| | |
|---|---|
| COURT FILE NUMBER | 1201 12838 |
| COURT | COURT OF KING'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | Calgary |
| PLAINTIFFS | Fiona Singh And Muzaffar Hussain, by his litigation Representative Fiona Singh |
| DEFENDANTS | GlaxoSmithKline Inc., GlaxoSmithKline LLC and GlaxoSmithKline PLC |
| DOCUMENT | **BOOK OF AUTHORITIES OF NAPOLI SHKOLNIK CANADA AND CLINT G. DOCKEN, K.C.** |

JUDICIAL CENTRE OF CALGARY
FILED
Dec 02, 2024
NB
by Email
CLERK OF THE COURT

C120073 CMH Dec 6, 2024


ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

**ROSS NASSERI LLP**
312 Adelaide St. W, Suite 700
Toronto ON M5V 1R2
Tel: 416-572-4910

**Eric S. Block, LSO# 47479K**
eblock@rossnasseri.com
Tel: 416-572-4909

**Eric Brousseau, LSO# 68025G**
ebrousseau@rossnasseri.com
Tel: 416-572-4906

**Viktor Nikolov, LSO# 84503P**
vnikolov@rossnasseri.com
Tel: 416-572-4910 ext. 132

## TABLES OF AUTHORITIES

### Jurisprudence

| | Authority | Paragraphs |
|---|---|---|
| **1.** | *Agnew-Americano v Equifax Canada*, 2018 ONSC 275 | **30** |
| **2.** | *Burrow v Arce*, 997 S.W.2d 229 (1999) (Sup. Ct. Tex.) | **32** |
| **3.** | *Duzan v Glaxosmithkline, Inc.*, 2011 SKQB 118 | **30** |
| **4.** | *Fantl v Transamerica Life Canada*, 2009 ONCA 377 | **20** |
| **5.** | *McCallum-Boxe v Sony*, 2015 ONSC 6896 | **30** |
| **6.** | *Moiseiwitsch v Canadian National Railway Company*, 2022 BCSC 331 | **22** |
| **7.** | *Northwest v Canada (Attorney General)*, 2006 ABQB 902 | **15, 18, 20** |
| **8.** | *Persaud v Talon International Inc.,*2022 ONSC 6359 | **18, 27, 32** |
| **9.** | *Singh v Glaxosmithkline Inc*, 2021 ABQB 316 | **27** |
| **10.** | *Smith v National Money Mart*, 2011 ONCA 233 | **18** |
| **11.** | *Wilson v Servier,* 2005 CanLII 7128 (ON SC) | **24** |

### Legislation

| | Authority | Paragraph |
|---|---|---|
| **12.** | *Class Proceedings Act*, SA 2003, c C-16.5, s 35 | **15** |

2018 ONSC 275
Ontario Superior Court of Justice

Agnew-Americano v. Equifax Canada

2018 CarswellOnt 837, 2018 ONSC 275, [2018] O.J. No. 361, 288 A.C.W.S. (3d) 27

# BETHANY AGNEW-AMERICANO (Plaintiff) and EQUIFAX CANADA CO. AND EQUIFAX, INC. (Defendants)

LAURA BALLANTINE (Plaintiff) and EQUIFAX CANADA CO. AND EQUIFAX, INC. (Defendants)

Glustein J.

Heard: December 19, 2017
Judgment: January 24, 2018
Docket: CV-17-582551CP, CV-17-582566CP

Counsel: Jean-Marc Leclerc, for Plaintiff in Court File No. CV-17-582551CP
Venessa Vuia, Anthony Tibbs, for Plaintiff in Court File No. CV- 17-582566CP

***Glustein J.*:**

**Nature of motions and overview**

1 The court is asked to determine which of the plaintiffs shall have carriage of the class action brought against the defendants Equifax Canada Co. ("Equifax Canada") and Equifax, Inc. ("Equifax US") (collectively the "Equifax Defendants").

2 In Court File No. CV-17-582551CP (the "Agnew-Americano Action"), the plaintiff Bethany Agnew-Americano ("Agnew-Americano") (and the proposed representative plaintiff to be added by pseudonym, Jane Doe) [1] are represented by the law firm of Sotos LLP ("Sotos"). Agnew-Americano brings a motion seeking:

> (i) a stay of the action brought by the plaintiff Laura Ballantine ("Ballantine") in Court File No. CV-17-582566CP (the "Ballantine Action"),
>
> (ii) a declaration that no other actions may be commenced in Ontario without leave of the court in respect of the subject matter of the action, and
>
> (iii) an order without the consent of the Equifax Defendants to add Jane Doe as a representative plaintiff and making other amendments to the statement of claim as in the form attached to the affidavit of Mohsen Seddigh ("Seddigh") sworn November 2, 2017 (the "Seddigh Affidavit").

3 In the Ballantine Action, Ballantine (and the proposed representative plaintiff to be substituted Adele Perisiol ("Perisiol")) [2] are represented by the Merchant Law Group ("Merchant"). [3] Ballantine brings a motion seeking:

> (i) carriage of the proposed class action against the Equifax Defendants,
>
> (ii) a stay of the Agnew-Americano Action, and
>
> (iii) a declaration that no other actions may be commenced in Ontario without leave of the court in respect of the subject matter of the action.

4 Neither party seeks costs of the motion. [4]

5 Both actions arise out of the unauthorized intrusion by "hackers" into the Equifax Defendants' computer systems from mid-May 2017 through July 2017.

6 Both plaintiffs filed proposed amended statements of claim in their motion records. I rely on these proposed claims (which I refer to respectively as the "Agnew-Americano Claim" and "Ballantine Claim") [5] to consider the issues raised in this carriage motion.

7 In the recent case of *Mancinelli v. Barrick Gold Corp.*, 2016 ONCA 571 (Ont. C.A.) ("*Mancinelli*"), the Court of Appeal set out a non-exhaustive list of 14 factors for the court to consider on a carriage motion. In *Kowalyshyn v. Valeant Pharmaceuticals International, Inc.*, 2016 ONSC 3819 (Ont. S.C.J.) ("*Kowalyshyn*"), Perell J. referred to similar factors and also considered some additional factors.

8 Many of those factors are not at issue on this motion as the parties agree that they are neutral. The parties raise no different factors outside the *Mancinelli* and *Kowalyshyn* analysis.

9 On this motion, the contested factors can be summarized as follows:

(i) The nature and scope of the causes of action and the theories advanced: Agnew-Americano submits that her claim raises more viable causes of action which may be successful at certification or trial.

Ballantine submits that "less is more", and that the additional causes of action relied upon in the Agnew-Americano Claim are either not viable or unnecessary;

(ii) The resources and experience of counsel: Agnew-Americano submits that (a) the Sotos lawyers proposed to have carriage of the Agnew-Americano Action have significantly more experience than the Merchant lawyers proposed to have carriage of the Ballantine Action, both in privacy law class actions and as plaintiffs' class action counsel; and (b) findings of past misconduct by lawyers at the Merchant firm should be considered by the court. Ballantine submits that this factor is neutral;

(iii) The state of the action including preparation and class engagement: Agnew-Americano submits that Sotos has conducted more work on the file to date, has been more engaged with prospective class members, and is more prepared to move the litigation forward. Ballantine submits that this factor is neutral;

(iv) Fee arrangements: Agnew-Americano submits that (a) Merchant did not obtain a written retainer prior to commencing the Ballantine Action and (b) Merchant's retainer agreement with Ballantine does not comply with the requirements under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*") and, as such, this factor supports carriage to Agnew-Americano. Ballantine submits that this factor is neutral;

(v) Class definition: Agnew-Americano submits that the proposed class definition in the Agnew-Americano Claim is superior since it encompasses potential class members who have a contractual claim.

Ballantine submits that the proposed class definition in the Ballantine Claim is superior since the proposed Agnew-Americano class definition includes an unnecessary subclass for breach of contract;

(vi) Interrelationship of class actions in more than one jurisdiction: Ballantine submits that because Merchant is counsel on three additional class proceedings in Quebec, Saskatchewan and British Columbia [6] seeking the same relief, with both the Saskatchewan and British Columbia actions seeking certification of a national class, this factor favours carriage by Ballantine.

Agnew-Americano submits that this factor supports carriage by her. She submits that (a) Ballantine has not been clear as to her intentions with respect to her action; and (b) Merchant is counsel on multiple proceedings in multiple jurisdictions which counsel does not intend to pursue which is an abuse of process as it is not necessary to protect limitation periods; and

(vii) The anonymity of the representative plaintiff: Ballantine submitted in her factum that the proposed anonymity of the additional representative plaintiff in the Agnew-Americano Action was a factor in favour of carriage for Ballantine. Agnew-Americano submitted in her factum that this factor was neutral. [7]

10 The critical issue on a carriage motion is which of the competing actions is more likely to advance the interests of the class. For the reasons I discuss below, I find that the Agnew-Americano Action is more likely to do so. I order that carriage of the proposed class action be granted to Agnew-Americano and I stay the Ballantine Action.

11 I find the first and second factors summarized above (the nature and scope of the causes of action and the theories advanced, and the experience of counsel) are the most important on the facts of this case.

12 The nature and scope of the Agnew-Americano Claim raise more viable causes of action which may succeed on certification or at trial. The claims in the Agnew-Americano Action for intrusion upon seclusion and breach of provincial privacy legislation are not "fanciful or frivolous" and do not raise any "glaring deficiencies" (*Mancinelli*, at para. 42). I do not accept Ballantine's position that "The claims in the *Agnew-Americano* Action for 'intrusion upon seclusion' and breach of provincial privacy statutes are fundamentally flawed".

13 I also find that the breach of contract and breach of consumer protection legislation claims in the Agnew-Americano Action expand the basis of the claim for class members.

14 Consequently, the broader approach of Agnew-Americano to the claim is preferable and in the best interests of the class members.

15 There is a significant discrepancy between the experience of counsel proposed to act on the respective class actions. The proposed team for the Agnew-Americano Action consists of experienced privacy law class action lawyers at Sotos with the ability to understand key issues and move the action forward. The affidavit evidence filed on behalf of Ballantine [8] provides no particulars as to the relevant experience of the proposed lawyers, and instead focuses on generalities about the Merchant law firm and counsel.

16 With respect to the other factors, they are less important but still favour Agnew-Americano.

17 Sotos has taken appropriate steps to protect the interests of the class members from the outset of the litigation, and has worked diligently to advise prospective class members of relevant issues. Merchant's evidence as to steps it has taken to move the litigation forward is general at best, and does not demonstrate the level of commitment of Sotos.

18 Merchant's decision to begin proceedings without a written retainer is concerning, as is the failure of its fee agreement to comply with requirements under the *CPA*.

19 The proposed class definition in the Agnew-Americano Claim is preferable. While the class definition on the negligence claims is similar in both actions, the Agnew-Americano Claim extends the class to those with a contractual relationship.

20 The contractual class is not unnecessary (as submitted by Ballantine), but instead expands the range of damages available to the class members through contractual damages and remedies under consumer protection legislation. Further, even if subclasses are later required, the *CPA* provides for a process to create such subclasses.

21 The issue of multiple class actions in other jurisdictions also favours carriage to Agnew-Americano. There is uncertainty as to whether the Ballantine Action will proceed, and no such concern for the Agnew-Americano Action. Consequently, it is preferable to grant carriage to Agnew-Americano.

22 Agnew-Americano submitted that (i) the practice of filing class actions in multiple jurisdictions is an abuse of process; and (ii) it is not necessary to file multiple class actions to preserve limitation periods. However, I do not decide these legal issues as they are not necessary to my reasons.

23 Finally, I agree with both counsel that the proposed anonymity of Jane Doe as an additional representative plaintiff does not affect carriage of the class action. Agnew-Americano can represent all class members even if her interest is not identical to others. Further, the issue of the anonymity of Jane Doe can be determined at a later date (if that issue is even raised). Even if Jane Doe did not wish to continue as a representative plaintiff, another person who received the Equifax letter could be added at that time.

**Facts**

24 I review the background facts as well as the facts related to each of the factors I set out above.

***i) Background facts***

25 Based on the pleadings, the Equifax Defendants operate a business with two aspects that are relevant to this litigation.

26 First, the Equifax Defendants gather personal information on consumers for the purposes of providing credit reports to customers seeking such information.

27 Second, the Equifax Defendants sell services to individual customers who wish to protect themselves from concerns such as credit fraud, identity theft, and other risks involving the unauthorized disclosure of personal information.

28 On September 7, 2017, Equifax US announced that an unauthorized intrusion due to a "cybersecurity incident" by "criminals" who "exploited a U.S. website application vulnerability" had occurred in its computer systems from mid-May 2017 through July 2017.

29 In the press release, Equifax US stated that (i) the information accessed "primarily includes names, Social Security numbers, birth dates, addresses and, in some instances, driver's license numbers"; and (ii) "[i]n addition, credit card numbers for approximately 209,000 U.S. customers, and certain dispute documents with personal identifying information for approximately 182,000 U.S. customers, were accessed". Equifax US stated that it "will send direct mail notices to consumers whose credit card numbers or dispute documents with personal identifying information were impacted".

30 Equifax US stated in its press release that the intrusion impacted approximately 143 million U.S. consumers and that the breach also included "unauthorized access to limited personal information for certain UK and Canadian residents". Equifax US did not set out the number of affected Canadians or refer to a plan to notify them of the breach.

31 On September 15, 2017, Equifax US issued a further press release, in which it explained the method by which hackers accessed Equifax's computer systems. Equifax US stated that:

> (i) the attack occurred "through a vulnerability in Apache Struts (CVE-2017-5638), an open-source application framework that supports the Equifax online dispute portal web application";
>
> (ii) the vulnerability was identified and disclosed by the United States Computer Emergency Readiness team in March 2017; and
>
> (iii) the hacker intrusions occurred from May 13, 2017 through July 30, 2017.

32 On September 19, 2017, Equifax Canada issued a press release, which stated that:

> (i) it believed approximately 100,000 Canadian consumers were affected by the breach but that its investigation was ongoing; and
>
> (ii) "the information that may have been breached includes name, address, Social Insurance Number and, in limited cases, credit card numbers".

33 By October 16, 2017, Equifax Canada updated its website to state that the personal information of approximately 8,000 Canadian consumers was impacted. The website advised that:

> The potentially impacted information may include names, addresses, Social Insurance Numbers and, in limited cases, credit card numbers. Other potentially impacted information includes username and password, and secret question/secret answer, which we believe are several years old and were login credentials for use of our direct-to-consumer website.

34 The website update also stated that (i) "some of the consumers with affected credit cards announced in the company's initial statement may be Canadian"; and (ii) "[o]ur investigation is now complete and Equifax is notifying impacted Canadians by mail and offering them free credit monitoring and identity theft protection."

35 Equifax Canada's website was subsequently updated to revise the 8,000 figure to almost 20,000. Equifax Canada's website now states:

> The personal information of approximately 8,000 Canadian consumers was impacted. In addition, it was also determined that some of the consumers with affected credit cards announced in [*sic*] company's initial statement are also Canadian. We now know that this group includes 11,670 impacted Canadian consumers and we are in the process of notifying them by mail and offering them free credit monitoring and identity protection.

36 Consequently, according to Equifax Canada, almost 20,000 Canadians are affected by the privacy breaches.

37 I review below the facts relevant to each of the carriage factors at issue in this case.

***ii) Factor 1: Facts relevant to the nature and scope of the causes of action and the theories advanced***

38 Both claims were issued on September 12, 2017. I review each claim below.

*a) The Agnew-Americano Claim*

39 The Agnew-Americano Claim names Agnew-Americano as the proposed representative plaintiff. Agnew-Americano is a monthly subscriber to the "Complete Premier Plan" offered by Equifax Canada, providing daily credit monitoring and identity theft insurance.

40 A further representative plaintiff was also a subscriber to the same plan. That plaintiff received a letter dated October 17, 2017 in which Equifax Canada advised that her social insurance number, name, address, date of birth, phone number, e-mail address, user name, password and secret question/secret answer were compromised in the data breach announced by Equifax US on September 7, 2017.

41 The Agnew-Americano Claim requests that the second representative plaintiff (referred to as "Jane Doe") be permitted to use an alias to prevent her personal information from being further impacted as a result of publicly identifying herself as an affected person in the class proceeding.

42 The Agnew-Americano Claim alleges five causes of action: (i) negligence, (ii) intrusion upon seclusion, (iii) breach of provincial privacy statutes, (iv) breach of contract, and (v) breach of consumer protection legislation. I review these claims below.

**1. The negligence claim**

43 On the negligence claim, Agnew-Americano pleads:

> (i) The Equifax Defendants owed the Class Members a duty of care in the collection, retention, use, and disclosure of personal information and a duty to safeguard the confidentiality of their personal information;
>
> (ii) The Equifax Defendants breached their duty of care since they, *inter alia*, (a) "failed to take adequate steps to ensure that a website application vulnerability would not result in the exposure of extremely sensitive personal information belonging to millions of North American consumers", (b) "failed to apply a website application patch made public in March 2017 in a timely way, waiting until at least August 2017 before applying it", and (c) "failed to give notice to Canadians affected by the breach until October 17, 2017, several months after the breach was detected, and over one month after it was publicly announced"; and
>
> (iii) "As a result of the defendants' acts and omissions, Class Members suffered reasonably foreseeable damage and losses, for which the defendants are liable".

**2. The intrusion upon seclusion claim**

44 With respect to the intrusion upon seclusion claim, Agnew-Americano pleads:

> The actions of the defendants constitute intentional or reckless intrusions upon seclusion that would be highly offensive to a reasonable person, for which the defendants are liable. The defendants failed to take appropriate steps to guard against unauthorized access to sensitive financial information involving the Class Members' private affairs or concerns. Their actions were highly offensive, causing distress and anguish to Class Members, for which the defendants are liable and should pay damages.

**3. The breach of provincial privacy statutes claim**

45 With respect to the claim for breach of provincial privacy statutes, Agnew-Americano relies on such legislation in British Columbia, Manitoba, Newfoundland and Labrador, and Quebec. Agnew-Americano pleads that the Equifax Defendants are liable under these statutes since:

> As described above, the actions of the defendants constitute intentional or reckless intrusions upon seclusion that would be highly offensive to a reasonable person, for which the defendants are liable. The defendants failed to take appropriate steps to guard against unauthorized access to sensitive financial information involving the Class Members' private affairs or concerns.

**4. The breach of contract claim**

46 In addition, the Agnew-Americano Claim alleges breach of contract on behalf of all persons who purchased Equifax credit monitoring and identity theft protection services for a monthly fee, on the basis that the Equifax Defendants breached their contractual agreement to maintain "strict security safeguards".

47 The breach of contract claim is based on the following Privacy Policy statement provided by Equifax Canada when it entered into a contractual relationship with the class members:

> Equifax maintains strict security safeguards when storing or destroying your personal information in order to prevent unauthorized access, collection, use, disclosure, copying, modification, disposal or similar risks. These standards are in place for all information, regardless of how it is stored and we regularly review, test and enhance our systems to ensure they meet accepted industry standards. [ . . . ]

48 Agnew-Americano pleads that:

(i) "[t]his Privacy Policy formed part of the contracts between the defendants and Class Members affected by the Equifax Contractual Claims";

(ii) "[i]t was a term of the contracts of Class Members affected by the Equifax Contractual Claims that Equifax would maintain strict security safeguards when storing and retaining personal information in order to prevent unauthorized access and similar risks"; and

(iii) "[i]t was a further term of the contracts that the Class Members would be provided with notice if their personal information was disclosed on the Internet, and that they would be provided with protection against identity theft".

49 Consequently, Agnew-Americano pleads that the Equifax Defendants breached their contracts with class members with "Equifax Contractual Claims" and are liable to repay all fees paid by those class members.

**5. The breach of provincial consumer protection legislation claim**

50 Agnew-Americano also alleges breach of consumer protection legislation in Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, Newfoundland and Labrador, Nova Scotia, and Prince Edward Island. She alleges that the Equifax Defendants "made false, misleading or deceptive representations that their services had strict security standards", by representing that (i) "they maintained strict security safeguards when storing personal information in order to prevent unauthorized access" and (ii) "they are trusted stewards of personal information".

51 Agnew-Americano pleads that as a result of the allegedly false representations, the Equifax Defendants "engaged in unfair practices" so that "[c]onsumers affected by the Equifax Contractual Claims are entitled to rescind their contracts and/or an award of damages".

*b) The Ballantine Claim*

52 The Ballantine Action is now proposed to be brought by Perisiol who, like the proposed plaintiff Jane Doe in the Agnew-Americano Action, received a similar notice from Equifax Canada dated October 17, 2017. It is not proposed that Ballantine continue as a representative plaintiff.

53 The Ballantine Claim is based solely on negligence. Ballantine relies on all of the facts summarized in the "Background facts" section above and pleads:

(i) "In an attempt to increase profits, Equifax negligently failed to maintain adequate technological safeguards to protect the Plaintiff's and Class Members' Private Information from unauthorized access by unauthorized third-parties";

(ii) "Equifax could have and should have substantially increased the amount of money it spent to protect against cyber-attacks but chose not to";

(iii) "Equifax failed to have implemented systems which would have alerted it to the unusual activity necessary to collect such large amounts of data"; and

(iv) "Equifax failed to act diligently and responsibly by delaying notification of the Data Breach for more than a month after its discovery".

54 Consequently, Ballantine pleads:

The Plaintiff and Class Members seek damages, redress, and other compensation from the Defendants for harm, inconveniences, economic losses, mental distress, or other losses resulting from the unauthorized access to their confidential personal and information records.

