified as a potential representative by the very fact of his independence since, in fact, that is the very kind of person who would be equipped to "vigorously and capably prosecute" the lawsuit. The fact that their circumstances may be different from some or all of the balance of the class members did not represent a conflict "on the common issues". Nor did it mean that they could not fairly and adequately represent the class.

The conflict alleged in *Kerr v. Danier Leather Inc.*[48], concerned the relationship between the proposed representative plaintiffs and their counsel. The two representative plaintiffs were spouses of one another and one of them was a partner in the law firm seeking to be plaintiffs' class

[48] (2001), 14 C.P.C. (5th) 292 (Ont. S.C.J.)

counsel. The defendants argued that, because the representative plaintiffs had a stake in the legal fees that may be approved for class counsel, there could be at least the appearance that they were making recommendations in respect of the class that were influenced by the impact upon legal fees. Although Cumming J. did not conclude that there was a conflict, he found as follows:

> As a general principle, it is best that there is no appearance of impropriety. In this situation, there is the perception of a potential for abuse by class counsel through acting in their own self-interest rather than in the interests of the class. ... In my view, the better practice is that class counsel should be unrelated to a representative plaintiff so that there is not even the possible appearance of impropriety[49].

(c) Requirements of a representative plaintiff at common law

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[49] *Ibid.* at para. 72

In addition to the requirements for appointing a representative plaintiff set out in s. 5(1)(e) of the *CPA*, the Supreme Court of Canada has articulated, in the class actions trilogy, three criteria to ensure that the proposed representative plaintiff will adequately represent the class and vigorously and capably prosecute the interests of the class: motivation of the representative plaintiff; competence of class counsel; and capacity of the representative plaintiff to bear the costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally).[50]

(i) motivation

It seems likely that the Court will consider the proposed representative plaintiff's motivation under s. 5(1)(e) of the *CPA*, in determining whether the proposed representative plaintiff would "fairly and adequately" represent the interests of the class. Perhaps for this reason there has been no jurisprudence in Ontario which explicitly adverts to this requirement.

(ii) experience of class counsel

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[50] *Supra* note 3, at 555

In *Fenn v. Ontario*, Cullity J. stated that the named plaintiff must have counsel (and, therefore, cannot be self-represented) both before and after certification so that the Court may ensure that the representative plaintiff does not consider his or her interests to the exclusion of the other members of the class.[51] In *Ward-Price v. Mariners Haven Inc.*[52], the Court stated that, by granting certification, the Court has determined that it is satisfied that the representative plaintiff has selected competent counsel to represent the class. At that point, the Court has, in effect, imposed the selection of that counsel on the members of the class. If a class member is not satisfied with the choice of counsel, one option may be to choose to opt out of the proceeding.

In *Dumoulin v. Ontario*[53], Cullity J. stated that the manner in which class counsel proposes to conduct the action is directly relevant to the ability of the representative plaintiff to fairly and adequately represent the interests of the class. Such information is essential for the purpose of determining

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[51] *Fenn v. Ontario*, [2004] O.J. No. 2736 (S.C.J.) at paras. 10-11 and 19

[52] [2004] O.J. No. 2308 (S.C.J.) at para. 15 per Nordheimer J.

[53] [2004] O.J. No. 2779 (S.C.J.) at para. 3

whether a class proceeding will be the preferable procedure. The Court must be satisfied, for example, that plaintiffs' counsel has the administrative capacity to manage the class action.[54]

(iii) ability to pay

Since the Supreme Court of Canada class actions trilogy[55], courts in Ontario have considered the ability of the representative plaintiff to bear any costs that may be incurred in the litigation and it is now considered a necessary requirement for an appropriate representative plaintiff. [Section 31(2) of the *CPA* provides that, class members, *other than the representative party*, are not liable for costs except with respect to determination of their own individual claims.] Interestingly, no Ontario case has yet considered a motion against a representative plaintiff for security for costs under Rule 56.01.

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[54] *Neufeld v. Manitoba*, [2001] M.J. No. 500 (Q.B.) at para. 42; aff'd, [2002] M.J. No. 374 (C.A.) at para. 9

[55] *Supra* notes 3 and 4

In *Fehringer v. Sun Media Corp.*[56], Nordheimer J. stated that the absence of evidence regarding the representative plaintiff's financial resources to fund the litigation or cover expenses associated with the litigation leaves the Court without an essential element necessary to conclude that the proposed representative plaintiff would fairly and adequately represent the interests of the class. This suggests that the absence of such evidence could be fatal to a motion for certification. It is possible that, in such a case, the Court would adjourn the motion to permit further evidence on this issue or, alternatively, allow a substitute representative plaintiff to be appointed so that the policy objectives in class proceedings would be met. It may be necessary for the proposed representative plaintiff to waive any privilege relating to the terms of an agreement with counsel relating to legal fees and disbursements in order to satisfy this evidentiary burden.[57]

In *Pearson v. Inco Ltd.*[58], Nordheimer J. referred to the *Western*

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[56] (2002), 27 C.P.C. (5th) 155 at para. 35 per Nordheimer J.