***iii) Factor 2: Facts relevant to the resources and experience of counsel***

55 I review the evidence filed by each party on this issue below.

*a) Evidence filed by Agnew-Americano about the experience of the Sotos lawyers proposed to have carriage of the Agnew-Americano Action*

56 Seddigh attached the biographies of the Sotos lawyers who would have carriage of the Agnew-Americano Action and provided detailed evidence as to their experience:

(i) David Sterns ("Sterns"), Louis Sokolov ("Sokolov") and Jean-Marc Leclerc ("Leclerc") will be lead counsel on the file;

(ii) Sterns is co-counsel in a privacy class action involving Lenovo Canada, a claim which alleges that the defendant breached the privacy interests of people who purchased certain Lenovo computers by preloading laptops with malicious adware that is alleged to intercept the user's secure connection and allows criminals to do the same. That matter was certified by decision of Justice Perell in *Bennett v. Lenovo (Canada) Inc.*, 2017 ONSC 5853 (Ont. S.C.J.) ("*Bennett-Certification*");

(iii) Sterns is past president of the Ontario Bar Association and a past chair of the civil litigation section of the Ontario Bar Association;

(iv) Sterns recently presented a seminar to the Advocates' Society on privacy law issues;

(v) Sterns has been recognized both by Chambers Canada 2016 for his expertise as plaintiff class action counsel and by the LEXPERT Directory as "repeatedly recommended" (2013-2017) for class actions;

(vi) Sterns was co-counsel in a successful 41 day common issues trial that resulted in a $45 million award for the class (subsequently reduced to $36.9 million on appeal and subject to a further process before the trial judge to determine the final amount) (cited as *Trillium Motor World Ltd. v. Cassels Brock & Blackwell LLP*, 2017 ONCA 544 (Ont. C.A.));

(vii) Sterns was called to the Quebec bar in 1992 and to the Ontario bar in 1994;

(viii) Sokolov is co-counsel on two privacy class actions involving unauthorized review and dissemination of personal health information;

(ix) Sokolov is also co-counsel in certified overtime claims against ScotiaBank and CIBC, which allege systemic issues of wrongdoing;

(x) Sokolov was called to the Ontario bar in 1993. He has been recognized by Chambers Canada 2016 for his expertise as plaintiff class action counsel;

(xi) Leclerc is co-counsel with Sokolov on two privacy class actions. He was lead counsel at the Ontario Court of Appeal arising out of a jurisdiction motion brought by the Peterborough Regional Hospital regarding the applicability of the *Personal Health Information Privacy Act 2004*, S.O. 2004, c. 3, Sched. A to breach of privacy claims made in the class proceeding. The appeal was dismissed (cited as *Hopkins v. Kay*, 2015 ONCA 112 (Ont. C.A.), leave to appeal to Supreme Court of Canada denied [2015 CarswellOnt 16503 (S.C.C.)]);

(xii) Leclerc has spoken on privacy law issues before a number of organizations, including the Ontario Bar Association;

(xiii) Leclerc was called to the Ontario bar in 2001 and is recognized by Chambers Canada 2016 as an expert in plaintiff class action litigation;

(xiv) Sterns, Sokolov, and Leclerc have all been involved in several class action summary judgment motions; and

(xv) The Chambers rankings are based on their research and extensive interviews, involving no payment of any kind by Sotos. In their review of "notable practitioners" at Sotos, Chambers refers to each of Sterns, Sokolov, and Leclerc

with favourable comments as to their advocacy skills, intellectual abilities, willingness to cooperate, analytical skills, and abilities to make strategic choices.

57 The Sotos firm is ranked amongst the highest in Canada by Chambers as plaintiff class action counsel.

58 No disciplinary findings have been made against either Sterns, Sokolov, or Leclerc over their collective experience.

*b) Evidence filed by Ballantine about the experience of the Merchant lawyers proposed to have carriage of the Ballantine Action*

59 Ballantine filed evidence from Simoes by affidavit sworn November 2, 2017 (the "First Simoes Affidavit"). Simoes filed a supplementary affidavit sworn November 16, 2017 (the "Second Simoes Affidavit"), addressing some of the issues raised in the Seddigh Affidavit.

60 Simoes set out the Merchant firm's participation "in a number of actions relating to the loss or breach of consumer personal information". Three of the files were settled and one file was ongoing in Quebec. Simoes led no evidence that any of the lawyers proposed to be involved with the Ballantine Action had any involvement in those cases.

61 Simoes also referred to the firm's experience as a national law firm in many class actions.

62 With respect to the particular experience of proposed counsel "who have been actively involved with" the Ballantine Action "or who are anticipated to be involved", Simoes referred to six lawyers. Simoes provided no curriculum vitae for any of them, no information as to their recognition by external organizations and only a general description of their practices. Simoes provided no evidence as to the Merchant lawyers' years of call.

63 Simoes set out the following evidence about the six lawyers, quoted verbatim:

(i) Venessa Vuia works primarily in the area of class actions. She has been involved in the preparation of pleadings, affidavits, and certification records in dozens of class actions, including pharmaceutical class actions, automobile class actions, and tax shelter class actions. She has appeared before the courts of Saskatchewan and Ontario in connection with these matters;

(ii) Anthony Tibbs works almost exclusively in the area of class actions, has been involved in the preparation of pleadings, affidavits, and certification records in dozens of class actions, including privacy breach class actions, and has appeared before the courts of British Columbia, Alberta, Saskatchewan, and Ontario in connection with these matters;

(iii) Iqbal S. Brar works primarily in the area of class actions. He has been involved in the preparation of pleadings, affidavits, and certification records in dozens of class actions, including securities class actions, price-fixing class actions, automobile class actions, and government duty class actions;

(iv) Casey Churko has more than ten years of experience almost exclusively in class action litigation, having been involved in the preparation of pleadings, affidavits, and certification records in dozens of class actions, including securities class actions, and has appeared before the courts of British Columbia, Alberta, Ontario, Saskatchewan, Manitoba, Nova Scotia, and Newfoundland and Labrador in connection with these matters;

(v) Roch Dupont has many years of experience in the Department of Justice's commercial law and criminal prosecution divisions (including cartel enforcement, price-fixing, fraud, gangs, and fraudulent bankruptcy prosecutions), and has significant experience conducting large-scale complex litigation. For the past few years, Mr. Dupont has been working with MLG almost exclusively on class action matters;

(vi) Christopher Simoes practices civil litigation with a focus on class actions. He has prepared pleadings, affidavits, and certification records in several class actions. He has appeared before the courts of Saskatchewan, Alberta, and Ontario in connection with these matters.

64 Simoes states that Venessa Vuia ("Vuia") and Anthony Tibbs ("Tibbs") "have primary carriage of this matter".

*c) Evidence filed by Agnew-Americano about the experience of the Merchant lawyers proposed to have carriage of the Ballantine Action and about Anthony Merchant and Tibbs*

65 In his affidavit, Seddigh sets out evidence as to Anthony Merchant, a senior lawyer at the Merchant firm.

66 Anthony Merchant is listed as one of the lawyers in the Saskatchewan claim. He is referred to three times in the Merchant website in relation to the Equifax class action. On that Merchant website, Anthony Merchant is represented as "well known for pursuing class action lawsuits in Canada", and:

> known to be one of Canada's most active litigators with more than 600 reported cases in leading Caselaw Journals, having argued thousands of cases before the Canadian and American Courts, in Trial and Administrative Courts, and the Courts of Appeal of various American and Canadian jurisdictions, the Federal Court of Canada, and the Supreme Court of Canada. Tony Merchant, Q.C., has a long history in pursuing public policy cases and is a former Member of the Legislative Assembly (M.L.A.)

67 The Seddigh Affidavit sets out uncontested evidence about the conduct of Anthony Merchant:

> (i) The Saskatchewan Court of Appeal found that he engaged in misconduct involving retainer agreements;
>
> (ii) He was found guilty of wilfully interfering with the lawful use of private property, contrary to the *Criminal Code*;
>
> (iii) He was convicted of conduct unbecoming for withdrawing or authorizing the withdrawal of trust funds, contrary to court order and without client consent;
>
> (iv) In 2014, the Saskatchewan Court of Appeal found that he was guilty of conduct unbecoming in respect of two counts involving breaches of court orders; and
>
> (v) He is being sued by the Government of Canada in respect of allegations of illegitimate time entries and excessive disbursements in connection with residential school class action settlements. In that matter, former Justice Iacobucci commented that Merchant's billing raised "serious concerns about the information Mr. Merchant provided".

68 The Seddigh Affidavit also sets out uncontested evidence that Ontario courts have expressed concerns about the conduct of Anthony Merchant and the practice of the Merchant firm which the courts have described as "disturbing", "the very antithesis of what is in the best interests of the class", and "inappropriate both as a matter of legal ethics but also in the context of civil procedure".

69 By way of example, Justice Perell found that Merchant's conduct in writing to another lawyer's client "was inappropriate both as a matter of legal ethics but also in the context of civil procedure" (*Kutlu v. Laboratorios Leon Farma, S.A.*, 2016 ONSC 2127 (Ont. S.C.J.), at para. 18). Justice Winkler (as he then was) criticized Merchant for failing to disclose the existence of relevant claims (*Setterington v. Merck Frosst Canada Ltd.* [2006 CarswellOnt 506 (Ont. S.C.J.)], 2006 CanLII 2623 ("*Setterington*"), at para. 26).

70 With respect to the conduct of Tibbs, Agnew-Americano relies in her factum upon the decision of Belobaba J. in *Quenneville v. Volkswagen Group Canada Inc.*, 2016 ONSC 4607 (Ont. S.C.J.) ("*Quenneville*"). Justice Belobaba held that after carriage was denied to Merchant, the firm sought to "scoop" Ontario residents for class actions it was planning outside Ontario. Justice Belobaba found (*Quenneville*, at paras. 3, 15, 16, and 23):

> (i) "extreme carelessness by Mr. Tibbs, who was in court on February 3 and must have understood the court's concerns";
>
> (ii) Tibbs was "disingenuous";

(iii) Tibbs' e-mails to class members were "at the very least, misleading";

(iv) Tibbs' conduct was "careless, unprofessional, and arguably in breach of the carriage order"; and

(v) Tibbs "should have known better".

71 Seddigh also filed uncontested evidence from a printout from Merchant's Toronto office website that indicates that Vuia was called to the bar in January 2016 and Simoes was called to the bar in June 2015.

*d) Responding evidence filed by Ballantine with respect to the resources and experience of the Merchant lawyers and firm*

72 In the Second Simoes Affidavit, Simoes stated that Anthony Merchant "is uninvolved in the Ontario litigation". Simoes did not contest any of the court findings against Anthony Merchant, the Merchant firm, or Tibbs.

***iv) Factor 3: Evidence relevant to the state of the action including preparation and class engagement***

73 I address the evidence of the state of the action including preparation and class engagement with respect to each firm below.

*a) Evidence filed by Agnew-Americano relevant to the state of the action including preparation and class engagement of Sotos*

74 By the date the Agnew-Americano Claim was issued, the Equifax Defendants had not provided information regarding the numbers of Canadians affected by the breach. Based on the Equifax US press release, it knew of the breach beginning August 1, 2017 and disclosed the existence of the breach on Thursday, September 7, 2017.

75 On Monday, September 11, 2017, Agnew-Americano signed a written retainer agreement for Sotos to represent her and class members in the proposed class action.

76 On Tuesday, September 12, 2017, the Agnew-Americano Claim was issued. In that claim, Agnew-Americano sought interim relief to compel the Equifax Defendants to give direct notice to affected Canadians that a data breach occurred in relation to their personal information. On the same day, Leclerc requested the appointment of a case management judge.

77 The next day, Wednesday, September 13, 2017, Justice Perell advised Leclerc that I had been appointed as case management judge. On that day, Leclerc requested a case conference "on an urgent basis to request interim relief". My office advised Leclerc on Thursday, September 14, that I would make myself available on either Monday or Tuesday of the following week, *i.e.* September 18 or 19.

78 Sotos then prepared a motion record for interim relief. On September 18, 2017, Leclerc sent an e-mail to my assistant advising that "[w]e are in discussions with counsel for Equifax Canada, pending which we do not require a case conference tomorrow." The next day, on September 19, 2017, Equifax Canada issued a press release advising its Canadian customers of the data breach.

79 The first case conference was scheduled for October 17, 2017. Equifax Canada's website was updated the day before the case conference to advise that it would be giving direct notice to approximately 8,000 affected Canadians.

80 I conducted the case conference with counsel for Agnew-Americano and the Equifax Defendants on October 17, 2017.

81 As of October 19, 2017, Sotos received numerous enquiries from persons across Canada affected by the breach who received letters from Equifax Canada. To provide further assistance, Sotos sent a bilingual e-mail update on October 26, 2017 to all persons who had contacted Sotos regarding the class action. The update:

(i) informed e-mail subscribers that there was no obligation to register to be a member of the class action,

(ii) provided an update on the status of the class action and next steps in the case, and

(iii) provided immediate assistance to persons who had received letters from Equifax Canada advising that their personal information had been accessed by hackers.

82 Sotos also gave several media interviews regarding the Equifax privacy breach and the class action.

83 Sotos has prepared a certification record and it is ready to be served as soon as carriage is determined. Sotos also prepared a litigation plan which was attached as an exhibit to the Seddigh Affidavit.

*b) Evidence filed by Ballantine relevant to the state of the action including preparation and class engagement of Merchant*

84 In the First Simoes Affidavit, Simoes' only evidence as to preparation was that (i) Merchant had prepared an amended statement of claim (only to replace Ballantine with Perisiol as the representative plaintiff) and (ii) the general statement that:

> MLG [Merchant] has been actively preparing for the upcoming steps in this litigation, including *inter alia* collecting publicly-available documents, including confirmation letters sent out by Equifax to individuals which have confirmed that their information had been breached.

85 In the First Simoes Affidavit, Simoes stated that:

> In the event that carriage is awarded to Ms. Ballatine [*sic*] and/or Ms. Perisiol, it is expected that the motion record for certification of the action will be served and filed within 60 days.

86 In the Second Simoes Affidavit, Simoes referred to media coverage about the litigation, including interviews with Anthony Merchant. Simoes referred to the number of people who left contact information on the Merchant website as being interested in the Equifax class action litigation.

87 Simoes explained that Merchant had not finalized a certification record for the following reasons:

> We have not finalized the certification motion record as of yet because, as is evident from the evidence already before the Court, the Equifax situation has been quickly evolving and the parameters of the action changing.
>
> As the scope and nature of the breach and impact has become more clear, our litigation and evidence strategy has evolved. Further research is ongoing, aided in part by new information being provided by members of the putative class who have contacted our office.
>
> It is for that reason that we propose to serve our certification motion record *within* 60 days of carriage being determined. [Italics in original.]

*c) Evidence filed by Agnew-Americano relevant to the state of the action including preparation and class engagement of Merchant*

88 Seddigh filed as an exhibit a printout from MLG's website regarding the Equifax class action. Other than inviting the reader to join Merchant's e-bulletin contact list, the only statements on the website about the litigation are:

> Merchant Law Group LLP has launched a national class action lawsuit on behalf of all Canadians affected by the 2017 Equifax Data Breach.
>
> Equifax revealed that the breach discovered on July 29 could expose the personal information of about 143 million people in the United States. Equifax also indicated that the personal information of an undisclosed number of people in Canada and the United Kingdom was compromised.

89 There is no evidence of further information available on the Merchant website about the Equifax class action.

***v) Factor 4: Evidence relevant to the fee arrangements***

90 Both parties filed their written retainer agreements. I review each of them below.

*a) The Agnew-Americano retainer agreement*

91 The retainer agreement between Agnew-Americano and Sotos was dated September 11, 2017, one day prior to issuing the Agnew-Americano Claim in its original form, when Agnew-Americano was the only proposed representative plaintiff.

92 The retainer agreement between Jane Doe and Sotos is dated October 24, 2017. The Agnew-Americano Claim, which is the amended claim considered throughout these reasons, has not yet been issued.

93 The Agnew-Americano retainer agreements contain the following relevant terms:

(i) "Class Counsel will prosecute the Action on a contingency basis";

(ii) "Class Counsel and the Client agree that the legal fees will be charged on a percentage basis and that Class Counsel shall be paid a legal fee of thirty-three percent (33%) of any Recovery plus disbursements and applicable taxes. The legal fee will be calculated based on all benefits obtained for the class, including costs";

(iii) "It is understood that Class Counsel's legal fees and disbursements shall be subject to approval by the court and that Class Counsel may make any motion for approval of this agreement and their fees and disbursements";

(iv) "The Client acknowledges that the amount of a reasonable settlement or judgment in this case will depend on a number of factors, including liability, and expert evidence, among other things. A precise estimate is not possible at this time. However, by way of example, if the Defendants pay, by way of settlement, $5,000,000 before certification, it is understood that the contingency fee requested will be 33% of $5,000,000, or $1,650,000, plus disbursements and taxes";

(v) "The Client understands that any settlement affecting the Class is subject to approval of the Court";

(vi) "Subject to this agreement being approved by the Court, it shall bind Class Counsel"; and

(vii) "This agreement may be amended from time to time in writing by the Client and Class Counsel, before it is approved by the Court".

*b) The Ballantine retainer agreement*

94 The retainer agreement between Ballantine and Merchant was signed on November 2, 2017,[9] almost two months after the Ballantine Claim in its original form was issued.

95 The retainer agreement between Perisiol and Merchant is dated November 1, 2017. The Ballantine Claim, which is the amended claim considered throughout these reasons, has not yet been issued.

96 The Ballantine retainer agreements contain the following relevant terms:

(i) "I understand that this litigation is being pursued on a contingency basis such that legal fees and reasonable disbursements with respect to this class action will be payable only in the event of success in this litigation";

(ii) "I understand that success in these proceedings includes:

a) judgment on the common issues in favour of some or all class members; and

b) a settlement that benefits one or more class members and is approved by the court";

(iii) "I understand that MERCHANT LAW GROUP LLP shall be entitled to a legal fee which is equivalent to a percentage of the total value of any settlement or judgment in favour of the Class, over and above any award of court costs, or claim for reasonable disbursements incurred by the MERCHANT LAW GROUP LLP;"[Block letters in original text.]

(iv) "I agree that the above percentage will be calculated as a 25% fee of the total value of the amount recovered, or on the basis of a 3 times multiplier of my lawyers [*sic*] regular hourly rates for the time spent pursuing this class action litigation, whichever is higher . . . Payment is expected to be made by lump sum or as otherwise directed by the Court";

(v) "I understand that the total legal fee will vary according to the total value of any settlement or judgment which may result from this litigation"; and

(vi) "I understand that this Agreement, and any fees awarded pursuant to this Agreement, may be subject to approval by the Court".

vi) *Factor 5: Evidence relevant to the class definition*

97 I set out the proposed class definition in each of the claims.

98 The proposed class definition in the Agnew-Americano Claim is:

(a) all persons in Canada whose personal information was exposed to appropriation by unauthorized persons (i.e. "hackers") as a result of a security breach occurring between May 1, 2017 and August 1, 2017; and

(b) all persons in Canada who, on or before September 7, 2017, purchased from the defendants, their subsidiaries or related companies the following products:

(i) Equifax Complete Advantage;

(ii) Equifax Complete Premier;

(iii) Equifax Complete Friends and Family;

(iv) or any other Equifax products offering credit monitoring and identity theft protection (collectively, the "Equifax Contractual Claims").

99 The proposed class definition in the Ballantine Claim is:

All persons in Canada (including but not limited to in [*sic*] individual, corporations, and estates) who had, at any time prior to September 7th, 2017, personal or credit data collected, and stored by Equifax and who were subject to risk of data loss as a result of the breach which occurred between May and July 2017 (hereinafter the "**Data Breach**") or any other Class(es) or Sub-Class(es) to be determined by the Court; (herein after, "**Class Member(s)",** the "**Class**", the "**Member(s)**" [*sic*] [Emphasis in original text.]

**vii) Factor 6: Facts relevant to class actions in more than one jurisdiction and intentions of the parties**

100 In the First Simoes Affidavit, under the heading "Proceedings in Quebec", Simoes referred to a "parallel proceeding before the Superior Court of Quebec, styled as *Daniel Li v. Equifax Inc. and Equifax Canada Co*., No. 500-06-000885-174 (District of Montreal)". Simoes stated that "Erik Lowe from our Montreal office is leading the proceedings in Québec" and that "[t]o the best of our knowledge, the *Li* claim is the only proposed class proceeding in Québec relating to the Equifax data breaches."

101 The Quebec action seeks to certify only a proposed class in Quebec, under the same class definition terms as in the Ballantine Action.

102 Simoes did not mention in his first affidavit any parallel proceedings brought against the Equifax Defendants by Merchant before the British Columbia or Saskatchewan courts.

103 In his affidavit, Seddigh referred to all of the four class actions brought against the Equifax Defendants with Merchant as counsel.

104 In Saskatchewan, the Merchant firm is counsel in *Johnson v. Equifax Inc., Equifax Canada Inc., and Equifax Canada Co*. (Court File No. QBG 2290/2017) issued on September 8, 2017. The proposed class definition is for a national class on the same terms as the Ballantine Action. Anthony Merchant and Linh Pham of the Merchant firm are listed as the lawyers in the case.

105 In British Columbia, the Merchant firm is counsel in *Azam and Patel v. Equifax Inc*. *and Equifax Canada Co*. (Court File No. NEW-S-S-194558) issued on September 8, 2017. The proposed class definition is for a national class on the same terms as the Ballantine Action. Steven Roxborough of the Merchant firm is listed as the lawyer in the case.

106 Neither of the Simoes affidavits addressed Ballantine's intentions with respect to the Ontario action.

107 Ballantine submits in her factum that "if carriage is awarded in Ontario to MLG it is expected that the Ontario action (in a national jurisdiction) will take the lead".

108 However, at the hearing, counsel for Ballantine advised the court that he had no instructions as to whether he would proceed with the Ontario action, since it would need to be an issue discussed with Merchant clients in the other actions.

109 It is the intention of Agnew-Americano to proceed forthwith with her action, based on the uncontested evidence that the certification record has been prepared and is "ready to be served as soon as carriage is determined and the Statement of Claim is amended".

**Factor 7: Facts relevant to the proposed anonymity of the second representative plaintiff in the Agnew-Americano Action**

110 The Agnew-Americano Claim requests that the second representative plaintiff (referred to as "Jane Doe") be permitted to use an alias to prevent her personal information from being further impacted as a result of publicly identifying herself as an affected person in the class proceeding.

111 Sotos sent counsel for the Equifax Defendants a copy of the unredacted letter that Jane Doe received from the Equifax Defendants and asked that her personal information be kept confidential. Consequently, the Equifax Defendants are aware of the identity of the proposed representative plaintiff, Jane Doe.

**Analysis**

112 I first review the general principles and relevant factors for the court to consider on a carriage motion.

113 I then address the relevant law and application of the facts to each of the factors which is in dispute.

***i) The general principles and relevant factors***

114 The court in *Mancinelli* recently considered the general principles governing carriage motions and factors relevant to determining carriage of a class proceeding. Strathy C.J.O. held (*Mancinelli*, at paras. 11-14):

> (i) "There cannot be two or more certified class actions in the same jurisdiction representing the same class in relation to the same claim";
>
> (ii) "Where there are rival actions, a practice has developed for a proposed representative plaintiff to bring a motion for authorization to have his or her action proceed on behalf of all class members and to stay pending or future proceedings relating to the same issues";

(iii) The source of the court's jurisdiction to grant such relief is ss. 12 and 13 of the *CPA* and ss. 106 and 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("*CJA*"). Section 12 of the *CPA* authorizes the court to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination". Section 13 of the *CPA* gives the court jurisdiction to "stay any proceeding related to the class proceeding". Section 138 of the *CJA* provides that "[a]s far as possible, multiplicity of legal proceedings shall be avoided." Section 106 of the *CJA* provides that a court may stay any proceedings in the court "on such terms as are considered just"; and

(iv) The main criteria for determination of a carriage motion are: "(a) the policy objectives of the *CPA*, namely, access to justice, judicial economy for the parties and the administration of justice, and behaviour modification; (b) the best interests of all putative class members; and, at the same time, (c) fairness to defendants." (citing what Strathy C.J.O. described as the "seminal carriage case" of Cumming J. in *VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594 (Ont. S.C.J.)).

115 Strathy C.J.O. then reviewed the applicable case law and listed 14 factors to consider in the analysis (*Mancinelli*, at paras. 14-16 and 18):

(i) the nature and scope of the causes of action advanced,

(ii) the theories advanced by counsel as being supportive of the claims advanced,

(iii) the state of each class action, including preparation,

(iv) the number, size and extent of involvement of the proposed representative plaintiffs,

(v) the relative priority of commencing the class actions,

(vi) the resources and experience of counsel,

(vii) the presence of any conflicts of interest,

(viii) funding,

(ix) definition of class membership,

(x) definition of class period,

(xi) joinder of defendants,

(xii) the plaintiff and defendant correlation,

(xiii) prospects of certification, and

(xiv) the proposed fee arrangement.

116 In *Kowalyshyn*, Perell J. referred to similar factors and also considered the interrelationship of class actions in other jurisdictions, as a relevant factor in that case (*Kowalyshyn*, at para. 143).

117 The list is non-exhaustive. Strathy C.J.O. held (*Mancinelli*, at para. 17):

Other factors may have significance in the unique circumstances of other cases. Determinative factors in one case may have little or no significance in another.

118 Strathy C.J.O. stated that a "best interests" approach should govern carriage motions. He held (*Mancinelli*, at para. 22):

> I would resist a "tick the boxes" approach to carriage motions. The issue is not which law firm "wins" on the most factors. Rather, it is the best interests of the class and fairness to the defendants, having regard to access to justice, judicial economy and behaviour modification.

119 Strathy C.J.O. cited Justice Belobaba's carriage decision in *Mancinelli v. Barrick Gold Corp.* (reported as 2014 ONSC 6516 (Ont. S.C.J.) ("*Mancinelli-SCJ*")), describing the critical question as: "which of the competing actions is more likely to advance the interests of the class?" (*Mancinelli*, at para. 23).

120 The court has "a duty to protect class members and a broader duty to the administration of justice when approving counsel in a carriage motion" (*Mancinelli*, at para. 72).

121 Neither party raises any factor outside the *Mancinelli* or *Kowalyshyn* analysis. Further, both parties agree that many of the factors from those cases are neutral.

122 I now review each of the contested relevant factors below. I first consider the applicable law, and then apply that law to the facts of the present case.

***ii) Factor 1: The nature and scope of the causes of action and the theories advanced***

*a) The applicable law*

123 A carriage motion is not a Rule 21 motion. The Equifax Defendants can later challenge the pleadings either directly or by submitting that the first requirement for certification under s. 5(1)(a) of the *CPA* has not been met.

124 Even on a certification motion, "the certification stage is decidedly not meant to be a test of the merits of the action" (*Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) ("*Pro-Sys*"), at para. 99). The pleaded facts are assumed to be true and it is only if it is plain and obvious that the plaintiff's claim cannot succeed that the claim will not meet the s. 5(1)(a) requirement for certification (*Pro-Sys*, at para. 63).

125 Otherwise, as Perell J. noted in *Kowalyshyn* (at para. 147), a carriage motion "may ultimately be detrimental to the interests of the putative Class Members" if competing class counsel "[treat] the carriage motion . . . as an opportunity to play the Royal Navy in pursuit of the Battleship Bismarck" if "they did not hold back in pointing out allegedly very serious weaknesses and supposedly fatal flaws in the quality of their rival's legal, procedural, and evidentiary plans . . . to the delight of the Defendants who were standing gauging on the sidelines" .

126 Consequently, the court has applied a "glaring deficiency" or "fanciful or frivolous" test in assessing the nature and scope of a claim, rather than engaging in a Rule 21 review. In *Mancinelli*, Strathy C.J.O. held (at para. 42):

> The appellants acknowledge that the merits of the respective claims are not at issue on a carriage motion. **In *Setterington*, at para. 19, Winkler J., as he then was, said that the claim may be scrutinized for "glaring deficiencies" or to see whether it is "fanciful or frivolous"**. See also: *Sino-Forest* at para. 20. **Apart from this, however, he said it is inappropriate for the court to embark on an analysis of which claim is most likely to succeed.** [Emphasis added.]

127 Strathy C.J.O. added (*Mancinelli*, at paras. 45-47):

> **In my view, it is and should be the rule that the court should not enter into an examination of the underlying merits of the respective claims on a carriage motion. The motion judge gave three good reasons for the rule: (i) it is impossible to predict how the litigation will unfold and which claims will succeed and which will not; (ii) it is unfair and inappropriate to undertake such an analysis in full view of defence counsel; and (iii) a merits analysis should not be done on a carriage motion when it is not done on certification. I respectfully agree.**

> It is also my view, consistent with the jurisprudence, that there may be cases in which the actions are sufficiently indistinguishable that, to use the language of *Locking*, "a more detailed analysis may be necessary": see, e.g., *Sharma*. This analysis will not consider the merits but will consider, as the Divisional Court said in *Locking*, at para. 23, "the nature and scope of the causes of action advanced and the theories advanced by counsel for their approach to the case". This may include an assessment of the efficiency and costs of the competing strategies. I regard this factor as important, but not necessarily of greater importance than every other factor.
>
> **While some cases have given preference to "lean" actions over more comprehensive ones, I would reject any firm rule that "less is more" or, indeed, that "more is better". The ultimate question is whether the proposed strategy is reasonable and defensible.** [Emphasis added.]

128 Provided that the court finds that a claim is "genuinely viable", the role of the court is to consider whether it is in the best interests of the class to plead a broader or more narrow claim to determine which action "provided the class with a more effective framework within which to litigate the claims" (*Mancinelli*, at paras. 48-50).

129 Competing class counsel can amend pleadings based on "lessons learned from their rival's criticisms" (*Kowalyshyn*, at para. 145). However, the court must still consider the nature and scope of the claim and the theories advanced by counsel "as legal theories applicable to pleaded facts assumed to be true" (*Kowalyshyn*, at para. 167).

130 I now apply the above principles to the facts of the present case.

*b) Application of the law to the facts of the present case*

**1. The positions of the parties**

131 In the present case, there is a significant difference in the legal theories relied upon in the proposed class actions. Neither plaintiff acknowledges that she has "learned" from the approach taken by the other plaintiff. Each plaintiff submits that her approach is preferable.

132 Ballantine submits that "less is more" and that her proposed claim based solely on negligence is a more effective framework within which to litigate the claim. Ballantine submits that (i) the intrusion upon seclusion and breach of privacy legislation claims relied upon by Agnew-Americano are "fundamentally flawed", leaving the class members exposed to wasted time and costs arising from preemptive motions such as a motion to strike or a motion for summary judgment; and (ii) the breach of contract and consumer protection legislation claims relied upon by Agnew-Americano are duplicative of the negligence claim since those claims can only succeed if the negligence claim is successful.

133 Agnew-Americano submits that in the present case, "more is better" because the claims she advances are genuinely viable and provide a "further basis of liability" to "significantly [open] up the defendants' exposure" such that "it was in the best interests of the class to plead the broader" claims "resulting in a more comprehensive litigation framework" and "a more effective framework within which to litigate the claims" (as those expressions are found in *Mancinelli*, at paras. 47-49).

134 For the reasons that follow, I agree with the position of Agnew-Americano.

**2. Analysis**

135 Both parties advance a negligence claim, effectively on the same basis that the Equifax Defendants breached their duty of care by failing to put into place a mechanism to prevent the data breach when they were aware by March 2017 of their exposure to hackers. Neither party suggests that one pleading of negligence is stronger than the other.

136 The issue between the parties concerns the claims for (i) intrusion upon seclusion and breach of provincial privacy legislation, and (ii) breach of contract and breach of provincial consumer protection legislation.

137 I first address the intrusion upon seclusion and provincial privacy legislation claims.

*i. Intrusion upon seclusion and provincial privacy legislation claims*

***a. Intrusion upon seclusion***

138 There are three elements that must be established for a claim in intrusion upon seclusion, as set out in the leading case of *Jones v. Tsige*, 2012 ONCA 32 (Ont. C.A.) ("*Jones*") (at paras. 71-72):

(i) the defendant's conduct must be intentional or reckless;

(ii) the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and

(iii) the invasion must be such that a reasonable person would regard it as being highly offensive causing distress, humiliation, or anguish (*e.g.* intrusion into financial or health records).

139 Under a claim for intrusion upon seclusion, proof of harm to a recognized economic interest is not required (*Jones*, at para. 71). By contrast, a claim in negligence requires proof of a duty of care, a breach, damage, and a legal and factual causal relationship between the breach and the damage (*Saadati v. Moorhead*, 2017 SCC 28 (S.C.C.), at para. 19).

140 Consequently, an intrusion upon seclusion claim, if viable, provides a broader claim which opens up a defendant's exposure.

141 In *Douez v. Facebook, Inc.*, 2017 SCC 33 (S.C.C.) ("*Douez*"), the Supreme Court emphasized the importance of privacy as having "quasi-constitutional status", and stated that the court "has emphasized the importance of privacy — and its role in protecting one's physical and moral autonomy — on multiple occasions" (*Douez*, at para. 59).

142 Ballantine submits that the intrusion upon seclusion claim is "fundamentally flawed" on the second branch of the *Jones* test. Ballantine submits that since hackers and not the Equifax Defendants accessed the personal information, the requirement under the *Jones* test that "the defendant must have invaded . . . the plaintiff's private affairs or concerns" could not be met.

143 The Ballantine Claim, as currently drafted, pleads intrusion upon seclusion as a basis for the negligence claim. However, in her factum, Ballantine submits that "the reference in the [Ballantine] pleadings to intrusion upon seclusion (in the context of the negligence claim) is a drafting remnant inadvertently left in the claim and to be removed in due course, as that cause of action is wholly inapplicable to the within situation".

144 Ballantine does not submit any case that rejects an intrusion upon seclusion claim on the basis upon which she relies. [10] Instead, Ballantine relies on intrusion upon seclusion cases in which a defendant invaded the plaintiff's affairs. However, those cases do not address the situation of a defendant who allegedly permits an outside party to access private financial or other records.

145 As I note above, the present carriage motion is not a Rule 21 motion. The only role for the court is to determine whether the claim has a "glaring deficiency" or is "fanciful or frivolous" (*Mancinelli*, at para. 42).

146 Agnew-Americano relies on the decision of Belobaba J. in *Bennett v. Lenovo (Canada) Inc.*, 2017 ONSC 1082 (Ont. S.C.J.) ("*Bennett — Rule 21*"), in which Belobaba J. dismissed a motion under Rule 21 by the defendants to strike the claim for intrusion upon seclusion. In *Bennett-Rule 21*, the intrusion was alleged to have occurred because a computer manufacturer pre-loaded laptops with a program that injected unauthorized advertisements and which "allows hackers . . . to collect . . . bank credentials, passwords and other highly sensitive information" (*Bennett — Rule 21*, at para. 4). That situation raises some similarities with the allegation in the present case since the Equifax Defendants allegedly knew that their system was at risk from hackers yet allegedly took no steps to protect the system from the hackers.

147 Justice Belobaba held (*Bennett — Rule 21*, at para. 27):

> The risk of unauthorized access to private information is itself a concern even without any *actual* removal or actual theft. For example, if a landlord installs a peephole allowing him to look into a tenant's bathroom, the tenant would undoubtedly feel that her privacy had been invaded even if the peephole was not being used at any particular time. [Italics in original.]

148 Ballantine seeks to distinguish the *Bennett — Rule 21* decision on the basis that Lenovo:

> knowingly installed software which would intercept private information and send it to third parties without the knowledge and authorization of the user [in circumstances] that the software even when working as intended (and not at the behest of unscrupulous hackers) was designed to intercept private information and send it to a third party (Superfish) without the knowledge and consent of the end user.

149 Consequently, Ballantine submits that "the blame for that intrusion upon seclusion [falls] squarely within the four walls of Lenovo's own house" since Lenovo took a "deliberate or intentional action to intercept and misuse private information of consumers for its own (or its partners') gain".

150 I do not agree with Ballantine that the intrusion upon seclusion claim is "frivolous or fanciful".

151 The court in *Bennett — Rule 21* found that "the risk of unauthorized *access* to private information is itself a concern". [Italics in original.] If a "peephole" analogy were to be applied to the alleged conduct of the Equifax Defendants, a court could find on the pleadings that the Equifax Defendants recklessly permitted a peephole to be established. If so, it would be a viable issue as to whether the claim for intrusion upon seclusion may lie.

152 Further, in *Bennett — Rule 21*, the intrusion upon seclusion was alleged not only on the basis of the program installed by Lenovo, but also on the basis that Lenovo exposed its computer users to the risk of hacking, allegations similar to those in the present case.

153 In *Bennett — Rule 21*, Justice Belobaba refused to strike the plaintiff's claims that installing the program "compromises the security of sensitive personal, financial and otherwise confidential information that is commonly stored on computers and other electronic devices" by allowing hackers "to intercept a user's internet connections . . . and collect their bank credentials, passwords and other highly sensitive information" including "confidential personal and financial information" which "exposed the class members to significant risks, including the risk that their personal and financial information will be stolen and sold to third parties for commercial purposes" (*Bennett — Rule 21*, at paras. 18-19).

154 Further, those claims were certified by Justice Perell (*Bennett — Certification*, at para. 76 (iii) to (viii)).

155 In essence, the Ballantine submission is that it is "fanciful or frivolous" to plead intrusion upon seclusion because the difference between the Agnew-Americano Claim and the claim against Lenovo in *Bennett* is that the Equifax Defendants failed to install a program to protect privacy while Lenovo installed a program which did not protect privacy. I do not agree that such a factual distinction renders the claim "fanciful or frivolous".

156 The viability of the claim for intrusion upon seclusion in the present action is supported by the recent decision of Masuhara J. in *Tucci v. Peoples Trust Company*, 2017 BCSC 1525 (B.C. S.C.) ("*Tucci*"). Masuhara J. certified a claim against Peoples Trust Company (including a claim for intrusion upon seclusion) for permitting unauthorized access by hackers to personal financial information stored in the Peoples Trust database, a claim similar to the present case. In *Tucci*, the plaintiff alleged that Peoples Trust (*Tucci*, at para. 2):

> did not adequately secure personal information collected on its online application portal and stored in online databases. As a result, it is asserted that unauthorized persons were able to access the personal information, putting the proposed class members at risk of identity theft, cybercrime, and "phishing".

157 Masuhara J. held that it was not "plain and obvious" that an intrusion upon seclusion claim could not succeed under federal common law and certified that cause of action (*Tucci*, at paras. 151 and 257). [11]

158 The approach in *Bennett — Rule 21* and in *Tucci* could apply given the pleading (and acknowledgement by Equifax US in its press release) that (i) the vulnerability was identified and disclosed by the United States Computer Emergency Readiness team in March 2017; and (ii) the hacker intrusions occurred from May 13, 2017 through July 30, 2017. Agnew-Americano pleads that the conduct of the Equifax Defendants to allow the "peephole" to exist was either intentional, reckless, or wilful.

159 The approach in *Bennett-Rule 21* and in *Tucci* could also be supported on the basis of the broad approach to privacy law set out by the Supreme Court in *Douez*. Consequently, there is a viable argument that the Agnew-Americano claims for intrusion upon seclusion and breach of provincial privacy legislation are consistent with the broad and liberal approach courts have adopted with respect to privacy rights.

160 In *Jones*, the court referred to "routinely kept electronic databases" that "render our most personal financial information vulnerable" when discussing "technological change [which] has motivated the legal protection of the individual's right to privacy", and stated that "[i]t is within the capacity of the common law to evolve to respond to the problem posed by the routine collection and aggregation of highly personal information that is readily accessible in electronic form" (*Jones*, at paras. 67-68). Those comments further demonstrate that a claim for intrusion upon seclusion arising from hacking is not "fanciful or frivolous".

161 Finally, I note that two of the cases settled by Merchant against both Walmart Canada and The Home Depot involved hackers rather than intrusions by the defendant (see *Drew v. Walmart Canada Inc.*, 2017 ONSC 3308 (Ont. S.C.J.) ("*Drew*") and *Lozanski v. Home Depot, Inc.*, 2016 ONSC 5447 (Ont. S.C.J.) ("*Lozanski*")). While it is not clear whether the claim in *Lozanski* relied upon intrusion upon seclusion, the claim in *Drew* did so (*Drew*, at paras. 7-8).

162 While the approval of the settlement in *Drew* did not review whether the intrusion upon seclusion claim would survive certification, it is yet another example, along with *Tucci*, *Bennett-Rule 21*, *Bennett-Certification*, and the comments of the courts in *Douez* and *Jones*, all of which demonstrate that the Agnew-Americano claim of intrusion upon seclusion is viable. It does not contain a "glaring deficiency" nor is it "fanciful or frivolous".

163 Such a claim provides a significantly broader basis for the claim of the class members, as it is not necessary to prove harm.

***b. Breach of provincial privacy statutes***

164 Ballantine's submission that Agnew-Americano's claim for breach of provincial privacy legislation is not viable [12] is based on a similar argument as the intrusion upon seclusion claim, *i.e.* Ballantine submits that no claim can lie since the violation of the right to privacy would not be by the "party" against whom relief is sought, and there is no evidence that the Equifax Defendants acted in a wilful or intentional manner. I do not agree.

165 It is not "fanciful or frivolous" that a court could apply the approach in the above case law and conclude that the legislation applies to a "party" who wilfully permits hackers to access their network to obtain personal information of the customers of the "party".

166 Further, at a carriage motion the facts are accepted as true for the purpose of determining whether a claim is "fanciful or frivolous", and the reckless and intentional conduct of the Equifax Defendants is pleaded.

167 In *Bennett — Rule 21*, Belobaba J. found, for the same reasons as with respect to the intrusion upon seclusion claim, that he was "not persuaded that the statutory privacy claims are certain to fail" (*Bennett — Rule 21*, at para. 29). Perell J. certified common issues on the breach of those provincial statutes (*Bennett — Certification*, at para. 76 (ix) to (xii)).

168 In *Bigstone v. St. Pierre*, 2011 SKCA 34 (Sask. C.A.) ("*Bigstone*"), Ottenbreit J.A. held (Smith J.A. dissenting) that it was inappropriate to strike a claim under *The Privacy Act*, R.S.S. 1978, c. P-24 (the *"Saskatchewan Privacy Act"*), when it was

alleged that Saskatchewan Power Company was vicariously liable for an employee's breach of privacy. While *Bigstone* did not address whether a "party" can be liable under provincial privacy legislation for allowing a hacker to access personal information, Ottenbreit J.A. held that (i) the concept of privacy under the *Saskatchewan Privacy Act* is "arguably quite broad" (*Bigstone*, at para. 23); (ii) it can "cover a wide spectrum of privacy interests" (*Bigstone*, at para. 26); and (iii) "the essential elements of the statutory tort have yet to be fully defined by our courts" (*Bigstone*, at para. 19).

169 Ottenbreit J.A. held that if the claim alleges (i) the action is pursuant to the *Saskatchewan Privacy Act*; (ii) the impugned conduct falls within the arguable scope of the *Saskatchewan Privacy Act*; (iii) the privacy is that of a person; (iv) the type of privacy interest is generally identifiable; and (v) the violation is wilful and without claim of right, a claim under privacy legislation could stand "[a]t this stage of the development of the jurisprudence respecting the *Act*" (*Bigstone*, at para. 34).

170 Consequently, I do not accept Ballantine's submission that "the privacy legislation will be of no meaningful assistance to the class". Regardless of whether such a claim can withstand a Rule 21 motion or a certification challenge under s. 5(1)(a) of the *CPA*, I cannot find these claims have a "glaring deficiency" or are "fanciful or frivolous" such that it is "fundamentally flawed" to seek relief under provincial privacy legislation for alleged wilful conduct in permitting criminal hacking of confidential information.

171 Similarly, a claim under the provincial privacy statutes also "significantly [opens] up the defendants' exposure", [13] since the class members will not have to establish proof of harm to their economic interests. Consequently, I find that it is in the best interests of the class to plead the broader breach of provincial privacy legislation.

*ii. Breach of contract and consumer protection legislation claims*

172 Ballantine submits that the Agnew-Americano claim for breach of contract is "a redundant exercise" and that "success in the claim for negligence would entitle recovery of damages by the alleged breach".

173 Similarly, with respect to the Agnew-Americano claim for breach of provincial consumer protection legislation, Ballantine submits that "[t]his is essentially a duplication of the breach of contract claim".

174 Ballantine acknowledges that there are no "fatal flaws" with either argument, but submits that these claims will generate increased costs and decrease efficiency.

175 I do not agree. I agree with the Agnew-Americano submission that the breach of contract and consumer protection claims could open the Equifax Defendants' exposure to contractual damages and other remedies, including rescission, not available under negligence claims. It would be in the best interests of the class members to plead the broader claims, resulting in a more comprehensive litigation framework.

176 I address each of those claims below.

*a. Breach of contract*

177 The basis for the breach of contract claim and the relevant pleadings are set out at paragraphs 47 and 48 above. [14] Agnew-Americano pleads that the Equifax Defendants breached their contracts with class members.

178 I agree with Agnew-Americano's submission that a breach of contract claim for the class members who had a contract with the Equifax Defendants for credit protection services is distinct from the negligence claim.

179 Ballantine submits that a finding of negligence for failure to exercise due care in protecting the financial information will be the same basis upon which a court could find breach of contract for those class members who have a contractual relationship with the Equifax Defendants.

180 However, counsel for Ballantine acknowledged at the hearing that the damages sought by class members with contractual claims (for those who paid for Equifax services) would not be available to those class members who only had negligence claims through exposure of their personal information stored on Equifax's computer system.

181 On that basis, I find that the contractual claim broadens the Equifax Defendants' exposure to damages and should proceed in the best interests of the class members who had a contractual relationship with the Equifax Defendants.

*b. Breach of consumer protection legislation*

182 With respect to the claims under consumer protection legislation, I agree with Agnew-Americano that those claims also provide a broader basis for potential liability of the Equifax Defendants. They are not simply duplicative as submitted by Ballantine.

183 I adopt the following summary of the consumer protection claim from the Agnew-Americano factum:

> The Sotos claim also claims consumer protection legislation remedies on behalf of persons having a breach of contract claim. It alleges that Equifax made representations that they maintained strict security safeguards, but failed to do so. Subsection 14(1) of the *Consumer Protection Act, 2002* [S.O. 2002, c. 30, Sch. "A"] states that it is "an unfair practice for a person to make a false, misleading or deceptive representation." Subsection 14(2) states that "[w]ithout limiting the generality of what constitutes a false, misleading or deceptive representation, the following are included as false, misleading or deceptive representations: 1. A representation that the [ . . . ] services have [ . . . ] benefits or qualities that they do not have. 3. A representation that the [ . . . ] services are of a particular standard, quality, [ . . . ] if they are not." Consistent with the scheme of the CPA, based on the existence of these unfair practices, the Sotos claim seeks remedies pursuant to the statute.