[57] *Serhan v. Johnson & Johnson,* [2004] O.J. No. 1363 (S.C.J.) at paras. 7-10 per Cullity J.

[58] *Supra* note 38

*Canadian Shopping Centre*s case[59] and stated that an important consideration, in determining whether the representative plaintiff would adequately represent the interests of the class, is the ability of that representative plaintiff to bear the costs that will be necessary for the prosecution of the class action[60]. There were two facts in this case which gave Nordheimer J. concerns about the proposed representative plaintiff's ability to meet that requirement. Firstly, a $25,000.00 cost award against the representative plaintiff, ordered payable forthwith, was outstanding for six months and paid just before the certification motion was heard. Secondly, the representative plaintiff advised that he had applied to the Class Proceedings Committee for funding, however, no decision had yet been rendered and the representative plaintiff had provided evidence of no concrete and specific alternative funding arrangement. Nordheimer J. stated that, without that information, he was unable to conclude that the representative plaintiff had available to him the financial wherewithal to properly pursue these claims and thereby adequately represent the interests of the class[61].

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[59] *Supra* note 3

[60] *Supra* note 38 at para. 140

[61] *Ibid.* at para 143

In another case decided shortly thereafter, *Moyes v. Fortune Financial Corp.*[62], Nordheimer J. stated that no hard and fast rules could be laid down in respect of what evidence will be necessary to show that the representative plaintiff can effectively prosecute the action if it is certified. The Court must be satisfied of the financial ability of the representative plaintiff to bear the costs that will be necessary for the proper prosecution of the class action. It is not clear whether this includes the ability of the representative plaintiff to pay an adverse cost award. However, Nordheimer J. cautioned that the Courts should not turn the certification process into a form of pre-judgment examination in aid of execution. Nor should there be a requirement that the representative plaintiff guarantee the costs of the defendants if a class proceeding, or even a motion for certification, is unsuccessful.

There are several ways that a proposed representative plaintiff may fund a class action, each of which is designed to promote access to justice:

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[62] (2002), 61 O.R. (3d) 770 (S.C.J.) at para. 44 per Nordheimer J.; aff'd (2004), 67 O.R. (3d) 795 (Div. Ct.)

solicitation of funds from class members[63]; funding from the Class Proceedings Fund; and a contingency fee arrangement. The latter method is, by far, the most common in Ontario, perhaps due to the limitations in funding available from the Class Proceedings Fund. Each of these two latter methods is considered in turn.

Class Proceedings Fund

The *Law Society Amendment Act (Class Proceedings Funding), 1992*[64] provides for the establishment of an account of the Law Society Foundation (known as the "Class Proceedings Fund"), which was initially endowed with $500,000.00 for the following purposes:

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[63] *CPA*, s. 17(7). The *CPA* provides that, with leave of the court, notice that a class action has been certified may include a solicitation of contributions from class members to assist in paying solicitor's fees and disbursements. However, courts will be cautious of investor financed class actions. See *Smith v. Canadian Tire Acceptance Ltd.* (1995), 22 O.R. (3d) 433 (Gen. Div.); aff'd (1995), 26 O.R. (3d) 94 (C.A.)

[64] S.O. 1992, c. 7 ("*Act*")

1. Financial support for plaintiffs to class proceedings and to proceedings commenced under the *Class Proceedings Act, 1992*, in respect of disbursements related to the proceeding; and

2. Payments to defendants in respect of costs awards made in their favour against plaintiffs who have received financial support from the Fund[65].

Therefore, a plaintiff who has received funding from the Class Proceedings Fund ("the Fund"), will receive funding for disbursements (but not legal fees) associated with prosecuting the action and in respect of adverse costs awards made in favour of the defendants to the class proceeding. The *Act* specifically provides that a defendant who has the right to apply for payment from the Fund in respect of a cost award against a plaintiff may not recover any part of the award from the representative plaintiff[66]. Rule 12.04(2) provides that, where funding has been provided, no order for costs may be made against the representative unless the Law Society Foundation has had notice and an opportunity to present evidence and make submissions.

The regulations under the *Act* provide that financial assistance is to be

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[65] *Act*, s. 59.1(1) and (2)

[66] *Act*, s. 59.4(3)

provided to plaintiffs in stages:

1. Steps taken up to the end of the hearing of a motion for an order certifying the proceeding as a class proceeding;

2. Appeals of orders relating to certification;

3. Steps other than those described in paragraphs 1 and 2 taken up to the end of discovery or cross-examination on affidavits;

4. Steps other than those described in paragraphs 1 to 3 concerning the determination of common issues;

5. Appeals from a judgment on common issues;

6. Steps other than those described in paragraphs 1 to 5[67].

Members of the Class Proceedings Committee are appointed to administer the Fund and to consider applications made by plaintiffs for funding. The Committee may direct payments from the Class Proceedings Fund to a plaintiff who makes application in an amount that the Committee

[67] O. Reg. 771/92 under the *Law Society Act*, s. 2 ("Regulation")

considers appropriate[68]. The Committee will apply the following criteria for decisions respecting a plaintiff's application:

1. The extent to which the issues in the proceeding affect the public interest;

2. If the application for financial support is made before the proceeding is certified as a class proceeding, the likelihood that it will be certified; and

3. .The amount of money in the Fund that has been allocated to provide financial support in respect of other applications or that may be required to make payments to defendants under s. 59.4 of the *Act*[69].

In making a decision, the Committee may also have regard to:

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[68] *Act*, s. 59.3(3)

[69] Regulation, s. 5

(a) the merits of the plaintiff's case;

(b) whether the plaintiff has made reasonable efforts to raise funds from other sources;

(c) whether the plaintiff has a clear and reasonable proposal for the use of any funds awarded;

(d) whether the plaintiff has appropriate financial controls to ensure that any funds awarded are spent for the purposes of the award; and

(e) any other matter that the Committee considers relevant[70].

The record the Committee requires to enable it to determine whether it will grant funding is extensive. It must include the following:

1. If the applicant is an individual, his or her name, address, telephone number, and fax number, if any;

2. If the applicant is a corporation, its name, head office

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[70] *Act*, s. 59.3(4)

address, telephone number, and fax number and a copy of its articles of incorporation;

3. Each defendant's name;

4. A statement indicating which of the stages in the proceeding the application addresses;

5. A copy of the pleadings and any court order relating to the proceeding;

6. A description of the class and an estimate of the number of members in the class;

7. A legal opinion describing and assessing the merits of the applicant's case, and any other information and documents the applicant considers appropriate for this purpose;

8. If the applicant has not yet applied for certification of the proceeding as a class proceeding, a statement indicating when the applicant will do so;

9. If the proceeding has not yet been certified as a class proceeding, a legal opinion assessing the likelihood that it will be certified;

10. A statement of the financial support being requested, itemized according to the purposes for which it is being requested;

11. Such information and documents as the applicant considers

appropriate to address the following matters: to raise funds from other sources, clear and reasonable proposal for the use of any funds awarded, and appropriate financial controls to ensure that any funds ordered are spent for the purposes of the award;

12. An affidavit by the applicant stating that the information provided by him, her, or it in connection with the application is true;

13. Authorization to the Committee and to the Board to verify the information provided by the applicant in connection with the application;

14. The name and address of the applicant's lawyer;

15. A statement by the lawyer indicating that he or she will accept payments from the Class Proceedings Fund in connection with the application and will use them for the purposes for which the payments are made;

16. A list of the individual lawyers expected to participate in the prosecution of the case, a description of their experience and qualifications, a statement whether a contingency fee arrangement has been entered into, and an estimate of the aggregate number of hours the applicant's solicitors expect to and are prepared to devote to the case;

17. Material addressing the defendant's ability to pay any judgment and comply with any non-monetary relief which may ultimately be granted against it and, if it appears the defendant will not be able to pay or comply, explaining why financial support should nevertheless be granted;

18. The plan proposed for the final litigation plan;

19. A budget regarding disbursements expected to be required up to and including trial; and

20. An executive summary concerning the application[71].

If an applicant is financially supported by the Committee and the class proceeding is successful, the amount advanced to the plaintiff from the Fund plus a levy of 10% of the settlement funds or monetary award is to be paid to the Fund.[72]

The plaintiff's application will be held confidential, however, the Committee may ask the plaintiff to consent to the Committee requesting the defendant to provide written submissions which will enable the Committee to consider the funding application. Without the express consent of the plaintiff, the Committee will never request submissions from a defendant, review unsolicited submissions from a defendant, or confirm or deny to a

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[71] Regulation, s. 3(1); and Class Proceeding Committee Practice Direction 1, s. 5

[72] Class Proceedings Committee Practice Direction 1, s. 14. Pursuant to Rule 12.05(1)(d), payment of this levy will be addressed in the order approving the settlement or in the judgment.

defendant that the plaintiff has submitted an application[73]. However, once funding has been granted, the plaintiff must notify the defendant in the proceeding and, if the proceeding is certified as a class proceeding, the other class members[74]. If the application is denied, the plaintiff may re-apply at any time[75].