184 Section 7(1) of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A (the "*Consumer Protection Act, 2002*") provides that the rights under that Act exist despite any agreement or waiver to the contrary. The remedies under the *Consumer Protection Act, 2002* include rescission and any remedy that is available at law, including damages (ss. 18(1) and 18(2) of the *Consumer Protection Act, 2002*).

185 Rescission may be available under the *Consumer Protection Act, 2002* if the breach is established, even if it might not be available as a contractual remedy.

186 In contrast, under contract law, "[d]amages arising out of breach of contract are governed by the expectation of the parties at the time the contract was made" (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 (S.C.C.), at para. 19).

187 Consequently, I accept the Agnew-Americano submission that the available remedies under the *Consumer Protection Act, 2002* "could be important to the extent that Equifax seeks to plead or rely on defences to the contractual claim like part performance to argue that class members obtained the benefit of the bargain despite the privacy breach".

***iii. Conclusion***

188 For the above reasons, I find that the Agnew-Americano Claim raises viable causes of action that broaden the Equifax Defendants' exposure. It is in the best interests of the class members to plead the broader claims, resulting in a more comprehensive litigation framework. This factor is important to my conclusion that Agnew-Americano have carriage of the class action.

189 As this is not a Rule 21 motion, or an issue of certification under s. 5(1)(a) of the *CPA*, I make no findings as to whether any of the proposed claims could withstand such attack. Fairness to the defendants requires the court to limit its conclusion to the "glaring deficiencies" or "fanciful or frivolous" tests.

**iii) Factor 2: The resources and experience of counsel**

*a) The applicable law*

**1. The positions of the parties**

190 Counsel for Agnew-Americano and Ballantine disagreed as to whether the court ought to engage in a review of the experience of counsel proposed to have carriage of the action.

191 Ballantine relies on cases that held that the court should not engage in a "beauty pageant". Ballantine submits that the "experience" factor is neutral since both law firms have the capabilities to act as litigation counsel.

192 Agnew-Americano submits that the court can consider the experience of counsel under the *Mancinelli* test.

193 For the reasons that follow, I accept the position of Agnew-Americano and find that the experience of counsel is a relevant factor which can be considered.

**2. The relevant legal principles**

194 The court in *Mancinelli* set out the factor of "the resources and experience of counsel" as a separate factor to consider in a carriage motion. This is distinct from the factor of the nature and scope of the causes of action and theories advanced by counsel in the respective claims.

195 Given the guiding principles in *Mancinelli* that (i) the court must consider the "best interests of the class"; (ii) the critical question is "[w]hich of the competing actions is more likely to advance the interests of the class?"; and (iii) the court has a duty to protect class members and a broader duty to the administration of justice when approving counsel in a carriage motion, it would be counter-intuitive that counsel's experience or resources should be ignored when there is evidence of a difference between counsel proposed to have carriage of a class action.

196 Similarly, it would be counter-intuitive to ignore objective evidence of a difference in experience given Winkler J.'s statement in *Setterington* (at para. 26) that "the court is required to consider first and foremost the interests of the silent class members".

197 Ballantine relies on the statement of Belobaba J. as motion judge in *Mancinelli-SCJ* that "the task of the court is not to choose between the competing firms according to their relative resources and expertise; rather, it is to determine which of the competing actions is more or most likely to advance the interests of the class" (*Mancinelli — SCJ*, at para. 12).

198 In *Mancinelli-SCJ*, the court had no concern about any differences between the experience of counsel relevant to which action would most likely advance the interests of the class. Belobaba J. held that "any *one* of the elite class action firms involved herein — Koskie Minsky, Siskinds, Sutts Strosberg, Rochon Genova or Merchant — have more than enough expertise and experience *on their own* to do an excellent job as carriage counsel" [15] (*Mancinelli — SCJ*, at para. 13). [Italics in original.]

199 Ballantine also relies on the comment of the court in *Mancinelli* which rejected the appellants' submission that the motion judge "should have engaged in a detailed weighing of the resources and expertise of the two counsel groups", including "the presence of Merchant in the consortium" (*Mancinelli*, at para. 68).

200 Ballantine relies on the above comments to submit that in the present case I should find that the experience of the lawyers proposed for the class action is a neutral factor. I do not agree.

201 If the court is satisfied that either legal team proposed to have carriage of the class action can equally represent the interests of the class members, the court should not "choose between the competing firms according to their relative resources and expertise". However, I do not take Belobaba J. to conclude that the court should ignore the experience of counsel if there is evidence relevant to "which of the competing actions is more likely to advance the interests of the class" (see *Mancinelli-SCJ*, at para. 12).

202 The comments of Belobaba J. in *Mancinelli — SCJ* are consistent with the analysis of Perell J. in *Sharma v. Timminco Ltd.* (2009), 99 O.R. (3d) 260 (Ont. S.C.J.) ("*Sharma*"). In *Sharma*, Perell J. stated that "for the case at bar", it was not helpful to hold a "beauty pageant", "where the rival law firms describe their current talents and past accomplishments" (*Sharma*, at para. 18). In *Sharma*, Perell J. found that the "the best interests of the class members could be satisfied by choosing either firm to be class counsel" since Perell J. was satisfied that both firms were "capable of providing a similar quality of service to the class" (*Sharma*, at paras. 83-86).

203 Consequently, the Ballantine submission that "The reality is that the 'resources and experience of counsel' factor will often be a neutral and unhelpful metric in the comparative analysis", is based on case law where the court was satisfied on the evidence that any of the proposed law firms (or lawyers if such evidence was led) would equally have been able to represent class members in the proposed class action (see also *Kowalyshyn*, at para. 183).

204 However, there is a difference between (i) the court selecting a winner of a "beauty pageant" between lawyers or law firms who both satisfy the court that they would be equally capable of leading a class action, and (ii) the court finding a difference between the relevant expertise of the lawyers proposed to have carriage of the class action. In the latter situation, the "experience" factor set out by the court in *Mancinelli* must be considered.

205 There may also be a difference between the expertise of a law firm and the expertise of the lawyers proposed to act on a class action. If there is evidence before the court as to relevant differences in experience between proposed counsel for the litigation, it would be contrary to the principles and factors in *Mancinelli* to ignore such a difference.

206 It is not "mudslinging" (as that term was used by Edmond J. in *Thompson v. Manitoba (Minister of Justice)*, 2016 MBQB 169 (Man. Q.B.), at para. 55) to lead evidence of the experience of the lawyers who are proposed to have carriage of the case.

207 Further, leading evidence about who will be counsel on the action is consistent with the obligation on lawyers on a carriage motion to set aside the adversarial system and instead provide the court with all relevant information, regardless of whether it assists one law firm over the other.

208 In *Setterington* (at para. 26), Winkler J. set out the general principle that "[i]t is incumbent upon representative plaintiffs and their counsel seeking [carriage orders] to make full disclosure to the court of all factors that could logically impact on the determination of the motion." [16] Winkler J. held (*Setterington*, at para. 26):

> **On a carriage motion, much as in the case of a settlement approval hearing, there is a requirement of utmost good faith on the part of counsel to forego reliance on the adversarial system as a fact-finding mechanism and place all material facts which can have any bearing on the issues before the court, whether these may be against their interests or not**. It would be to ignore the reality of class proceedings to disregard the fact that counsel granted carriage of a class proceeding stand to reap a substantial fee if successful. **Accordingly, there must be a concomitant obligation to ensure full and frank disclosure of all material facts because the protection of the interests of the silent class members, in those circumstances, demands no less.** [Emphasis added.]

209 If the court must consider "all factors that could logically impact on the determination of the motion" (*Setterington*, at para. 26) and the court "has a duty to protect class members and a broader duty to the administration of justice when approving counsel in a carriage motion" (*Mancinelli*, at para. 72), then the experience of proposed counsel may be a relevant factor.

210 Also, contrary to Ballantine's submission, the court in *Mancinelli* held that past misconduct of counsel (and in particular, Anthony Merchant) could be considered. The court found no basis to interfere with Belobaba J.'s review of the evidence before him on the carriage motion, which included the past misconduct (*Mancinelli*, at para. 72).

*b) Application of the law to the facts of the case*

**1. The experience of counsel**

211 Counsel agreed at the hearing that the "resources" of the respective law firms was a neutral factor. [17]

212 Both parties rely on their experience as law firms in matters relating to (i) the loss or breach of personal information and (ii) class action litigation. In that regard, the factor is neutral, as both firms have considerable experience.

213 However, the court can review the experience of the individual lawyers on the proposed team [18] of lawyers to determine if, on the evidence, there is a distinction relevant to carriage of the class action.

214 Consequently, I review the experience of the members of the team of lawyers proposed to be involved in the litigation, and in particular those with primary carriage of the file.

215 Based on the evidence I review at paragraphs 56 to 58 above, the expertise of the proposed Sotos team cannot be impugned. Ballantine takes no issue with their experience and agrees that the Sotos lawyers are qualified to act as counsel in this matter.

216 The expertise of the proposed Sotos class counsel is confirmed by the evidence as to (i) their role as counsel in significant breach of privacy class actions, (ii) independent rankings for each of Sterns, Sokolov, and Leclerc as plaintiffs' class action counsel, (iii) the lawyers' record of involvement in class action litigation including summary judgment, Rule 21, and jurisdictional motions, (iv) experience as speakers on privacy law issues, and (v) leadership roles in class action and civil litigation bar association organizations.

217 In contrast, there is no evidence of any involvement by Vuia in any cases related to the issue of the loss of personal information which is central to the present case. Other than a general statement that she has "participated" in "dozens of class actions", the exclusion of privacy matters [19] from the description of her practice [20] is telling: there is no evidence before the court of her experience relevant to the issues in the present action on which she is to share "primary carriage".

218 Further, Ballantine filed no evidence as to Vuia's background or years of experience. It was Agnew-Americano (through Seddigh) who led evidence that Vuia was called to the bar in 2016. Consequently, the court cannot have the confidence that the class members would be equally served by Vuia as one of two counsel with "primary carriage of this matter".

219 In no way do I seek to impugn the abilities of Vuia. However, on a motion where the court has a "duty to protect class members and a broader duty to the administration of justice when approving counsel in a carriage motion" (*Mancinelli*, at para. 72), the objective difference between the experience of Vuia and that of the Sotos lawyers is compelling.

220 There is no evidence that any of the other lawyers proposed for the Ballantine legal team (except Tibbs) have any experience in breach of privacy cases, again a significant difference with the lawyers from Sotos proposed by Agnew-Americano.

221 With respect to Tibbs, the only reference to his privacy law experience is a general comment that he "has been involved in the preparation of pleadings, affidavits, and certification records in dozens of class actions, including privacy breach actions". In light of the evidence as to the expertise of the proposed Sotos lawyers, such a general statement about Tibbs' experience, without any evidence of prior retainers, professional experience, or independent rankings, does not establish that the experience factor is neutral.

222 Consequently, this is not a situation of picking a "winner" in a "beauty pageant" when faced with law firms and lawyers with proposed carriage of the case of similar experience.

223 On the one hand, the evidence about the two lawyers proposed to have primary carriage of the Ballantine Action (in a proposed team of six lawyers) consists of (i) a bald assertion that one of the lawyers (Tibbs) has been "involved" in "privacy breach class actions" and (ii) the other lawyer (Vuia) was called to the bar in 2016 with no evidence of experience in privacy

law matters. There is no evidence that any of the other four lawyers on the proposed team have privacy law experience, and Simoes proffers only general comments as to their experience.

224 On the other hand, Agnew-Americano's evidence is that carriage of her class action will be conducted by three senior counsel with experience both in privacy law cases and in class action litigation in which they had active or leading roles on pivotal certification and jurisdictional issues.

225 Ballantine submits in her reply factum that whoever is lead counsel "would not change the real-world reality that a great deal of work on the file would necessarily be done . . . by more junior associates and assistants" and that "each task will generally be completed by the least expensive individual with the competence to do so". I agree that such an approach is typical for significant litigation. However,

> (i) work would be done under the direction of lead counsel, whose expertise is pivotal to the court's level of confidence that the best interests of the class would be advanced; and
>
> (ii) the experience of the proposed members of the team can be considered by the court if there is evidence to that effect.

226 Consequently, whether experience is considered of an individual lawyer or the team of lawyers with proposed carriage, the members of the Sotos team have significantly more relevant experience to best advance the interests of the class members.

227 Ballantine submits that the factor of experience of counsel is one of "optics" alone. Ballantine's approach is well-illustrated by her submission in her factum that "we could have just as easily named — to take an example only — Roch Dupont as primary counsel of record" as a method of satisfying the court of the experience factor. I find Ballantine's submission contrary to the law and disconcerting.

228 It would be improper to list a lawyer as having a lead counsel role when that is not the case, but rather just for "optics". It is not a question of randomly "naming Mr. Dupont as primary counsel" [21] as submitted by Ballantine. Rather, it is a question of leading evidence, based on full and fair disclosure to the court, to satisfy the court of the expertise of the proposed counsel for the case.

**2. Factors relating to the conduct of counsel**

229 While not necessary to my analysis above as to the relative experience of the proposed counsel for the actions, the failure of Simoes to disclose all material facts before the court (as required under *Setterington*) is also a matter relevant to the choice of counsel.

230 In particular, as I discuss below in my consideration of the other class actions brought in more than one jurisdiction, Simoes did not disclose any information about the Saskatchewan and British Columbia litigation on the same matter brought by Merchant (even though Simoes expressly referred to the Quebec litigation). That same failure to disclose the existence of other litigation was the subject of criticism of Winkler J. in *Setterington*, yet Merchant chose to take the same non-disclosure approach before this court (see *Setterington*, at para. 26).

231 Counsel who continue to ignore disclosure obligations already the subject of prior court criticism raise a legitimate concern as to whether that counsel should be selected to represent the interests of class members.

232 Agnew-Americano submitted that the court should consider the comments of the courts and past disciplinary proceedings affecting Anthony Merchant, as well as the comments of Belobaba J. in *Quenneville* about Tibbs.

233 Ballantine relies on the court's comment in *Mancinelli* that the motion judge did not err in the weight he attributed to "the presence of Merchant in the consortium" (*Mancinelli*, at para. 68). However, this submission does not support a conclusion that the conduct of Anthony Merchant or Tibbs cannot be considered by the court.

234 The court held in *Mancinelli* that "prior misconduct" of counsel could be a factor relevant to discharge its duty to protect class members (*Mancinelli*, at para. 72). If I were to consider that factor, the findings of Belobaba J. as to Tibbs' conduct before the Ontario courts would further weigh against granting carriage to the Merchant firm, as would the conduct of Anthony Merchant, when compared to the uncontested evidence of no findings of misconduct against any of the members of the Sotos team.

235 However, given the significant discrepancy in experience which already exists between which counsel can best advance the interests of the class members, it is not necessary for me to rely on the above conduct as a factor.

236 For the above reasons, on the evidence in the present case, I find that the factor of experience of counsel favours carriage for Agnew-Americano.

***iv) Factor 3: The state of the action including preparation and class engagement***

*a) The applicable law*

237 The extent of preparation is a factor that can be considered by the court on a carriage motion (*Mancinelli*, at para. 51). As Strathy C.J.O. held (*Mancinelli*, at para. 52):

> But since only one firm will go into battle, it is not unreasonable to ask which has done the best job in preparing itself for battle and whether its preparation has yielded benefits for the class. And this is precisely what the motion judge did.

238 In the present case, it is early in the proceedings. However, there are some differences between the state of the action including preparation and class engagement, I address the relevant evidence below.

*b) Application of the law to the facts of the present case*

239 The evidence at paragraphs 74 to 83 above demonstrates that Sotos has taken the following steps in the action:

(i) prepared for a motion for interim relief to compel the Equifax Defendants to give direct notice to affected Canadians that a data breach occurred in relation to their personal information,

(ii) prepared a certification record that is ready to be filed following the carriage motion, and

(iii) prepared a thorough update to class members about the proposed class action and steps consumers at risk of the data breach could take to protect themselves from identity theft.

240 The evidence at paragraphs 84 to 89 above demonstrates that Merchant:

(i) has not finalized the certification motion record but proposes to serve it within 60 days of carriage being determined, and

(ii) set out two general paragraphs on its website to describe the four actions it has brought in British Columbia, Saskatchewan, Ontario and Quebec.

241 None of the above factors are determinative of who should have carriage of the matter. However, on the evidence, the Sotos firm has done more in relation to the litigation and class engagement.

242 There is no evidence from the Equifax Defendants [22] as to whether their decisions to:

(i) issue a press release on September 19, 2017 to advise Canadian customers of the data breach, immediately after Agnew-Americano sought a case conference,

(ii) notify affected Canadians, posted on the Equifax Canada website on October 16, 2017, a day before the scheduled case conference, and

(iii) send letters out within days of the case conference,

were affected by the interim relief sought and steps taken by Sotos in the Agnew-Americano Action. While the timing of the decisions could support such an inference, I make no finding on the evidence before me.

243 However, there is also no evidence to support Ballantine's submission that the steps taken by Sotos with respect to requiring the Equifax Defendants to give direct notice to affected Canadians were irrelevant and a waste of resources.

244 The steps taken by Sotos were appropriate to protect the interests of the class members whose personal information was accessed by hackers. The decision to pursue that relief was reasonable, and important for class members who unlike Equifax customers in the United States, did not know if they had been personally affected by the data breach.

245 Also, the level of detail in the Sotos e-mail update, as compared to the "bare bones" approach of the Merchant website, demonstrates class engagement by the Sotos firm that is relevant to the carriage issue.

246 Ballantine submitted that the decision in *Quenneville* prohibits, or cautions against, communications by counsel with the class before the carriage motion is decided. Ballantine submitted in her factum that, as a result of Belobaba J.'s comments in *Quenneville*, "a lawyer or a firm could be fairly critiqued for actively communicating with putative class members prior to carriage being determined or certification achieved and *not* fully informing them of the existence of, in this case, competing proposed class proceedings". [Italics and emphasis in original.]

247 Ballantine also submitted in her factum that:

> Given our experience in *Quenneville*, we have deliberately chosen to limit communication with the general public regarding this action until carriage has been resolved, [23] to minimize the potential for confusion among the prospective class.

248 I do not agree with Ballantine's interpretation of *Quenneville*.

249 In *Quenneville*, the issue before Belobaba J. was the conduct of Tibbs and the Merchant firm after carriage was decided. Belobaba J. held (*Quenneville*, at paras. 2-7, 10, and 15-16):

(i) After the Merchant firm was not granted carriage, Merchant sent an email "blast" inviting recipients to retain the firm for either an individual joinder action or a class proceeding;

(ii) At an immediate motion to address the email blast, Belobaba J. "suggested to Mr. Tibbs that the MLG email blast may well be misleading and in breach" of the carriage order;

(iii) In his endorsement from the motion, Belobaba J. concluded that Merchant's breach of the carriage order was "deserving of censure and condemnation" and awarded costs to the plaintiffs on a substantial indemnity basis;

(iv) Belobaba J. then heard a contempt motion when Merchant continued to recruit Ontario residents for the Merchant class action; and

(v) Belobaba J. characterized Tibbs' conduct as "careless, unprofessional and arguably in breach" of the carriage order, and ascribed "extreme carelessness" to Tibbs' conduct which Belobaba J. described as "disingenuous".

250 *Quenneville* does not support Ballantine's submission that counsel who seek to have carriage of a class action should not communicate with potential class members who have signed up for e-mail updates during that time.

251 With respect to the date of delivery of the certification record, I adopt the comments of Belobaba J. in *Kaplan v. Casino Rama Services Inc.*, 2017 ONSC 2671 (Ont. S.C.J.) ("*Kaplan*") that "I am not persuaded that carriage should turn on" the date of delivery of certification materials when "the more likely scenario" is that the Equifax Defendants and the representative plaintiff would have to agree on a reasonable schedule for the certification motion that could well accommodate a 60-day preparation time for the certification motion material (*Kaplan*, at para. 10).

252 The preparation and class engagement is not extensive at present. Nevertheless, I do not accept Ballantine's submission that "nothing turns on this". This factor, while not as significant, still favours carriage of the Agnew-Americano Action.

***v) Factor 4: Fee arrangements***

*a) The applicable law*

253 In *McCallum-Boxe v. Sony Corp.*, 2015 ONSC 6896 (Ont. S.C.J.) ("*McCallum-Boxe*"), Belobaba J. found that there was a practice of the Merchant firm to (i) commence class actions without a written retainer agreement in place, and (ii) enter into such non-written agreements that provided only for Merchant to seek legal fees from the defendant as part of the settlement agreement. Belobaba J. held that such a practice was "the very antithesis of what is in the best interests of the class" and was "disturbing" (*McCallum-Boxe*, at paras. 1 and 11).

254 Section 32(1) of the *CPA* requires that "[a]n agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing". In *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233 (Ont. C.A.) ("*Smith Estate*"), Juriansz J.A. reiterated the principle under s. 32(1) of the *CPA* that all class action fee agreements must be in writing (*Smith Estate*, at para. 53).

255 Section 32(2) of the *CPA* requires court approval of an agreement respecting fees and disbursements:

> An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

256 Also, in *Smith Estate*, the court held that the fee agreement must make specific reference to the requirement for class counsel to obtain court approval to seek a multiplier. Juriansz J.A. held (*Smith Estate*, at para. 64):

> Nowhere else in the agreement is it stipulated that class counsel is permitted to bring a motion to have their fees increased by a multiplier. Recital D of the agreement merely states that "[t]he Act provides, among other things, that a Fee Agreement: . . . (d) may permit a solicitor to be paid by having a Base Fee increased by a multiplier or as a percentage of the Recovery". While this is accurate as a general statement, it does not bring the fee agreement under s. 33(4) of the CPA. It does not, as a matter of contract, "permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier".

257 In *Smith Estate*, the court further found that it is not sufficient for the retainer agreement to make clear that the agreement must be approved by the court. The retainer agreement must expressly indicate that the court shall determine what fees will be allowed to counsel (*Smith Estate*, at para. 66).

*b) Application of the law to the facts of the present case*

258 Agnew-Americano raises several concerns about the Ballantine retainer agreements. [24]

259 Merchant commenced the Ballantine Action without a written retainer agreement from their client. That agreement was dated November 2, 2017, the date the motion material was to be exchanged between counsel, and almost two months after the Ballantine Claim was issued.