To date, the Fund has failed to achieve its primary objective, namely, access to justice for the following reasons.

Firstly, the 10% levy on any judgment or proceeds of settlement flowing to plaintiffs in a case where funding has been granted may be a disincentive to apply. Because the quantum of damages sought and obtained in class actions is often in the millions of dollars, this means that a sizable amount is paid to the Fund in addition to repayment of the amounts advanced by the Fund during the litigation in the event of success. One method of alleviating this disincentive and ensuring that the Fund remains sufficiently funded, would be to reduce the amount of the levy and apply it to all class

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[73] Class Proceedings Committee Practice Direction 2, ss. 2 and 3

[74] Regulation, ss. 8(3) and (4)

[75] Class Proceedings Committee Practice Direction 1, s. 13

actions in Ontario.

Secondly, the Fund has benefited very few plaintiffs. The Law Foundation of Ontario publishes its *Annual Report*, which contains a Report on Class Proceedings. The 2002 and 2003 *Annual Reports* show that fewer than a dozen applications were made in the period 2001 to 2003 and that fewer than a handful of applications were granted. It is likely that, in the early years of the Fund, the Committee administering it was extremely conservative in its funding decisions. Because the original endowment was only $500,000, there was a risk that it could be completely depleted in a short period of time by disbursements and adverse cost awards. However, latterly, the balance in the Fund has been high: in 2001, $613,803; in 2002, $3,492,427; and in 2003, $3,388,310.[76] It remains to be seen whether this will result in a greater number of successful applications in future.

Thirdly, it is extremely costly to apply to the Fund. The record to be assembled and submitted to the Committee is extensive and it is necessary to re-apply in stages.

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[76] *The Law Foundation of Ontario, 2002 Annual Report*, at 6-8, 15, and 26; *The Law Foundation of Ontario, 2003 Annual Report*, at 2

Fourthly, the Fund covers disbursements but not legal fees, which means that a representative plaintiff without the means to prosecute an action must still make arrangements to cover legal fees. This usually means that plaintiff's counsel will act on a contingency fee basis. (However, a significant benefit of obtaining funding is that the Fund will cover an adverse cost award in favour of the defendants. Recent jurisprudence suggests that such awards may be sizable.[77])

Fifthly, a plaintiff will be prohibited from applying until after a defence has been entered or the defendant has brought a motion. It is common practice that defendants will be permitted to delay delivering a defence until after the certification motion, by which time crippling legal costs may already have been incurred.

Other jurisdictions in Canada have dealt with the issue of costs differently. For example, in British Columbia, Newfoundland, and Saskatchewan, the Court may not award costs to any party on a

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[77] For example, *Gariepy v. Shell Oil Co.,* [2002] O.J. No. 3495 per Nordheimer J.; and *Pearson v. Inco*, [2002] O.J. No. 3532 per Nordheimer J.

certification motion, save in exceptional circumstances.[78] In Manitoba, no costs are permitted at any stage of the proceedings.[79] The comparable Quebec legislation[80] establishes an agency "Fonds d'aide aux recours collectifs" ("Fonds") to "ensure the financing of class actions" and provides funding for fees and disbursements as well as adverse cost awards. The representative plaintiff must repay the Fonds amounts advanced plus a percentage of the balance (if any) after the class claims have been satisfied.

Contingency Fee Arrangements

Contingency fee arrangements, whereby class counsel assumes the risk of all or a part of the legal costs, are common. It is also common that counsel agreeing to act on a contingency fee basis will also provide an indemnity to the proposed representative plaintiff in respect of any adverse cost award. Obviously, this limits the number of counsel willing and able to take on class actions. However, because of those risks and the fact that the lawyers must carry substantial amounts in disbursements and unbilled

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[78] *Class Proceedings Act*, R.S.B.C. 1996, c.50, s. 37(1), (2); *Class Actions Act*, S.N.L. 2001, c. C-18.1, s. 37(1), (2); *The Class Actions Act*, S.S. 2001, c. C-12.01, s. 40(1), (2)