260 Merchant's conduct repeats the same "disturbing" practice already criticized by Belobaba J. in *McCallum-Boxe*. Section 32(1) of the *CPA* requires that such an agreement be in writing. I adopt Belobaba J.'s view that it is improper for counsel to

have a client serve as a representative plaintiff without the client considering the consequences of acting as a representative plaintiff based on a written retainer agreement.

261 The Merchant approaches in the present case and in *McCallum-Boxe* encourage a rush to the courthouse with a claim the instant a potential class action arises, with a representative plaintiff who has not received the written fee agreement required by law, and has not had the opportunity to consider the legal consequences of such a written agreement. Consequently, the present Ballantine fee agreement remains antithetical to the interests of the proposed representative plaintiff, and contrary to both s. 32(1) of the *CPA* and settled law in *Smith Estate*.

262 I contrast the Ballantine retainer agreement with that of Agnew-Americano, in which Sotos ensured that a written fee agreement was in place with Agnew-Americano prior to commencing the action.

263 Further, contrary to the conclusion of the court in *Smith Estate* and under s. 33(4) of the *CPA*, the Ballantine retainer agreement does not set out that Merchant "is permitted to bring a motion to have their fees increased by a multiplier". The court in *Smith Estate* was clear that an agreement which only states that a solicitor may obtain such fees without indicating that a court application is required is in violation of the *CPA* (*Smith Estate*, at para. 64).

264 The Ballantine retainer agreement states only that Merchant's legal fee "will be calculated as a 25% fee of the total value of the amount recovered, or on the basis of a 3 times multiplier of my lawyers [*sic*] regular hourly rates for the time spent pursuing this class action litigation, whichever is higher".

265 Further, while s. 32(2) of the *CPA* requires all fee agreements to be approved by the court, the Ballantine retainer agreement improperly states that "any fee awarded pursuant to this Agreement *may* be subject to approval of the court". [Emphasis added.] This permissive language is again contrary to the mandatory language required (*Smith Estate* , at para. 66).

266 In contrast, in the Agnew-Americano retainer agreements, Sotos advises the clients that:

> It is understood that Class Counsel's legal fees and disbursements **shall** be subject to approval by the court and that Class Counsel may make any motion for approval of this agreement and their fees and disbursements. [Emphasis added.]

267 Ballantine submits that the above issues should not be a factor because those concerns are "technicalities and, in the final analysis, neither firm has an advantage over the other in this respect". I do not agree.

268 The retainer agreement requirements under the *CPA* exist for the protection of the representative plaintiff and the members of the class. Ballantine entered into litigation without a written retainer agreement and then signed a written retainer agreement without it setting out important requirements under the *CPA*.

269 Counsel for Ballantine did not dispute that the Merchant retainer agreement with Ballantine was (i) signed after the Ballantine Claim was issued and (ii) subject to the above criticisms.

270 Consequently, I do not accept Ballantine's submission that "Nothing significant or meaningful, in our respectful submission, turns on these alleged technical deficiencies". They are not technical deficiencies.

271 Ballantine submits that the Agnew-Americano retainer agreement [25] is "hardly a specimen of perfection", raising three technical breaches of Reg. 195/04 of the *Solicitors Act*, R.S.O. 1990, c. S.15. Those breaches relate to (i) the proper title of the retainer agreement (s. 1(1)(a) of Reg. 195/04), (ii) the failure to include the firm's and lawyer's name, address, and telephone number (s. 2(1) of Reg. 195/04), and (iii) the agreement not including a statement that "the solicitor shall not recover more in fees than the client recovers as damages or receives by way of settlement" (s. 3(1) of Reg. 195/04).

272 However, Ballantine concedes that "We fully acknowledge that, as drafted, MLG's retainer agreement is also lacking in these [technical] respects".

273 Ballantine does not submit that the Agnew-Americano retainer agreement breached the *CPA*.

274 The technical breaches of Reg. 195/04 which are common to both parties' retainer agreements cannot be classified in the same manner as the substantive breaches in the Ballantine retainer agreement of both the *CPA* and case law in which Ontario courts have directly commented on Merchant's practice with respect to retainer agreements. The same substantive defects recur in the present case.

275 All of the above flaws in the Ballantine retainer agreement support carriage to Agnew-Americano. The continued pattern of Merchant either being unaware of or ignoring the requirements under both the *CPA* and the settled law raises concerns that the Ballantine Action would not best advance the interests of the class members in this litigation.

***vi) Factor 5: Class definition***

276 Counsel for Ballantine acknowledged at the hearing that the class definition in the present case is intertwined with the nature and scope of the causes of action pleaded. Given that the only aspect of the class definition challenged at the hearing related to those Equifax customers with contractual claims, the Agnew-Americano class definition would be appropriate given my finding above that the breach of contract and consumer protection legislation claims are not duplicative.

277 I find the proposed class definition preferable in the Agnew-Americano Claim, for the reasons I review below.

*a) The applicable law*

278 It is within the discretion of the court to narrow the class definition based on the evidence at the certification motion, so an over-inclusive class definition which can be amended as a result of the certification process ought not to be determinative for a carriage motion. Perell J. stated in *Kowalyshyn* (at para. 215):

> Generally speaking, having regard to the goals of class actions to provide access to justice, behaviour modification, and judicial economy, more serious than an over-inclusive Class Membership, which can be pruned, is an under-inclusive definition. One, however, cannot be definitive about the extent of a class definition because class size involves several concerns and the nature of the particular class action makes a difference. In the immediate case, in my opinion, Ms. O'Brien's class definition is preferable to Ms. Kowalyshyn's but Ms. Kowalyshyn's is not objectionable.

279 The class definition will identify those with potential claims against the defendants, will help to define the parameters of the action, and will describe those who are entitled to receive notice of certification if the action is certified. Any person's membership in the class must be determined by stated, objective criteria (*Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58 (S.C.C.), at para. 57).

*b) Application of the law to the present case*

280 As in *Kowalyshyn*, neither class definition in this matter is "objectionable". Each class definition reflects the nature and scope of the proposed claims from each party.

281 In the Agnew-Americano Claim, the class definition was modified from the initial claim. It now includes as part of the class those persons in Canada "whose personal information was exposed to appropriation by unauthorized persons (i.e. "hackers") as a result of a security breach occurring between May 1, 2017 and August 1, 2017". The revised class definition in the Agnew-Americano Claim is similar to the proposed class definition in the Ballantine Claim of persons in Canada "who had, at any time prior to September 7th, 2017, personal or credit data collected, and stored by Equifax and who were subject to risk of data loss as a result of the breach which occurred between May and July 2017".

282 The Oxford English Dictionary defines "expose" as "cause someone to be vulnerable or at risk". [26] Consequently, both definitions encompass persons whose information was placed at risk by the impugned conduct of the Equifax Defendants.

283 I do not agree with Ballantine that the group of proposed class members with contractual claims in the Agnew-Americano Action is unnecessary as a subclass.

284 By proposing a class of members with contractual relationships, the class definition expands the class to those who have a cause of action for (i) breach of contract because the "Privacy Policy" statement of strict security was allegedly breached (assuming contractual damages can be proven) or (ii) claims under the consumer protection legislation for rescission (or damages) on the basis of a false representation. In either event, these contractual class members have a potential remedy which may not be available to those members who only have a negligence claim.

285 Consequently, I do not find that the Agnew-Americano class definition is "over-inclusive", "unnecessary" or "duplicative".

286 Even if there was a need to create subclasses as a result of the breach of contract and consumer protection claims, subclasses are provided for in the *CPA* and are frequently certified (see *Da Silva v. 2162095 Ontario Ltd.*, 2016 ONSC 2069 (Ont. S.C.J.), at paras. 10-11; *578115 Ontario Inc. v. Sears Canada Inc.*, 2010 ONSC 5673 (Ont. S.C.J.), at paras. 7-8).

287 Section 6 (5.) of the *CPA* states that:

> The court shall not refuse to certify a class proceeding solely on any of the following grounds:
>
> 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

288 Consequently, I prefer the class definition proposed in the Agnew-Americano Claim.

***vii) Factor 6: Interrelationship of class actions in more than one jurisdiction***

*a) The positions of the parties*

289 Ballantine submits that this factor favours carriage for the Ballantine Action, since the Merchant firm is counsel in class actions brought in the same matter in Saskatchewan, Quebec, and British Columbia. A national class is sought in both the Saskatchewan and British Columbia actions, while the Quebec claim seeks only to certify a Quebec class.

290 Simoes did not disclose the existence of the Saskatchewan or British Columbia litigation in his first affidavit. Rather, Seddigh disclosed the existence of those actions in his affidavit.

291 In his second affidavit, Simoes took the position that (i) the Saskatchewan and British Columbia filings were required to preserve limitation periods; and (ii) the Quebec filing was required to address Quebec practice that "often proceeds on its own track due to the differing legal system and principles which apply" since "Quebec civil procedure rules require that the Quebec courts consider, first and foremost, the interests of Quebec class members".

292 Agnew-Americano submits that this factor favours carriage for her action, since (i) Ballantine's intentions with respect to proceeding on the Ontario class action are not clear; (ii) bringing duplicative class proceedings in multiple jurisdictions which counsel does not intend to pursue is an abuse of process and unnecessary to protect limitation periods; and (iii) there is no evidence that Sotos could not work cooperatively with other counsel.

*b) The applicable law*

**i) The intentions of the party to proceed are relevant**

293 In *Kowalyshyn*, Perell J. reviewed the issues arising in relation to class actions seeking certification of a national class brought in multiple jurisdictions. Justice Perell did not find that the mere bringing of an action by counsel in another jurisdiction gave that same counsel an advantage towards carriage.

294 Instead, Justice Perell considered the evidence before him that "Ms. O'Brien prefers to have her ally, Mr. Catucci, prosecute the Québec action while she parks her Ontario action", while in the Kowalyshyn action, "Ms. Kowalyshyn prefers

to prosecute the Ontario action and park the British Columbia proceedings while prosecuting the Ontario action" (*Kowalyshyn*, at para. 225).

295 The existence of multiple class actions in different jurisdictions is not a basis to award carriage to a law firm that managed to file multiple claims. Such an argument would transform a carriage motion into an indirect stay motion, allowing counsel to park litigation in multiple jurisdictions in order to have full control over a national class. Such a result would neither be in the best interests of class members nor fair to defendants who should be able to participate in any consideration of stay issues.

296 Perell J. held that "there are similar but not identical class actions in British Columbia, Ontario, and Québec" (*Kowalyshyn*, at para. 225).

297 Perell J. held that the O'Brien action was, in effect, indirectly seeking a stay of the Ontario litigation in favour of the Quebec proceedings, without bringing such a motion before the court. Consequently, Perell J. granted carriage to the Kowalyshyn action subject to a future motion for a stay in which the defendants could participate (*Kowalyshyn*, at paras. 227-30 and 269-73).

298 Fairness to the defendants is a core consideration of the carriage motion (*Mancinelli*, at para. 13). Justice Perell's focus on this factor when addressing the interjurisdictional issue in *Kowalyshyn* is consistent with the requirements for a carriage motion.

299 In other words, if the court has concerns that a party is using a carriage motion to indirectly stay Ontario proceedings, it would be a factor against granting carriage to that party.

**ii) The existence of Quebec litigation does not mean that carriage should be granted to the same law firm**

300 The existence of Quebec litigation brought by the same firm seeking carriage in Ontario is not, on its own, a basis to prefer carriage. As Perell J. reviewed in *Kowalyshyn*, it is the intentions of the parties with respect to those actions that ought to be reviewed by the court.

301 If a Quebec court certifies the action on behalf of persons in Quebec, a plaintiff can amend the Ontario class definition to exclude Quebec residents (*Shah v. LG Chem, Ltd.*, 2017 ONSC 7206 (Ont. S.C.J.), at para. 14). I agree with the Agnew-Americano submission that "[t]here is nothing unworkable in having a national class action certified in Ontario only to then have another class action certified in Quebec".

302 Further, just because a law firm's Quebec office succeeds in being the first to file in Quebec does not mean that the firm should be granted carriage in Ontario. In *Wilson v. LG Chem Ltd.*, 2014 ONSC 1875 (Ont. S.C.J.) ("*Wilson and Shah*"), Conway J. held that "there is no reason why different firms in Ontario and Québec cannot work cooperatively with one another in prosecuting their proposed class actions" (*Wilson and Shah*, at para. 28).

**iii) Abuse of process/limitation periods**

303 At the hearing, Agnew-Americano submitted that Merchant had a "practice" of filing class actions in multiple provinces, and that such conduct has been found by courts to constitute an abuse of process. Agnew-Americano submitted that this was a further basis to award carriage to the Agnew-Americano Action.

304 In *Bancroft-Snell v. Visa Canada Corp.*, 2016 ONCA 896 (Ont. C.A.) ("*Bancroft-Snell*"), Blair J.A. held that "[t]here are many cases as well where the courts have attempted to discourage [ . . . ] multiple class actions, for the purpose of securing carriage of the national class proceedings. Coincidentally, many have involved the Merchant Law Group" (*Bancroft-Snell*, at para. 83).

305 In *BCE Inc. v. Gillis*, 2015 NSCA 32 (N.S. C.A.) ("*BCE*"), the Nova Scotia Court of Appeal held that it was an abuse of process to file a claim with no intention to advance the litigation. Scanlan J.A. commented on Merchant's conduct in that case (*BCE*, at paras. 38-41):

> **This case involves one of nine virtually identical national class actions brought on behalf of the same plaintiffs, by the same firm; MLG. I leave it to other courts to determine whether that can ever be justified. I am satisfied that there must be an intention to pursue the action in the jurisdiction in which it was filed.** MLG's correspondence with the prothonotary in Nova Scotia made it clear that the intention was to pursue the Saskatchewan claims seeking national certification in that province. **Dr. Gillis is bound by the national litigation strategy adopted by MLG.**
>
> I also refer to the comments of Lord Wolfe in *Grovit v. Doctor*, [1997] 2 All E.R. 417 (Eng. H.L.) at p. 424 where he says:
>
> > **The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process.** [ . . . ]
>
> Absent an intent to prosecute the Nova Scotia claims, bringing an action in Nova Scotia serves no proper purpose. **It is improper to file a claim in multiple jurisdictions, or even to file a single claim in a single jurisdiction when there is no intention to advance that litigation.** The absence of intention to prosecute the Nova Scotia claim or an attempt at re-litigation here, weighs against the respondents on the issue of abuse of process. [ . . . ] [Emphasis added.]

I refer to the comments in [*Drover v. BCE Inc.*, 2013 BCSC 1341 (B.C. S.C.)], where the Court said:

> **46 It is plain that Mr. Merchant's plan was to commence virtually identical class action proceedings in Saskatchewan, Manitoba, Ontario, Quebec, Alberta and British Columbia with the goal of certifying one national class in Saskatchewan. Once that goal had been achieved, the plan was to obtain either a settlement or a judgment on behalf of the national class. If that plan failed, one or more of the dormant actions in the other provinces would be resuscitated.**
>
> [ . . . ]

306 Scanlan J.A. concluded (*BCE*, at para. 46):

> MLG suggests that starting virtually identical actions across the country is not unusual and can be sound practice. **Commencing multiple class actions and then doing nothing is not permissible "tactics". It is an abuse of process**. [Emphasis added.]

307 In the present case, Ballantine submits that it was necessary to file multiple class actions in multiple jurisdictions to protect the limitation periods of class members. Ballantine relies on the decision in *Duong v. Stork Craft Manufacturing Inc.*, 2011 ONSC 2534 (Ont. S.C.J.) ("*Duong*"). However, in *Duong*, that issue was not before the court.

308 In *Duong*, R. Smith J. held that an Ontario class action should not be discontinued upon settlement of a British Columbia action, since that would have triggered the limitation period for Ontario residents since British Columbia had an opt-in (rather than opt-out) provision. That concern was the subject of the decision. The court did not find that it was necessary to file multiple class actions to preserve limitation periods (*Duong*, at paras. 5, 9-10, 22, 31, 39-49, and 54).

309 In *Turon v. Abbott Laboratories Ltd.*, 2011 ONSC 4343 (Ont. S.C.J.) ("*Turon*"), Strathy J. (as he then was) stated that "The practice of commencing actions solely for the purpose of tolling the limitation period has been characterized as an abuse of process" (*Turon*, at paras. 27-30). Strathy J. relied on jurisprudence in which Merchant had engaged in such a practice.

310 In *Turon*, Strathy J. commented that counsel cannot "stake out claims to national class actions in multiple jurisdictions, keep some of the actions inactive or 'parked' in some jurisdictions, and leave the defendants, the potential class members and the court up in the air about their intentions" (*Turon*, at para. 14).

311 Lederman J. dismissed the motion for leave to appeal in *Turon v. Abbott Laboratories Ltd.* (cited as 2011 ONSC 4676 (Ont. Div. Ct.)) and held (at para. 7):

> As Strathy J. found, it is not appropriate to issue class proceedings merely to toll the limitation period in Ontario for Ontario members just to keep their options open. This amounts to an abuse of process both to the proposed class and to the defendants who are held in limbo.

312 Similarly, Ball J. in *Duzan v. GlaxoSmithKline Inc.*, 2011 SKQB 118 (Sask. Q.B.) ("*Duzan*"), commented with respect to Merchant that "it is not acceptable for plaintiffs to commence class actions in multiple jurisdictions and then leave the courts and the defendants guessing as to whether and when any particular action will proceed" (*Duzan*, at para. 36). Ball J. characterized Merchant's approach as a "multijurisdictional game of class action 'whack-a-mole' [which] would in itself be sufficient basis for an unconditional stay on the basis of abuse of process" (*Duzan*, at para. 37).

313 Agnew-Americano relies on s. 28 of the *CPA* that provides "any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding" to submit that in Ontario, as an opt-out jurisdiction, all members of a proposed national class are protected from the running of the limitation period, regardless of the residence of the particular class member.

314 Agnew-Americano further relies on the decision of the Supreme Court of Canada in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 (S.C.C.), in which Côté J. held (at para. 60):

> The purpose of s. 28 *CPA* is to protect potential class members from the winding down of a limitation period until the feasibility of the class action is determined, thereby negating the need for each class member to commence an individual action in order to preserve his or her rights. [ . . . ] Once the umbrella of the right exists and is established by a potential class representative in asserting a cause of action, class members are entitled to take shelter under it as long as the right remains actively engaged. The provision is squarely aimed at judicial economy and access to the courts, encouraging the former while preserving the latter.

315 As I discuss below, I accept Agnew-Americano's submission that the uncertainty as to Ballantine's intentions, given the positions taken in the Ballantine factum and in Ballantine's submissions before the court, is sufficient to find that the existence of multiple actions brought by Merchant favours carriage for the Agnew-Americano Action.

316 Consequently, it is not necessary for me to decide the legal issue as to the effect on limitation periods against non-Ontario residents arising from a class action brought in Ontario. That issue should be addressed in the context of a matter where the issue is properly before the court.

*c) Application of the law to the facts of the case*

317 As I set out at paragraphs 106 to 108 above, Ballantine's intentions for her action are uncertain. Counsel for the Ballantine Action acknowledged at the hearing that he could not provide certainty, since the Merchant firm acted for other representative plaintiffs in the other actions and he did not have instructions. In her factum, Ballantine submits that "it is expected" her action would "take the lead".

318 I agree with the Agnew-Americano submission that:

> The result of these inconsistent statements with qualifying language gives Merchant the liberty to do whatever it wants to do with its class actions.

319 Also, Simoes did not disclose the Saskatchewan or British Columbia actions in his first affidavit. Instead, he only disclosed the Quebec action as other related litigation on which Merchant was counsel. That breach of the *Setterington* obligation of full disclosure creates further concern that the present carriage motion is an indirect attempt to stay the Ontario action.

320 There is no evidence that Sotos could not work with counsel in other jurisdictions to address issues related to national class actions. If counsel cannot accommodate interjurisdictional issues, then either Agnew-Americano or the Equifax Defendants can exercise their rights to address such issues.

321 Consequently, given the vague submissions in Ballantine's factum as to her intent to proceed with the Ontario action and Ballantine's counsel's submissions on that issue to the court, compared to the uncontested evidence that Agnew-Americano will proceed with the litigation, the interrelationship of multiple class actions in multiple jurisdictions brought by Merchant as counsel favours carriage to the Agnew-Americano Action.

**viii) Factor 7: The anonymity of the proposed additional representative plaintiff in the Ballantine Action**

322 Ballantine submitted in her factum that there is no difference between the adequacy of the proposed representative plaintiffs, except for the issue of anonymity.

323 In her factum, Ballantine submitted that while not a significant factor, the proposed anonymity of Jane Doe as an additional representative plaintiff favoured carriage by the Ballantine Action.

324 However, at the hearing, Ballantine abandoned this position and acknowledged that this factor was neutral, because Agnew-Americano was remaining as a representative plaintiff and could still represent other class members even if Jane Doe could not remain anonymous or no longer could serve as a representative plaintiff.

325 While I accept that Ballantine's concession at the hearing is proper, I briefly address this issue.

326 In her factum, Ballantine submitted that because the additional proposed representative plaintiff in the Agnew-Americano Action intends to proceed by way of pseudonym (Jane Doe), then the Agnew-Americano Action would breach s. 17(6) of the *CPA*, which requires that the notice of certification "describe the proceeding including the names and addresses of the representative parties and the relief sought". Consequently, Ballantine submitted in her factum that this factor favours carriage to her.

327 In her factum, Ballantine relied on the decisions in *L. (T.) v. Alberta (Director of Child Welfare)*, 2006 ABQB 104 (Alta. Q.B.) ("*T.L.*") and *R. v. John Doe*, 2016 FCA 191 (F.C.A.)("*Canada*"), in which the courts declined to order a publication ban on the identity of the representative plaintiff.

328 Agnew-Americano distinguished *L. (T.)* on the basis that in that case, the defendant did not know the identity of its accuser. In the present case, the Equifax Defendants have the unredacted letter the proposed representative plaintiff received from Equifax Canada, and as such, know her identity.

329 With respect to the *Canada* decision, Agnew-Americano submitted:

> [T]he rationale of the Federal Court of Appeal is not consistent with the CPA or the reality of the sheer numbers of class members in this case. While class counsel should be expected to have resources to field enquiries from class members, it is not reasonable to expect a representative plaintiff to field questions from potentially 19,000 class members (more if class members having claims for breach of contract are included). Moreover, this would not be desirable either, as class members would be expected to have questions about the legal process that a class member may not be equipped to answer.

330 The issue of whether Jane Doe will be required to proceed without a pseudonym is not before me. Counsel for the Equifax Defendants may wish to make submissions on the issue. The amendment to permit Jane Doe to be added is without prejudice to any submissions the Equifax Defendants may make once that claim is served.

331 Also, even if a representative plaintiff cannot personally assert all the claims at issue, the representative plaintiff may be entitled to represent the claims of other class members who do not have those claims (*Patel v. Groupon Inc.*, 2012 ONSC 1799 (Ont. S.C.J.), at para. 7).

332 In any event, if a proposed representative plaintiff is not approved, the court can adjourn the proceeding to substitute an appropriate representative. This issue can also be addressed early in the proceedings if necessary (see *Graham v. Imperial*

*Parking Canada Corp.*, 2010 ONSC 4982 (Ont. S.C.J.), at para. 201; *6323588 Canada Ltd. v. 709528 Ontario Ltd.*, 2012 ONSC 2985 (Ont. S.C.J.), at paras. 96-102).

333 Consequently, this factor is neutral.

**Order and costs**

334 For the above reasons, I order that carriage of the proposed class action is granted to the plaintiffs in the Agnew-Americano Action. I order the Ballantine Action to be stayed.

335 I order that no other actions be commenced in Ontario without leave of the court in respect of the subject matter of this action.

336 I also grant leave to add Jane Doe as a representative plaintiff and to make other amendments to the statement of claim in the form of the Agnew-Americano Claim, without prejudice to the Equifax Defendants.

337 As agreed by counsel, I order no costs of the motion. Counsel may provide me with a draft order approved as to form and content for my review, or if any issues arise with respect to the order, they can be addressed at a hearing to be scheduled through my assistant.

*Carriage granted to A-A plaintiff, representative plaintiff Jane Doe added, other action stayed, and declaration made that no other actions may be commenced in Ontario without leave of court in respect of subject matter of action.*

Footnotes

1 I refer to Agnew-Americano as the representative plaintiff throughout these reasons although both Agnew-Americano and Jane Doe are proposed to be the representative plaintiffs in the amended statement of claim.

2 I refer to Ballantine as the representative plaintiff throughout these reasons although it is proposed that Perisiol be substituted for Ballantine as the representative plaintiff in the amended statement of claim.

3 I refer to the law firm as "Merchant" in these reasons. To the extent the parties refer to Anthony Merchant, Q.C., a lawyer at the Merchant firm, I refer to him as "Anthony Merchant".

4 Agnew-Americano sought costs of the motion in her notice of motion but did not advance that relief at the hearing.

5 (even though both Agnew-Americano and Jane Doe would be plaintiffs in the proposed amended claim in the Agnew-Americano Action and Perisiol would be the plaintiff in the proposed amended claim in the Ballantine Action)

6 (although, as I discuss below, Ballantine did not initially disclose the existence of the Saskatchewan or British Columbia litigation and it was Seddigh who raised this issue in his affidavit on behalf of Agnew-Americano)

7 Ballantine did not pursue this submission at the hearing, as her counsel acknowledged that the factor was neutral since Agnew-Americano was remaining as a representative plaintiff who could represent the interests of all class members. Nevertheless, I briefly address this argument in my reasons.

8 (by Christopher Simoes ("Simoes"), a lawyer at Merchant)

9 This was the same day carriage motion materials were to be exchanged between the parties. I find the timing disconcerting as it suggests that a written retainer agreement was only obtained to ensure it was before the court. However, given the deficiencies in the Ballantine retainer agreement that I review below, and the fact it was signed almost two months after the Ballantine Claim was issued, I do not rely on such an inference arising from the date Ballantine signed the retainer agreement.

10 Ballantine's counsel, Merchant, relies on the same cause of action for intrusion upon seclusion in the related Saskatchewan action, pleaded in almost identical terms to the Agnew-Americano Claim. I do not rely on this inconsistency but note that Merchant in Saskatchewan does not appear to take the position advanced before me.

11 Masuhara J. did not certify the intrusion of seclusion claim under British Columbia common law, relying on the decision in *Foote v. Canada (Attorney General)*, 2015 BCSC 849 (B.C. S.C.), at para. 116, that the British Columbia privacy legislation occupied the field. I do not address this issue at this time, as the claim in the present case is viable whether at common law or under provincial privacy protection legislation.

12 The claim in Saskatchewan on which Merchant is counsel pleads breach of provincial and territorial privacy statutes. However, as I discuss at footnote 10, I do not rely on this apparent inconsistency to find that the Agnew-Americano claim for breach of provincial privacy legislation is not "fanciful or frivolous".

13 (particularly if Ballantine's submission is correct that the "field is occupied" for an intrusion upon seclusion claim by provincial legislation in some jurisdictions, an issue I do not decide)

14 As at footnote 10 above, in the Saskatchewan claim on which Merchant is counsel, the representative plaintiff pleads "breach of contract and warranty". Again, while I note the inconsistency in positions advanced, I do not take that into account for my analysis of whether the Agnew-Americano breach of contract claim is duplicative.

15 (a passage referred to by Strathy C.J.O. in *Mancinelli*, at para. 69)

16 I address this issue in more detail below given the failure of Simoes to disclose other relevant litigation in Saskatchewan and British Columbia.

17 Ballantine submitted in her factum that as a "national" firm, Merchant could provide more "face-to-face" contact with class members which "past experience has shown" to be important to class members, "particularly where data breach class actions are concerned", since "class members . . . are understandably skittish about relying on technology to address their concerns". This is an example of Ballantine making submissions to the court unsupported by any evidence (see also paragraph 247 of these Reasons). Ballantine led no evidence as to whether the Merchant firm had any face-to-face contact with class members either in this matter or in any other similar matters. At the hearing, counsel for Ballantine did not pursue this argument and agreed that the "resources" factor was neutral.

18 Ballantine relies on that distinction when she submits that the conduct of Anthony Merchant should not be taken into account because he will not be involved in the Ontario litigation.

19 Simoes only states that Vuia has experience in "dozens of class actions, including pharmaceutical class actions, automobile class actions, and tax shelter class actions".

20 Even if there had been a general reference to Vuia's experience in privacy law matters (as there was with Tibbs), there still would have been no specific evidence as to relevant matters to assist the court in contrast to the evidence in the Seddigh Affidavit.

21 In any event, there is no evidence that Mr. Dupont has any experience in privacy law cases.

22 (nor would any reasonably be expected)

23 This is another example of Ballantine making submissions to the court for which there was no evidentiary support.

24 The retainer agreements are essentially identical for Ballantine and Perisiol.

25 The Agnew-Americano retainer agreement is essentially identical to the Jane Doe retainer agreement.

26 *Oxford Dictionary*, "expose", online: https://en.oxforddictionaries.com/definition/expose.

No. 98-0184
Supreme Court of Texas

# Burrow v. Arce

997 S.W.2d 229 (Tex. 1999)
Decided Jul 1, 1999

No. 98-0184.

Argued November 18, 1998.

Decided July 1, 1999.

On Petition for Review from the Court of Appeals
230 for the Fourteenth District of Texas. *230

Kenneth Tekell, David M. Gunn, Houston, for Petitioners.

Mike A. Hatchell, Molly H. Hatchell, Tyler, William v. Dorsaneo, III, Dallas, William J. Skepnek, Lawrence, KS, Steven M. Smoot, Austin, for Respondents.

231 *231

232 *232

NATHAN L. HECHT, Justice.

The principal question in this case is whether an attorney who breaches his fiduciary duty to his client may be required to forfeit all or part of his fee, irrespective of whether the breach caused the client actual damages. Like the court of appeals,[1] we answer in the affirmative and conclude that the amount of the fee to be forfeited is a question for the court, not a jury. We reverse the court of appeals' judgment only insofar as it affirms defendants' summary judgment based on affidavits we find to be conclusory.

[1] 958 S.W.2d 239.

## I

Explosions at a Phillips 66 chemical plant in 1989 killed twenty-three workers and injured hundreds of others, spawning a number of wrongful death and personal injury lawsuits. One suit on behalf of some 126 plaintiffs was filed by five attorneys, David Burrow, Walter Umphrey, John E. Williams, Jr., F. Kenneth Bailey, Jr., and Wayne Reaud, and their law firm, Umphrey, Burrow, Reaud, Williams Bailey. The case settled for something close to $190 million, out of which the attorneys received a contingent fee of more than $60 million.

Forty-nine of these plaintiffs then filed this suit against their attorneys in the Phillips accident case alleging professional misconduct and demanding forfeiture of all fees the attorneys received. More specifically, plaintiffs alleged that the attorneys, in violation of rules governing their professional conduct, solicited business through a lay intermediary,[2] failed to fully investigate and assess individual claims,[3] failed to communicate offers received and demands made,[4] entered into an aggregate settlement with Phillips of all plaintiffs' claims without plaintiffs' authority or approval,[5] agreed to limit their law practice by not representing others involved in the same incident,[6] and intimidated and coerced their clients into accepting the settlement.[7] Plaintiffs asserted causes of action for breach of fiduciary duty, fraud, violations of the Deceptive Trade Practices — Consumer Protection Act,[8] negligence, and breach of contract. The attorneys have denied any misconduct and plaintiffs' claim for fee forfeiture.

2 *See* Tex. Disciplinary R. Prof'l Conduct 7.03(b), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A (1998) (Tex. State Bar R. art. X, § 9).

3 *See id.* Rules 1.01, 2.01.

4 *See id.* Rule 1.03.

5 *See id.* Rule 1.08(f).

6 *See id.* Rule 5.06(b).

7 *See id.* Rules 1.02, 2.01.

8 Tex. Bus. Com. Code §§ 17.41-.63.

The parties paint strikingly different pictures of the events leading to this suit:

The plaintiffs contend: In the Phillips accident suit, the defendant attorneys signed up plaintiffs *en masse* to contingent fee contracts, often contacting plaintiffs through a union steward. In
233 many instances the contingent fee *233 percentage in the contract was left blank and 33-1/3% was later inserted despite oral promises that a fee of only 25% would be charged. The attorneys settled all the claims in the aggregate and allocated dollar figures to the plaintiffs without regard to individual conditions and damages. No plaintiff was allowed to meet with an attorney for more than about twenty minutes, and any plaintiff who expressed reservations about the settlement was threatened by the attorney with being afforded no recovery at all.

The defendant attorneys contend: No aggregate settlement or any other alleged wrongdoing occurred, but regardless of whether it did or not, all their clients in the Phillips accident suit received a fair settlement for their injuries, but some were disgruntled by rumors of settlements paid co-workers represented by different attorneys in other suits. After the litigation was concluded, a Kansas lawyer invited the attorneys' former clients to a meeting, where he offered to represent them in a suit against the attorneys for a fee per claim of $2,000 and one-third of any recovery. Enticed by the prospect of further recovery with minimal risk, plaintiffs agreed to join this suit, the purpose of which is merely to extort more money from their former attorneys.

These factual disputes were not resolved in the district court. Instead, the court granted summary judgment for the defendant attorneys on the grounds that the settlement of plaintiffs' claims in the Phillips accident suit was fair and reasonable, plaintiffs had therefore suffered no actual damages as a result of any misconduct by the attorneys, and absent actual damages plaintiffs were not entitled to a forfeiture of any of the attorneys' fees. In disposing of all plaintiffs' claims on these grounds, the court specifically noted that factual disputes over whether the attorneys had engaged in any misconduct remained unresolved.

Before summary judgment was granted and less than two weeks before trial was set, plaintiffs amended their pleadings and named four additional plaintiffs. Defendants objected to the addition of these plaintiffs "due to the lack of service of citation and untimeliness of their appearance". In its summary judgment, the district court granted defendants' objection and struck the additional plaintiffs as parties.

All but one of the plaintiffs (Austin Gill, pro se) appealed. The court of appeals agreed with the district court that defendants had established that plaintiffs had suffered no actual damages caused by any misconduct, and thus it affirmed the summary judgment on all plaintiffs' claims except breach of fiduciary duty.[9] The court disagreed, however, that actual damages are a prerequisite for fee forfeiture.[10] Observing that Texas law has long recognized fee forfeiture as a remedy for an agent's breach of fiduciary duty to his principal with or without actual damages, the court discerned "no reason to carve out an exception for breaches of fiduciary duty in the attorney-client relationship."[11] However, the court refused to hold that fee forfeiture was either automatic or total for an attorney's breach of fiduciary duty to his

client;[12] rather, the court concluded that whether a fee should be forfeited, and how much of it, depends on the following factors:

9 958 S.W.2d at 251-256.

10 *Id.* at 244-249.

11 *Id.* at 246.

12 *Id.* at 249-250.

> (1) the nature of the wrong committed by the attorney or law firm;
>
> (2) the character of the attorney's or firm's conduct; (3) the degree of the attorney's or firm's culpability, that is, whether the attorney committed the breach
> 234 intentionally, *234 willfully, recklessly, maliciously, or with gross negligence; (4) the situation and sensibilities of all parties, including any threatened or actual harm to the client; (5) the extent to which the attorney's or firm's conduct offends a public sense of justice and propriety; and (6) the adequacy of other available remedies.[13]

13 *Id.* at 250.

The appeals court concluded that while the parties were entitled to have a jury determine whether the defendant attorneys breached their fiduciary duties, the court was required to determine the amount of any fee forfeiture because forfeiture is an equitable remedy.[14] Accordingly, the court of appeals reversed the summary judgment and remanded the case for a determination of whether the defendants breached their fiduciary duty to their former clients, and if so, what amount, if any, of their fee should be forfeited to plaintiffs.[15] The court also held that the four plaintiffs added by the amended pleadings should not have been struck.[16]

14 *Id.* at 251.

15 *Id.* at 251, 258.

16 *Id.* at 258.

Shortly before the court of appeals' opinion issued, plaintiffs settled with three of the defendants, Walter Umphrey, John E. Williams, and Wayne Reaud. The three remaining defendants, David Burrow, F. Kenneth Bailey, Jr., and the law firm of Umphrey, Burrow, Reaud, Williams Bailey, petitioned this Court for review. Plaintiffs (including Gill) also petitioned this Court for review.[17] We refer collectively to the petitioner-plaintiffs as "the Clients", and to the petitioner-defendants as "the Attorneys".

17 The petitioner-plaintiffs are: Carol Arce, individually and as next friend of Lyndsey Arce and Lauren Arce; Raul S. Alvarado; David H. Anderson, Jr.; Freddie Barfield; Dorothy Barfield; Mercer Black; Richard W. Bradley, Jr.; James Karl Bryant; Sandra Bryant; Stephen Lloyd Bryant; Thomas G. Butcher; Julane Campbell, individually and as next friend of Jason Campbell, Justin Campbell, and Jaret Campbell; Dennis Mike Curry; Ricky L. Dannelley; Glenn E. Deshotel; John L. Dixon; Silverrol Ferguson; Julian Garcia, Jr.; Austin Gill; Robert F. Gudz; Joe Alan Holzworth; Wesley S. Hood; Bobby Ray Jones; James M. Kerr; Stanley P. Korenek; James L. Lauderdale; Jesse H. Luna; Ronald D. Lyon; Walter E. Marbury, Jr.; John Martinez; Patrick McCourtney; Gary McPherson; Lisa McPherson; Carol D. Montelongo; Pete Montoya III; Herbert Mosley; Terry L. Mullins; Adolfo Ochoa, Jr.; Philip Owens; Jesus R. Pena; Carl T. Richardson; Glenn W. Robbins; Johnnie Rogers; Stephen R. Ross; Amanda Ann Seaman; Terry Wayne Simpson; Allen Smith, Jr.; Helga Sieglinde Thompson; Robert A. Wash; and Calvin L. Williams.

The Clients contend that the Attorneys' serious breaches of fiduciary duty require full forfeiture of all their fees, irrespective of whether the breaches caused actual damages, but if not, that a determination of the amount of any lesser forfeiture should be made by a jury rather than the

court. The Clients also contend that their lack of actual damages has not been established as a matter of law. The Attorneys argue that no fee forfeiture can be ordered absent proof that the Clients sustained actual damages, but even if it could, no forfeiture should be ordered for the misconduct the Clients allege.

We granted both petitions.[18]

18 41 Tex. Sup.Ct. J. 1318 (Aug. 25, 1998).

## II

At the outset we consider whether the Attorneys have established as a matter of law that the Clients have suffered no actual damages as a result of any misconduct by the Attorneys. The lower courts concluded that Robert Malinak's affidavit offered by the Attorneys in support of their motion for summary judgment established that they caused the Clients no actual damages. The Clients argue that Malinak's affidavit is too conclusory to
235 support summary judgment. *235

An expert's opinion testimony can defeat a claim as a matter of law, even if the expert is an interested witness, such as the defendant.[19] But it is the basis of the witness's opinion, and not the witness's qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness.[20] Thus, as we held in *Anderson v. Snider*, "conclusory statements made by an expert witness are insufficient to support summary judgment."[21] In that case, an attorney sued for malpractice moved for summary judgment supported by his own affidavit, which stated in substance:

19 *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991) (per curiam).

20 *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726-727 (Tex. 1998) (citing *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)); *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711-712 (Tex. 1997); *Schaefer v. Texas Employers' Ins. Ass'n*, 612 S.W.2d 199, 202-204 (Tex. 1980).

21 808 S.W.2d at 55.

> I have reviewed the Plaintiff's Original Petition, my file and the relevant and material documents filed with the Court, and it is clear that I acted properly and in the best interest of [my client] when I represented her, and that I have not violated the [DTPA]. I did not breach my contract with [my client], and have not been guilty of any negligence or malpractice. [My client] has suffered no damages or legal injury as a result of my representation of her.[22]

22 *Id.* at 54 (second alteration in original).

We held that this affidavit, which gave no basis for its conclusions, was nothing more than a sworn denial of plaintiff's claims and could not support summary judgment.[23]

23 *Id.* at 55.

Here, Malinak's affidavit states that his opinions are based on the pleadings and evidence in the case and his experience and training as a personal injury trial lawyer. The affidavit then avers in substance:

> It is important as an attorney in evaluating cases for settlement to consider the underlying liability facts involved, and in this instance the underlying facts with reference to the Phillips explosion of 1989. In my opinion it is critical to the settlement evaluation of the cases arising out of that explosion to consider the identity of the employer of the plaintiffs and/or decedents at the time of the explosion. Moreover, I believe that it is important to consider the elements of damages available to each Plaintiff, whether it be an injury case, or a death case, and to consider the losses that occurred to each Plaintiff as a result of the explosion. I have considered the underlying liability facts, the employment status of the Plaintiffs and/or decedents, and have considered the elements of and damage facts on each Plaintiff to render my opinions expressed in this Affidavit.
>
> The Plaintiffs were caused no damages by reason of any and/or all of the allegations made by them against the Defendants. Each and all of the Plaintiffs were reasonably and fairly compensated by way of settlement for those elements of damages that were available to them as Plaintiffs in the cases against Phillips, taking into account the employment, liability, and injury facts involved. I have not addressed issues concerning the allegations of malpractice, wrongdoings, or omissions which allegedly resulted in damages to Plaintiffs. Irrespective of the validity of those allegations, it is my opinion that the Plaintiffs have not been damaged as a result of any of these allegations, whether groundless or valid.

These assertions are as deficient as those in the *Anderson* affidavit. The affidavit says no more than that Malinak, an experienced attorney, has considered the 236 *236 relevant facts and concluded that the Clients' settlements were all fair and reasonable. Malinak's training and experience qualify him to offer opinions on the fairness of the Clients' settlements, but he cannot simply say, "Take my word for it, I know: the settlements were fair and reasonable." Credentials qualify a person to offer opinions, but they do not supply the basis for those opinions. The opinions must have a reasoned basis which the expert, because of his "knowledge, skill, experience, training, or education",[24] is qualified to state. That basis is missing in Malinak's affidavit. He does not explain why the settlements were fair and reasonable for each of the Clients. His affidavit, like the affidavit in *Anderson*, is nothing more than a sworn denial of plaintiffs' claims and no more entitles the Attorneys to summary judgment than a lawyer's equally conclusory affidavit stating that the Clients had suffered $10 million damages would entitle them to summary judgment.

24 Tex. R. Evid. 702.

In reaching the contrary conclusion, the court of appeals reasoned:

> Malinack [sic] could have addressed the issues by listing each plaintiff separately, with the relevant data concerning them. Although that may have been clearer and more direct, we are of the opinion it is not required. As written, the affidavit gave appellants enough information, by referring to the specific items relied on, to enable them to controvert it.[25]

25 958 S.W.2d at 253.

The issue, however, is not whether Malinak's affidavit was controvertible; it clearly was. The Clients could simply have filed an affidavit by an attorney who had reviewed all the relevant facts and concluded that the settlements were not fair and reasonable. There is no suggestion that such testimony was unavailable to the Clients or even hard to come by. Instead, the issue is whether Malinak's affidavit states a sufficient basis for his opinions. Malinak might have analyzed the Clients' injuries by type, or related settlement amounts to medical reports and expenses, or compared these settlements to those of similar

claims, or provided other information showing a relationship between the plaintiffs' circumstances and the amounts received. He did not do so. The absence of such information did not merely make the affidavit unclear or indirect; it deprived Malinak's opinions of any demonstrable basis. We therefore conclude that summary judgment could not rest on Malinak's affidavit.

The Attorneys argue that even if Malinak's affidavit cannot establish that the Clients suffered no actual damages, the affidavits of attorney Burrow, a defendant, and attorney Allison, can. After stating that it was his goal "to see that each of these clients were reasonably compensated for their losses sustained as a result of the Phillips explosion", Burrow, a very experienced attorney, stated:

> To that end I developed the liability facts through on site inspection, discovery, and depositions. I considered the liability facts, the appropriate elements of damages for my clients, individually evaluated their cases, and I and my partners participated in the individual settlement of our individual client cases. It is my opinion that my goal was accomplished for all of the Plaintiffs now suing me.

Attorney Allison, another highly qualified attorney, stated that he was "familiar with the processes of evaluating, trying, and settling personal injury and death cases on both sides of the docket", and that "[t]he personal injury elements of recovery and `wrongful death' case elements of recovery were individually considered toward the goal of arriving at individually evaluated settlements that would fairly and reasonably compensate each Plaintiff, such goal being accomplished in each case." Neither Burrow's nor Allison's affidavit is as detailed as
237 Malinak's. Like Malinak, Burrow *237 and Allison have substantial credentials to render expert opinions on issues of attorney practice, but their affidavits, like Malinak's, offer no basis for the opinions stated. Together, these two affidavits add nothing to the Attorneys' summary judgment evidence.

Accordingly, we conclude that the Attorneys failed to establish as a matter of law that the Clients did not suffer actual damages, and thus the Attorneys were not entitled to summary judgment dismissing the Clients' claims on that basis.