[79] *The Class Proceedings Act*, C.C.S.M., c. C130, s. 37(1)

work in progress, the *CPA* provides for additional compensation in the event that the action is successful. Courts have enforced agreements whereby counsel are to be paid based upon a percentage of the amount recovered, as well as in accordance with a multiplier under s. 33 of the *CPA*. The first method has the advantage (to the members of the class) of being directly tied to the extent of the recovery. Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

Evidence of any such an arrangement will, no doubt, be put before the Court on the certification motion to satisfy it that the proposed representative plaintiff is suitable. The *CPA* provides that an agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall:

(a) state the terms under which fees and disbursements shall be paid;

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[80] An Act Respecting the Class Action, R.S.Q. c. R-2.1, ss. 6-7

(b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

(c) state the method by which payment is to be made, whether by lump sum, salary, or otherwise[81].

Such an agreement is not enforceable unless approved by the Court, on the motion of a solicitor, to ensure that the agreement is fair to all class members.[82] Normally, this will occur following the trial of the common issues or, if the matter is settled, at the conclusion at the "fairness hearing" in which the Court approves the settlement.[83]

Where an agreement is not approved, often the Court will award costs on a *quantum meruit* basis.[84]

III. Substituting a representative plaintiff

Section 35 of the *CPA* provides that the Rules of Court apply to class

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[81] *Act*, s. 32(1)

[82] *Act*, s. 32(2)

[83] *Act*, s. 29(2)

[84] *Act*, s. 32(4)

proceedings. Therefore, pursuant to rule 5.04(2), at any stage of a proceeding the Court may add, delete, or substitute a party "on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment". Where there is no prejudice to the respondents or the prejudice can be remedied, the representative plaintiff may be substituted[85]. In some cases, "special circumstances" may outweigh any prejudice. Such circumstances may include the substitution of a plaintiff with a tenable claim (for one who does not) to avoid the loss of many claims as a result of a limitation period, which will resume pursuant to s. 28 of the *CPA* if the class proceeding is terminated. However, it is improper and an abuse of process to name a "token" representative plaintiff simply to toll

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[85] *Young v. Janssen-Ortho Inc.*, [2002] O.J. No. 993 (S.C.J.) per Nordheimer J.; *Segnitz v. Royal & SunAlliance Insurance Co. of Canada* (2003), 41 C.P.C. (5th) 389 at para. 24; and *Logan v. Canada (Minister of Health)*, [2004] O.J. No. 2769 (C.A.)

the limitation period while a suitable class representative is found.[86]

[86] *Segnitz, supra* note 85, at paras. 18, 22

A motion to substitute the representative plaintiff must be brought in a timely way and relief may be denied where counsel have had ample opportunity and time to find a suitable representative plaintiff and have failed to do so.[87] In *Johnston v. State Farm Insurance Co. of Canada*[88], the Court referred to s. 19(1) of the *CPA*, which provides that, at any time in a class proceeding, the Court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding. Haines J. found that the purpose of this provision is not to provide a mechanism for the recruitment of alternative representative plaintiffs when it turns out that the proposed representative plaintiff has no cause of action.

The representative plaintiff may also be substituted where her/his counsel have demonstrated an inability to prosecute the action and the representative plaintiff refuses to appoint new counsel.[89]

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[87] *Farquhar v. Liberty Mutual Insurance Co.* (2004), 43 C.P.C. (5th) 361 (Ont. S.C.J.) per Haines J.

[88] (2003), 38 C.P.C. (5th) 181 (Ont. S.C.J.)

[89] *Lau v. Bayview Landmark Inc.,* [2004] O.J. No. 2788 (S.C.J.) per Cullity J.

Although the *CPA* provides the Court with the discretion to substitute a representative plaintiff, the moving party will have to demonstrate, not only that the substitute representative meets the requirements of s. 5, but also that there is no prejudice to the defendants and that fairness dictates that the plaintiff be substituted. Obviously, it is better to name the appropriate class representative at the outset and it is improper to commence an action before such a person is found.

IV. Conclusion

The most significant recent development in the jurisprudence setting out the criteria of an appropriate representative plaintiff is the requirement that the person proposed adduce evidence of his or her financial ability to prosecute the class action. Undoubtedly, this provides additional protection to defendants from strike suits (which have not proved to be the problem in Ontario which was once feared, based upon the United States experience), however, it has not really affected who will be appointed as a representative plaintiff since most class actions have, in the past, been funded by lawyers on a contingency fee basis. This trend is likely to continue unless substantial

changes are made to the Class Proceedings Fund.

September 9, 2004