## III

The Attorneys nevertheless argue that the Clients have not alleged grounds that would entitle them to forfeiture of any of the Attorneys' fees. Alternatively, the Attorneys contend that at most a portion of their fees is subject to forfeiture, and that that portion should be determined by the court rather than by a jury. The Clients counter that whether they sustained actual damages or not, the Attorneys, for breach of their fiduciary duty, should be required to forfeit all fees received, or alternatively, a portion of those fees as may be determined by a jury. These arguments thus raise four issues: (a) are actual damages a prerequisite to fee forfeiture? (b) is fee forfeiture automatic and entire for all misconduct? (c) if not, is the amount of fee forfeiture a question of fact for a jury or one of law for the court? and (d) would the Clients' allegations, if true, entitle them to forfeiture of any or all of the Attorneys' fees? We address each issue in turn.

### A

To determine whether actual damages are a prerequisite to forfeiture of an attorney's fee, we look to the jurisprudential underpinnings of the equitable remedy of forfeiture. The parties agree that as a rule a person who renders service to another in a relationship of trust may be denied compensation for his service if he breaches that trust. Section 243 of the *Restatement (Second) of Trusts* states the rule for trustees: "If the trustee commits a breach of trust, the court may in its discretion deny him all compensation or allow him

a reduced compensation or allow him full compensation."[26] Similarly, section 469 of the *Restatement (Second) of Agency* provides:

[26] Restatement (Second) of Trusts § 243 (1959).

> An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a wilful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned.[27]

[27] Restatement (Second) of Agency § 469 (1958); *see also id.* § 399(k) (one remedy for a principal whose agent violates a fiduciary duty is the refusal to pay compensation).

Citing these two sections, section 49 of the proposed *Restatement (Third) of The Law Governing Lawyers* applies the same rule to lawyers, who stand in a relation of trust and agency toward their clients. Section 49 states in part: "A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter."[28]

[28] Restatement (Third) of The Law Governing Lawyers § 49 (Proposed Final Draft No. 1, 1996).

Though the historical origins of the remedy of forfeiture of an agent's compensation are obscure, the reasons for the remedy are apparent. The rule is founded both on principle and pragmatics. In principle, a person who agrees to perform compensable services in a relationship of trust and violates that relationship breaches the agreement, express or implied, on which the right to compensation is based. The person is not entitled to be paid when he has not provided the loyalty 238 bargained for *238 and promised. Thus, for example, comment a to section 243 of the *Restatement (Second) of Trusts* explains:

> When the compensation of the trustee is reduced or denied, the reduction or denial is not in the nature of an additional penalty for the breach of trust but is based upon the fact that the trustee has not rendered or has not properly rendered the services for which compensation is given.[29]

[29] Restatement (Second) of Trusts § 243 cmt. a (1959).

Along the same lines, comment b to section 49 of the proposed *Restatement (Third) of The Law Governing Lawyers* explains: "The remedy of fee forfeiture presupposes that a lawyer's clear and serious violation of a duty to a client destroys or severely impairs the client-lawyer relationship and thereby the justification of the lawyer's claim to compensation."[30] Pragmatically, the possibility of forfeiture of compensation discourages an agent from taking personal advantage of his position of trust in every situation no matter the circumstances, whether the principal may be injured or not. The remedy of forfeiture removes any incentive for an agent to stray from his duty of loyalty based on the possibility that the principal will be unharmed or may have difficulty proving the existence or amount of damages. In other words, as comment b to section 49 of the proposed *Restatement (Third) of The Law Governing Lawyers* states, "[f]orfeiture is also a deterrent."[31]

[30] Restatement (Third) of The Law Governing Lawyers § 49 cmt. b (Proposed Final Draft No. 1, 1996).

[31] *Id.*

To limit forfeiture of compensation to instances in which the principal sustains actual damages would conflict with both justifications for the rule. It is the agent's disloyalty, not any resulting harm, that violates the fiduciary relationship and thus impairs the basis for compensation. An agent's

compensation is not only for specific results but also for loyalty. Removing the disincentive of forfeiture except when harm results would prompt an agent to attempt to calculate whether particular conduct, though disloyal to the principal, might nevertheless be harmless to the principal and profitable to the agent. The main purpose of forfeiture is not to compensate an injured principal, even though it may have that effect. Rather, the central purpose of the equitable remedy of forfeiture is to protect relationships of trust by discouraging agents' disloyalty.

In the one case in which we have considered the subject, *Kinzbach Tool Co. v. Corbett-Wallace Corp.*,[32] this Court held that an agent was required to forfeit a secret commission received from a conflicting interest even though the principal was unharmed. There, an oil field tool company, Corbett-Wallace, wanted to sell its sales rights contract on a patented tool, the whipstock, to another company, Kinzbach Tool, and was willing to go as low as $20,000 on the price. Corbett-Wallace contacted a Kinzbach Tool employee, Turner, and offered him a secret commission if he could get Kinzbach Tool to buy the whipstock contract. Corbett-Wallace instructed Turner not to disclose its bottom-line price to his employer but to get as large an offer as possible. Turner approached his superiors about buying the contract without disclosing his conversations with Corbett-Wallace or the price it was willing to take. Turner's superiors told him that Kinzbach Tool would pay as much as $25,000 for the contract and asked him to find out what price Corbett-Wallace would take. Turner did not tell his employer that Corbett-Wallace was willing to accept $5,000 less than Kinbach Tool was willing to offer. Kinzbach Tool bought the whipstock contract for $25,000, payable in installments, and Corbett-Wallace agreed to pay Turner a $5,000 commission. When
239 Kinzbach Tool learned of *239 Turner's secret commission arrangement, it sued Corbett-Wallace and Turner, claiming that the secret commission should be credited to the sale price. We agreed, holding that Turner had breached his fiduciary duty to his employer.[33] Rejecting Corbett-Wallace's argument that the commission should not be forfeited because Kinzbach Tool paid no more for the whipstock contract than it was worth, we explained:

> It is beside the point for either Turner or Corbett to say that Kinzbach suffered no damages because it received full value for what it has paid and agreed to pay. A fiduciary cannot say to the one to whom he bears such relationship: You have sustained no loss by my misconduct in receiving a commission from a party opposite to you, and therefore you are without remedy. It would be a dangerous precedent for us to say that unless some affirmative loss can be shown, the person who has violated his fiduciary relationship with another may hold on to any secret gain or benefit he may have thereby acquired. It is the law that in such instances if the fiduciary "takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received."[34]

Texas courts of appeals,[35] as well as courts in other jurisdictions[36] and respected
240 commentators,[37] have also held that forfeiture *240 is appropriate without regard to whether the breach of fiduciary duty resulted in damages.

32 160 S.W.2d 509 (Tex. 1942).

33 *Id.* at 513.

34 *Id.* at 514 (quoting *United States v. Carter*, 217 U.S. 286 (1910)).

35 *See, e.g., Watson v. Limited Partners of WCKT, Ltd.*, 570 S.W.2d 179, 182 (Tex.Civ.App. — Austin, 1978, writ ref'd n.r.e.) (holding that limited partners may

recover against general partner without a showing of actual damages); *Russell v. Truitt*, 554 S.W.2d 948, 952 (Tex.Civ.App. — Fort Worth 1977, writ ref'd n.r.e.) (holding that plaintiffs were entitled to recovery of agency fees as a matter of law if the breach of fiduciary duty was proved without regard as to whether the breach caused any harm); *Anderson v. Griffith*, 501 S.W.2d 695, 701 (Tex.Civ.App. — Fort Worth 1973, writ ref'd n.r.e) (explaining that, even though the principal was not injured, "`[t]he self-interest of the agent is considered a vice which renders the transaction voidable at the election of the principal without looking into the matter further than to ascertain that the interest of the agent exists'") (quoting *Burleson v. Earnest*, 153 S.W.2d 869, 874 (Tex. Civ. App. — Amarillo 1941, writ ref'd w.o.m.)); *see also Judwin Properties, Inc. v. Griggs Harrison, P.C.*, 911 S.W.2d 498, 507 (Tex. App. — Houston [1st Dist.] 1995, no writ) (stating in dicta that "[w]hen an attorney has stolen or used the interest to the detriment of his client, the plaintiff need not prove causation for breach of fiduciary duty"); *Bryant v. Lewis*, 27 S.W.2d 604, 608 (Tex.Civ.App. — Austin 1930, writ dism'd) (holding that attorney who represented clients with conflicting interests was not entitled to any compensation for legal services rendered without addressing whether actual damages were sustained).

36 *See*, *e.g.*, *Hendry v. Pelland*, 73 F.3d 397, 402 (D.C. Cir. 1996) ("[C]lients suing their attorney for breach of the fiduciary duty of loyalty and seeking disgorgement of legal fees as their sole remedy need prove only that their attorney breached that duty, not that the breach caused them injury."); *In re Estate of Corriea*, 719 A.2d 1234, 1241 (D.C. 1998) (holding that the plaintiff's inability to quantify the damages suffered did "not disqualify the profits ordered disgorged as `just compensation for the wrong'") (quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399 (1940)); *Eriks v. Denver*, 824 P.2d 1207, 1213 (Wash. 1992) (en banc) (rejecting the argument that a finding of damages and causation is required to order fee forfeiture); *Rice v. Perl*, 320 N.W.2d 407, 411 (Minn. 1982) (holding that the client need not prove actual harm to obtain fee forfeiture); *Searcy, Denney, Scarola, Barnhart Shipley, P.A. v. Scheller*, 629 So.2d 947, 952 (Fla. Dist. Ct. App. 1993) (holding that "fee forfeiture should be considered only when an ordinary remedy like offsetting damages is plainly inadequate"); *see also Frank v. Bloom*, 634 F.2d 1245, 1258 (10th Cir. 1980) (recognizing that "when the attorney is representing clients with actual existing conflicts of interest . . . the attorney's compensation may be withheld even where no damages are shown").

37 *See*, *e.g.*, Restatement (Third) of The Law Governing Lawyers § 49 cmt. d (Proposed Final Draft No. 1, 1996) ("But forfeiture is justified for a flagrant violation even though no harm can be proved."); Thomas D. Morgan, *Sanctions and Remedies for Attorney Misconduct*, 19 S. Ill. U.L.J. 343, 351 (1995) ("[T]he fee forfeiture sanction is available even where a client has suffered no loss as a result of an attorney's alleged misconduct."); 1 Geoffrey C. Hazard, Jr. W. William Hodes, The Law of Lawyering § 1.5:108 (2d ed. Supp. 1998) ("Generally speaking, where the claim rests on the disloyalty of the lawyer, and the remedy sought is forfeiture or disgorgement of fees already paid, rather than compensatory damages for poor service, the breach of the duty of loyalty *is* the harm, and the client is not required to prove causation or specific injury.").

The Attorneys nevertheless argue that forfeiture of an attorney's fee without a showing of actual damages encourages breach-of-fiduciary claims by clients to extort a renegotiation of legal fees after

representation has been concluded, allowing them to obtain a windfall. The Attorneys warn that such opportunistic claims could impair the finality desired in litigation settlements by leaving open the possibility that the parties, having resolved their differences, can then assert claims against their counsel to obtain more than they could by settlement of the initial litigation. The Attorneys urge that a bright-line rule making actual damages a prerequisite to fee forfeiture is necessary to prevent misuse of the remedy. We disagree. Fee forfeiture for attorney misconduct is not a windfall to the client. An attorney's compensation is for loyalty as well as services, and his failure to provide either impairs his right to compensation. While a client's motives may be opportunistic and his claims meritless, the better protection is not a prerequisite of actual damages but the trial court's discretion to refuse to afford claimants who are seeking to take unfair advantage of their former attorneys the equitable remedy of forfeiture. Nothing in the caselaw in Texas or elsewhere suggests that opportunistically motivated litigation to forfeit an agent's fee has ever been a serious problem.

The Attorneys also argue that without a determination of a client's actual damages there is nothing to measure whether the fee forfeiture is excessive in a case. The Attorneys point out that one measure of whether punitive damages are excessive is the amount of actual damages awarded. While this is true, forfeiture of an agent's compensation is not mainly compensatory, as we have already noted, nor is it mainly punitive. Forfeiture may, of course, have a punitive effect, but that is not the focus of the remedy. Rather, the central purpose of the remedy is to protect relationships of trust from an agent's disloyalty or other misconduct. Appropriate application of the remedy cannot therefore be measured by a principal's actual damages. An agent's breach of fiduciary duty should be deterred even when the principal is not damaged.

We therefore conclude that a client need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client.

## B

The Clients argue that an attorney who commits a serious breach of fiduciary duty to a client must automatically forfeit all compensation to the client. This, the Clients contend, is the import of our decision in *Kinzbach* and is necessary to thoroughly discourage attorney misconduct. But *Kinzbach* did not involve issues of whether forfeiture should be limited by circumstances or in amount. The agent there intentionally breached his fiduciary duty in a single, narrow transaction, and his only compensation was a commission. Our holding that his entire compensation was subject to forfeiture cannot fairly be said to require automatic, complete forfeiture of all compensation
241 for any misconduct of an agent. *241

Nor is automatic and complete forfeiture necessary for the remedy to serve its purpose. On the contrary, to require an agent to forfeit all compensation for every breach of fiduciary duty, or even every serious breach, would deprive the remedy of its equitable nature and would disserve its purpose of protecting relationships of trust. A helpful analogy, the parties agree, is a constructive trust, of which we have observed:

> Constructive trusts, being remedial in character, have the very broad function of redressing wrong or unjust enrichment in keeping with basic principles of equity and justice . . . . Moreover, there is no unyielding formula to which a court of equity is bound in decreeing a constructive trust, since the equity of the transaction will shape the measure of relief granted.[38]

[38] *Meadows v. Bierschwale*, 516 S.W.2d 125, 131 (Tex. 1974).

Like a constructive trust, the remedy of forfeiture must fit the circumstances presented. It would be inequitable for an agent who had performed extensive services faithfully to be denied all compensation for some slight, inadvertent misconduct that left the principal unharmed, and the threat of so drastic a result would unnecessarily and perhaps detrimentally burden the agent's exercise of judgment in conducting the principal's affairs.

The proposed *Restatement (Third) of The Law Governing Lawyers* rejects a rigid approach to attorney fee forfeiture. Section 49 states:

> A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. In determining whether and to what extent forfeiture is appropriate, relevant considerations include the gravity and timing of the violation, its wilfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.[39]

[39] Restatement (Third) of The Law Governing Lawyers § 49 (Proposed Final Draft No. 1, 1996).

The remedy is restricted to "clear and serious" violations of duty. Comment d to section 49 explains: "A violation is clear if a reasonable lawyer, knowing the relevant facts and law reasonably accessible to the lawyer, would have known that the conduct was wrongful."[40] The factors for assessing the seriousness of a violation, and hence "whether and to what extent forfeiture is appropriate", are set out in the rule. Elaborating on the rule, the comments to section 49 make it clear that forfeiture of fees for clear and serious misconduct is not automatic and may be partial or complete, depending on the circumstances presented. Comment a states: "A lawyer is not entitled to be paid for services rendered in violation of the lawyer's duty to a client, or for services needed to alleviate the consequences of the lawyer's misconduct."[41] And comment e observes: "Ordinarily, forfeiture extends to all fees for the matter for which the lawyer was retained . . . ."[42] But comment e adds: "Sometimes forfeiture for the entire matter is inappropriate, for example when a lawyer performed valuable services before the misconduct began, and the misconduct was not so grave as to require forfeiture of the fee for all services."[43] And comment b expands on the necessity for exercising discretion in applying the remedy:

[40] *Id.* cmt. d.

[41] *Id.* cmt. a.

[42] *Id.* cmt. e.

[43] *Id.*

> Forfeiture of fees, however, is not justified in each instance in which a lawyer violates a legal duty, nor is total forfeiture always appropriate. Some violations are inadvertent or do not significantly harm the client. Some can be adequately dealt with by the remedies described in Comment *a* or by a partial forfeiture (see Comment *e*). Denying *242 the lawyer all compensation would sometimes be an excessive sanction, giving a windfall to a client. The remedy of this Section should hence be applied with discretion.[44]

242

[44] *Id.* cmt. b.

The *Restatement*'s approach, as a whole, is consistent with Texas law concerning constructive trusts, and we agree with the forfeiture rule stated in section 49 as explained in the comments we have quoted. This rule, or something similar, also appears to have been adopted in most other jurisdictions that have considered the issue.[45]

45 *See, e.g., International Materials Corp. v. Sun Corp.*, 824 S.W.2d 890, 895 (Mo. 1992) (en banc) (holding that complete forfeiture is not warranted unless there is a clear and serious violation of the lawyer's duty destroying the client-lawyer relationship, thereby removing the justification for the lawyer's compensation, and that recovery could be in quantum meruit for benefits conferred); *Kidney Ass'n of Oregon, Inc. v. Ferguson*, 843 P.2d 442, 447 (Or. 1992) (favoring consideration of factors in determining whether attorney's fee should be reduced or denied when attorney breaches duty of loyalty); *In re Marriage of Pagano*, 607 N.E.2d 1242, 1249-1250 (Ill. 1992) ("[W]hen one breaches a fiduciary duty to a principal the appropriate remedy is within the equitable discretion of the court. While the breach may be so egregious as to require the forfeiture of compensation by the fiduciary as a matter of public policy, such will not always be the case.") (citations omitted); *Gilchrist v. Perl*, 387 N.W.2d 412, 417 (Minn. 1986) (holding that the amount of fee forfeiture should be determined by consideration of the relevant factors set out in the state's punitive damage statute); *Crawford v. Logan*, 656 S.W.2d 360, 365 (Tenn. 1983) (holding that any misconduct of an attorney does not automatically result in fee forfeiture but rather "[e]ach case . . . must be viewed in the light of the particular facts and circumstances of the case"); *Cal Pak Delivery, Inc. v. United Parcel Serv., Inc.*, 60 Cal.Rptr.2d 207, 216 (Cal. Ct. App. 1997) (recognizing California courts allowed partial fee recovery by the attorney "for services rendered before the ethical breach . . . or . . . on an unjust enrichment theory where the client's recovery was a direct result of the attorney's services"); *Fairfax Sav., F.S.B. v. Weinberg Green*, 685 A.2d 1189, 1209 (Md. Ct. Spec. App. 1996) (holding that law firm was not obligated to disgorge entire fee because firm rendered valuable legal services to clients, and because other remedies of actual and punitive damages and sanctions would be adequate); *Lindseth v. Burkhart*, 871 S.W.2d 693, 695 (Tenn. Ct. App. 1993) (holding that fee forfeiture for a breach of fiduciary duty is not automatic but depends on the facts and circumstances of each case); *Searcy, Denney, Scarola, Barnhart Shipley, P.A. v. Scheller*, 629 So.2d 947, 953 (Fla. Dist. Ct. App. 1993) (rejecting a mechanical application of fee forfeiture and approving the multi-factor approach to fee forfeiture as stated in the *Restatement (Third) of The Law Governing Lawyers*); *Seeman v. Gumbiner (In re Life Ins. Trust Agr. of Julius F. Seeman)*, 841 P.2d 403, 405 (Colo. Ct. App. 1992) ("[A] conflict of interest is only one of many factors to be considered in determining the award of fees; it does not mandate a denial of all compensation."); *Lurz v. Panek*, 527 N.E.2d 663, 671 (Ill. App. Ct. 1988) ("[W]e do not believe defendant should have to forfeit the entire fee . . . . Rather, we agree with the trial court that the jury was capable of apportioning the contingent fee."); *Mar Oil, S.A. v. Morrissey*, 982 F.2d 830, 840 (2d Cir. 1993) (stating that "[u]nder New York law, attorneys may be entitled to recover for their services, even if they have breached their fiduciary obligations"); *Sweeney v. Athens Reg'l Med. Ctr.*, 917 F.2d 1560, 1573-1574 (11th Cir. 1990) (holding that under Georgia law, if an attorney has engaged in unethical conduct, "the court may thus have a duty to require forfeiture of some portion of the fees"); *Iannotti v. Manufacturers Hanover Trust Co. (In re New York, New Haven Hartford R.R. Co.)*, 567 F.2d 166, 180-181 (2d Cir. 1977) (holding that the court properly tailored the amount of fee forfeiture based on the nature of the breach of fiduciary duty found, as well as evidence that the attorney had, prior to the breach, performed valuable services for the estate); *see also Brandon v. Hedland,*

*Fleischer, Friedman Cooke (In re Estate of Brandon)*, 902 P.2d 1299, 1317 (Alaska 1995) (noting that existing Alaska law appeared to require full fee forfeiture, but directing the trial court on remand to make alternative findings under the multi-factor approach in *Kidney Ass'n* "to reduce chances of a second remand following further appeal"); *Hendry v. Pelland*, 73 F.3d 397, 405 (D.C. Cir. 1996) (leaving open the extent of forfeiture to which the plaintiffs might be entitled if they succeed in proving that the attorney breached his duty of loyalty); *Musico v. Champion Credit Corp.*, 764 F.2d 102, 112-113 (2d Cir. 1985) (describing trend in New York law away from automatic full fee forfeiture); *Littell v. Morton*, 369 F. Supp. 411, 425 (D. Md. 1974) (characterizing strict fee forfeiture as "inequitable" unless a deliberate scheme to defraud the client exists). *But see, e.g., Pessoni v. Rabkin*, 633 N.Y.S.2d 338, 338 (N.Y. App. Div. 1995) (holding that an attorney who violates the disciplinary rules is not entitled to fees for any services rendered); *In re Estate of McCool*, 553 A.2d 761, 769 (N.H. 1988) (holding that "an attorney who violates our rules of professional conduct by engaging in clear conflicts of interest, of whose existence he either knew or should have known, may receive neither executor's nor legal fees for services he renders an estate").

The rule is not dependent on the nature of the
243 attorney-client relationship, as the *243 court of appeals thought,[46] but applies generally in agency relationships. Thus, as we have already seen, section 243 of the *Restatement (Second) of Trusts* sets out a similar rule for forfeiture of a trustee's compensation: "If the trustee commits a breach of trust, the court may in its discretion deny him all compensation or allow him a reduced compensation or allow him full compensation."[47] Comment c to section 243 elaborates:

46 958 S.W.2d at 249 ("Thus, we find a distinction, for purposes of the potential amount of forfeiture, between the typical agency relationship and the attorney-client relationship.").

47 Restatement (Second) of Trusts § 243 (1959).

> It is within the discretion of the court whether the trustee who has committed a breach of trust shall receive full compensation or whether his compensation shall be reduced or denied. In the exercise of the court's discretion the following factors are considered: (1) whether the trustee acted in good faith or not; (2) whether the breach of trust was intentional or negligent or without fault; (3) whether the breach of trust related to the management of the whole trust or related only to a part of the trust property; (4) whether or not the breach of trust occasioned any loss and whether if there has been a loss it has been made good by the trustee; (5) whether the trustee's services were of value to the trust.[48]

48 *Id.* cmt. c.

Section 469 of the *Restatement (Second) of Agency* requires forfeiture of all compensation that cannot be apportioned for properly performed services if the agent willfully and deliberately breaches his duty to his principal,[49] and as we have noted, comments to section 49 of the proposed *Restatement (Third) of The Law Governing Lawyers* echo this view.[50] But we do not read section 469 to mandate automatic forfeiture or preclude consideration of factors other than an agent's willfulness any more than comments to section 49 do.

49 Restatement (Second) of Agency § 469 (1958).

50 Restatement (Third) of The Law Governing Lawyers § 49 cmt. a, b (Proposed Final Draft No. 1, 1996).

Section 49 sets out considerations similar to those for trustees in applying the remedy of fee forfeiture to attorneys. As we have already noted, they are: "the gravity and timing of the violation, its wilfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies."[51] These factors are to be considered in determining whether a violation is clear and serious, whether forfeiture of any fee should be required, and if so, what amount. The list is not exclusive. The several factors embrace broad considerations which must be weighed together and not mechanically applied. For example, the "wilfulness" factor requires consideration of the attorney's culpability generally; it does not simply limit forfeiture to situations in which the attorney's breach of duty was intentional. The adequacy-of-other-remedies
244 factor does not preclude *244 forfeiture when a client can be fully compensated by damages. Even though the main purpose of the remedy is not to compensate the client, if other remedies do not afford the client full compensation for his damages, forfeiture may be considered for that purpose.

51 *Id.* § 49.

To the factors listed in section 49 we add another that must be given great weight in applying the remedy of fee forfeiture: the public interest in maintaining the integrity of attorney-client relationships. Like the fifth factor identified by the court of appeals — "the extent to which the attorney's or firm's conduct offends a public sense of justice and propriety"[52] — concern for the integrity of attorney-client relationships is at the heart of the fee forfeiture remedy. The Attorneys' argument that relief for attorney misconduct should be limited to compensating the client for any injury suffered ignores the main purpose of the remedy.

52 958 S.W.2d at 250.

Amici curiae, Professor Charles Silver and Professor Lynn Baker of the University of Texas School of Law, argue that section 49 of the proposed *Restatement (Third) of The Law Governing Lawyers* differs from the rule applicable to other agency relationships and is bad policy. They contend that in general the remedy of forfeiture applies only when the agent is suing for payment of compensation, and for a good reason. A principal dissatisfied with an agent's conduct, they argue, should terminate the agency and withhold compensation; the principal should not be allowed to wait until after the agent has completed his service and then try to take unfair advantage by suing to recover compensation already paid. We disagree that section 49 states a different rule for attorneys. As we have already noted, section 469 of the *Restatement (Second) of Agency* provides:

> An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a wilful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned.[53]

53 Restatement (Second) of Agency § 469 (1958).

Amici argue that this rule is limited by the caption of section 469, "Disloyalty or Insubordination *as Defense*".[54] But the comments to section 469 do not limit application of the rule to the defense of an agent's claim for compensation. Comment a states in part: "An agent is entitled to no compensation for a service which constitutes a violation of his duties of obedience."[55] Comment e adds that a "principal can maintain an action to

recover the amount" of compensation paid to an agent to which the agent is not entitled.[56] Amici argue that the scope of the rule should not be found in the comments, but we think there is more justification for looking to the comments than to two words in the title.

54 *Id.* (emphasis added).

55 *Id.* cmt. a.

56 *Id.* cmt. e.

Nor do we agree with amici that forfeiture should, as a matter of policy, be limited to the defense of an agent's claim for compensation. A client may well not know of his attorney's breach of fiduciary duty until after the relationship has terminated. An attorney who has clearly and seriously breached his fiduciary duty to his client should not be insulated from fee forfeiture by his client's ignorance of the matter. Nor should an attorney who has deliberately engaged in professional misconduct be allowed to put his client to the choice of terminating the relationship and risking that the outcome of the litigation may be adversely affected, or continuing the relationship despite the misconduct. The risk that a client will try to take unfair advantage of his former attorney does not 245 justify *245 restricting forfeiture to a defensive remedy when the trial court is easily able to prevent inequity in applying the remedy.

Accordingly, we conclude that whether an attorney must forfeit any or all of his fee for a breach of fiduciary duty to his client must be determined by applying the rule as stated in section 49 of the proposed *Restatement (Third) of The Law Governing Lawyers* and the factors we have identified to the individual circumstances of each case.

## C

The parties agree that the determination whether to afford the remedy of forfeiture must be made by the court. The Clients argue, however, that they are entitled to have the amount of the forfeiture set by a jury. The Attorneys argue, and the court of appeals held,[57] that the amount of any forfeiture is also an issue to be decided by the court.

57 958 S.W.2d at 250-251.

Forfeiture of an agent's compensation, we have already explained, is an equitable remedy similar to a constructive trust. As a general rule, a jury "does not determine the expediency, necessity, or propriety of equitable relief."[58] Consistent with the rule, whether a constructive trust should be imposed must be determined by a court based on the equity of the circumstances.[59] However, when contested fact issues must be resolved before equitable relief can be determined, a party is entitled to have that resolution made by a jury.[60]

58 *State v. Texas Pet Foods, Inc.*, 591 S.W.2d 800, 803 (Tex. 1979).

59 *See Meadows*, 516 S.W.2d at 131.

60 *See Texas Pet Foods*, 591 S.W.2d at 803 (stating that in an equitable proceeding, "ultimate issues of fact are submitted for jury determination").

These same principles apply in deciding whether to forfeit all or part of an agent's compensation. Thus, for example, a dispute concerning an agent's culpability — whether he acted intentionally, with gross negligence, recklessly, or negligently, or was merely inadvertent — may present issues for a jury, as may disputes about the value of the agent's services and the existence and amount of any harm to the principal. But factors like the adequacy of other remedies and the public interest in protecting the integrity of the attorney-client relationship, as well as the weighing of all other relevant considerations, present legal policy issues well beyond the jury's province of judging credibility and resolving factual disputes. The ultimate decision on the amount of any fee forfeiture must be made by the court.

The Clients argue that the determination of the amount of fees to be paid an attorney for his services is usually a factual matter for the jury, even in actions for quantum meruit, which are also based in equity,[61] and declaratory judgment actions in which the decision whether to award attorney fees is within the trial court's sound discretion.[62] But in such actions the issue for the jury is the value of the attorney's reasonable and necessary services, not whether a reasonable fee thus determined should nevertheless be withheld for some reason. In declaratory judgment actions, once the jury has found the value of reasonable and necessary legal services, the court must decide whether the award would be equitable and just.[63] In a forfeiture case the value of the legal services rendered does not, as we have explained, dictate either the availability of the remedy or amount of
246 the forfeiture. *246 Both decisions are inherently equitable and must thus be made by the court.

61 *See Truly v. Austin*, 744 S.W.2d 934, 938 (Tex. 1988).

62 *See Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998).

63 *Id.* at 21.

Thus, when forfeiture of an attorney's fee is claimed, a trial court must determine from the parties whether factual disputes exist that must be decided by a jury before the court can determine whether a clear and serious violation of duty has occurred, whether forfeiture is appropriate, and if so, whether all or only part of the attorney's fee should be forfeited. Such factual disputes may include, without limitation, whether or when the misconduct complained of occurred, the attorney's mental state at the time, and the existence or extent of any harm to the client. If the relevant facts are undisputed, these issues may, of course, be determined by the court as a matter of law. Once any necessary factual disputes have been resolved, the court must determine, based on the factors we have set out, whether the attorney's conduct was a clear and serious breach of duty to his client and whether any of the attorney's compensation should be forfeited, and if so, what amount. Most importantly, in making these determinations the court must consider whether forfeiture is necessary to satisfy the public's interest in protecting the attorney-client relationship. The court's decision whether to forfeit any or all of an attorney's fee is subject to review on appeal as any other legal issue.

## D

Finally, the Attorneys argue that none of the misconduct the Clients have alleged justifies a forfeiture of any fees. Although the Clients make numerous allegations of misconduct against the Attorneys, the parties' arguments have tended to focus on the assertion that the Attorneys reached an aggregate settlement in violation of Rule 1.08(f) of the Texas Disciplinary Rules of Professional Conduct.[64] The Attorneys and amici curiae argue that this rule is too vague and impractical for any violation to warrant forfeiture of an attorney's fee. The lower courts did not find it necessary to address this argument, and given the difficult considerations involved, we believe it to be imprudent for us to decide the matter in the first instance without a full airing below. Even were we to address it, we could not render judgment for the Attorneys without considering whether the other alleged disciplinary rules violations might also justify forfeiture, an issue barely mentioned in all the parties' briefing. All these issues must be considered by the district court on remand.

64 *See* Tex. Disciplinary R. Prof'l Conduct 1.08(f), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A (1998) (Tex. State Bar R. art. X, § 9).

## IV

Two minor matters require brief attention.

First: The Attorneys argue that the district court correctly struck the four plaintiffs added in amended pleadings as parties. The Attorneys

objected to the addition of the four plaintiffs on two grounds: that they had not served the Attorneys with citation, and that the addition was untimely. The first ground was not sufficient. Two days after plaintiffs first amended their pleadings, defendants filed a supplemental answer. The filing of an answer dispenses with the necessity of service of citation.[65] As for the second ground, the district court was obliged to allow the pleading amendment absent a showing that the defendants were surprised by it.[66] The defendants did not claim, much less show, surprise. Therefore, the four added plaintiffs should not have been struck.

65 Tex. R. Civ. P. 121.

66 Tex. R. Civ. P. 63.

Second: The court of appeals dismissed plaintiff Austin Gill's appeal as not having been timely filed. Although Gill is listed as a petitioner in this
247 Court, petitioners do *247 not complain of the court of appeals' dismissal of his appeal. We must therefore affirm that dismissal.

* * * * *

For the reasons explained, we modify the court of appeals' judgment to reverse the district court's judgment in its entirety except as to plaintiff Austin Gill, and we remand the case to the district court for further proceedings.

2011 SKQB 118
Saskatchewan Court of Queen's Bench

Duzan v. GlaxoSmithKline Inc.

2011 CarswellSask 227, 2011 SKQB 118, [2011] S.J. No. 210, 200 A.C.W.S. (3d) 395, 372 Sask. R. 108

# Michelle Duzan, Individually, and Carter Duzan, An Infant, by His Natural Mother and Litigation Guardian, Michelle Duzan, Plaintiffs (Respondents) and Glaxosmithkline, Inc., and Glaxosmithkline Uk Limited, Defendants (Applicants)

D.P. Ball J.

Judgment: March 21, 2011
Docket: Regina Q.B.G. 768/08

Counsel: E.F. Anthony Merchant, Q.C., Casey R. Churk, for Plaintiffs / Respondents
Robert W. Leurer, Q.C., Khurrum R. Awan, for Defendants / Applicants

***D.P. Ball J.*:**

1 The defendants ("GSK") apply for an order striking or permanently staying this action on the grounds that the proceedings are vexatious or otherwise an abuse of the process of the court. Specifically GSK contends:

(i) that the plaintiffs have pursued multiple claims in multiple jurisdictions in a manner that has been vexatious;

(ii) that the plaintiffs have abused the process of the court by failing to comply with orders establishing dates for the completion of steps to be taken in the litigation; and by confirming that they have no intention of prosecuting this claim as a class action proceeding.

2 The plaintiffs, through their counsel, acknowledge that they do not intend to proceed with the claim as either a personal action or as a class proceeding. They also acknowledge that they have failed to comply with the court's scheduling orders in this action. Nevertheless, they oppose the striking out or granting of an unconditional stay on the grounds:

(i) that it would be incompatible with the court's general duty to protect members of the proposed class in Saskatchewan and Canada; and

(ii) that if the action is struck out or unconditionally stayed it could mean that future class proceedings in Saskatchewan are barred by a limitation period.

3 Although the plaintiffs oppose an order striking or unconditionally staying the action, they do not oppose an order staying the action on the condition that they may apply to have the stay lifted if a national class is not certified in parallel proceedings being pursued elsewhere or if circumstances otherwise change in Saskatchewan.

**Issue**

4 Given the positions of the parties, the issue is whether this action should be struck, unconditionally stayed, or stayed on the conditions proposed by the plaintiffs.

***History of the litigation***

5 This action was commenced under *The Class Actions Act*, S.S. 2001, c. C-12.01 (as am.) (the "CAA") by Statement of Claim issued May 30, 2008 and served on GSK September 18, 2008. The claim seeks compensation for members of a proposed class comprised of mothers and their immediate family members. It alleges that their lives were adversely affected by birth defects in children caused by the ingestion of the drug Paxil by pregnant women. Paxil is manufactured, tested, marketed and distributed by GSK.

6 Before commencing this action, counsel for the plaintiffs, Merchant Law Group, commenced the following additional actions against GSK in Ontario and British Columbia:

(a) an action by Hazel Romano and others in the Ontario Superior Court of Justice commenced on May 25, 2007 and assigned Court File No. CV-07-01639-CP (the "Romano action");

(b) an action by Veronica Wakeman and others commenced in the Supreme Court of British Columbia in November of 2007 and assigned Court File No. 074371 (the "Wakeman action").

7 Class actions were also commenced against GSK in British Columbia by the law firm of Rosenberg & Rosenberg ("Rosenberg") as follows:

(a) an action by Sophia Talia Bennison and others commenced on October 3, 2007 and assigned Supreme Court of British Columbia Court File No. S076657 ("the first Rosenberg action"); and

(b) an action by Meah Bartram and others commenced on February 27, 2008 and assigned Supreme Court of British Columbia Court File No. S081441 ("the second Rosenberg action").

8 The three actions commenced by Merchant Law Group in Ontario, Saskatchewan and British Columbia and the two actions commenced by Rosenberg in British Columbia all make similar allegations, advance many of the same claims, and seek remedies similar to those claimed in this action.

9 Shortly after its commencement both parties to the Romano action in Ontario consented to a litigation time table which was incorporated into an order of the Ontario Supreme Court of Justice dated October 25, 2007. The order required the plaintiffs' counsel, Merchant Law Group, to serve its certification motion record by May 30, 2008 and contemplated that the motion itself would be heard during the week of January 12, 2009.

10 Merchant Law Group did not serve the Romano certification motion within the specified time. Instead, it applied for leave to discontinue the action on the assurance that this action would instead be pursued in Saskatchewan. Following those representations the Ontario court, by order dated April 3, 2009, granted leave to Merchant Law Group to discontinue the Romano action.

11 The discontinuance of the Romano action in Ontario left outstanding this action and the three actions in British Columbia. Rosenberg took the position that its two actions in British Columbia need not proceed because a national certification order against GSK would be sought by Merchant Law Group in this Saskatchewan action. In November of 2008, Rosenberg advised counsel for GSK that the representative plaintiffs in the second Rosenberg action intended to participate in this action in Saskatchewan.

12 In summary, by the latter part of 2008 Merchant Law Group and Rosenberg had advised courts in both Ontario and British Columbia that the plaintiffs in the class actions in those jurisdictions would be deferring to and participating in this action in Saskatchewan.

13 In the Saskatchewan proceeding, the plaintiffs did not in fact move the action forward in an expeditious manner. Their failure to apply for the designation of a case management judge as required by s. 4(2)(a) of the CAA resulted in an application by GSK for such a designation. That application was granted by Laing C.J. on June 16, 2009. One of the principle purposes of his order was to enable a scheduling order to be made if it was considered appropriate.

14 Thereafter, GSK continued to urge Merchant Law Group to agree to a schedule for completing the various procedural steps and time lines leading up to the hearing of the certification motion. No agreement proved possible. In August of 2009 GSK therefore applied for an order establishing a schedule. That application was granted by fiat dated August 26, 2009 (2009 SKQB 336, [2009] S.J. No. 512 (Sask. Q.B.)), and a time table was set which contemplated the hearing of the certification motion by October of 2010. In setting the schedule, the court found that because of the period of time in which the three Merchant Law Group initiated actions had been outstanding, it was appropriate to ensure that this action move forward expeditiously.

15 On January 22, 2010, Merchant Law Group filed its certification motion along with an affidavit sworn by the plaintiff, Michelle Duzan, and an affidavit sworn by one Esther Ingraham, a resident of Nova Scotia. An application by GSK for leave to cross examine both deponents was not opposed and that leave was granted on May 3, 2010.

16 The plaintiffs' motion for certification was filed in compliance with the litigation schedule established in the courts of August 26, 2009. However, the plaintiffs did not meet subsequent time lines set by the court and did not apply for an order extending the scheduled dates. As a result, on June 1, 2010, GSK applied for an order fixing additional dates and extended time lines for litigation steps leading to the hearing of the certification motion.

17 GSK's application of June 1, 2010 resulted in a fiat dated July 26, 2010 (2010 SKQB 264, [2010] S.J. No. 421 (Sask. Q.B.)) which found that the plaintiffs had not offered any satisfactory explanation for their failure to adhere to the litigation schedule established by the court. Even so, Merchant Law Group was granted leave to apply for an order further extending the time lines provided that its application was served and filed by August 27, 2010 and called for the certification motion to be heard on or before February 18, 2011. The court stated that if Merchant Law Group failed to apply as directed, GSK could seek "an appropriate remedy".

18 Merchant Law Group did not bring an application to extend the time lines as directed. Instead, on September 7, 2010, Mr. Merchant wrote a letter to the Local Registrar of the court asking that this action be held in abeyance while efforts to obtain certification of the claims against GSK were moved to British Columbia. The letter stated that Merchant Law Group had encountered "issues" with their representative plaintiffs in Saskatchewan and that they did not intend to proceed with the action "at this time, and conceivably at no time". Instead, Mr. Merchant stated, Merchant Law Group intended to assist in the second Rosenberg action in British Columbia.

19 A case conference was then held on November 29, 2010, during which Mr. Merchant informed the court that although the plaintiffs did not intend to proceed with this action, they would oppose an application by GSK to strike or permanently stay the proceedings.

20 GSK then filed this application on December 21, 2010. In response, Mr. Merchant filed an affidavit sworn by the plaintiff, Michelle Duzan, on January 4, 2011, which stated in part:

> 10. While I am unprepared to undertake the risks and expense of proceeding in Saskatchewan including the risks of costs and the expense of experts, I pose [sic] this action being struck now for want of prosecution, only 31 months since the claim was issued, and I pose [sic] this action being struck because if that happens, I fear that issues will arise regarding limitation periods as they apply to me for my claim against GlaxoSmithKline Inc. and GlaxoSmithKline UK Limited in connection with ingesting Paxil which resulted my son suffering from craniosynotosis.

21 The application was heard on February 11, 2011. Mr. Merchant confirmed that the plaintiffs in this action intend to "opt in" to the second Rosenberg action pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "CPA"). He advised that Merchant Law Group would be working cooperatively with Rosenberg in that proceeding. And he confirmed that the plaintiffs did not intend to move this action forward. He stated that Merchant Law Group would prefer to have it struck rather than be faced with an order directing that it move forward to certification.

**Analysis**

22 The appropriate order to be made — that is, whether the action should be struck out, unconditionally stayed or stayed on certain conditions — turns in part on the court's assessment of the somewhat interrelated arguments made by GSK. One argument is that the manner in which these claims have been pursued in multiple jurisdictions has been vexatious and an abuse of process. Another is that the plaintiffs' failure to comply with the court's scheduling orders and confirmation that they do not intend to pursue this claim as a class action should be fatal to its continuation under the CAA. Although GSK seeks an order striking or staying the claim, it does not do so on the basis that it should be dismissed for want of prosecution.

23 The court must also consider the concerns raised by the applicant in response. First, does the court have an overriding duty to potential class members in Saskatchewan and elsewhere in the circumstances of this case? And second, should a conditional order be made because of potential limitation period concerns?

24 Rule 173 of the *Queen's Bench Rules* provides in part:

> 173 The Court may at any stage of an action order any pleading or any part thereof to be struck out, with or without leave to amend, on the ground that:
>
> . . .
>
> (c) it is scandalous, frivolous or vexatious;
>
> . . .
>
> (e) it is otherwise an abuse of the process of the Court;
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly or may grant such order as may be just. ...

25 The term "abuse of process" is often used interchangeably with the terms "frivolous" or "vexatious" either separately or more usually in conjunction. See *Sagon v. Royal Bank* (1992), 105 Sask. R. 133, [1992] S.J. No. 197 (Sask. C.A.), at para. 19.

26 The doctrine of abuse of process engages the power of the court to prevent the misuse of its procedure in a way that could bring the administration of justice into disrepute. The doctrine concentrates on the integrity of the adjudicative process. It applies in a variety of legal contexts. For example, it ensures that issues, once decided, are not unfairly re-litigated, and it ensures that the litigation process is used to obtain a judicial solution and not as a vexatious end in itself.

27 Within its general flexibility the Saskatchewan Court of Appeal endorsed a non-exhaustive list of circumstances in which an abuse of process may be found. Those circumstances include:

> (a) proceedings which involve a deception on the court, or are fictitious or constitute a mere sham;
>
> (b) proceedings where the process of the court is not being fairly or honesty used but is employed for some ulterior or improper purpose or in an improper way;
>
> (c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose; or
>
> (d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.

*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481, 194 D.L.R. (4th) 648 (Ont. C.A.) at para. 55;

*Englund v. Pfizer Canada Inc.*, 2007 SKCA 62, 299 Sask. R. 298 (Sask. C.A.), at para. 41

*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.), at paras. 35-36, 42.

28 With those principles in mind I turn to the specific arguments advanced by GSK.

***GSK Argument No. 1.: The manner in which the claims have been pursued in multiple jurisdictions has amounted to an abuse of process.***

29 It is settled that the commencement of multiple class actions in the same jurisdiction, against the same defendant and with respect to the same subject matter, is an abuse of process. In appropriate situations, this principle extends to multiple class actions commenced in multiple jurisdictions. The Saskatchewan Court of Appeal has noted:

> It is well established that the commencement by a plaintiff of more than one action in the same jurisdiction against a defendant in relation to the same dispute or matter is an abuse of process. As Sir George Jessel observed over one hundred years ago, "It is *prima facie* vexatious to bring two actions where one will do". See: *McHenry v. Lewis*, [1883] 22 Ch.D. 397.
>
> . . .
>
> We believe the same concerns which motivate the courts to characterize the bringing of multiple actions in a single jurisdiction as an abuse of process can also apply, in appropriate circumstances, where the multiple actions have been brought in two or more jurisdictions...
>
> *Englund*, *supra*, at paras. 34 and 36.

30 Multiple actions become an abuse of process where there is no indication that they serve any legitimate interest of the plaintiffs. In such situations:

> ... the complexion of things changes. In such circumstances, the courts are being used in a manner which serves no proper purpose or which is vexatious or oppressive.
>
> *Englund*, *supra*, at para. 40

31 In *Englund*, the defendant sought a stay of a Saskatchewan class action which alleged that the plaintiffs had been harmed by the use of a drug manufactured by the defendant. The day after the Saskatchewan class action was commenced, counsel for the plaintiffs, Merchant Law Group, commenced another class action against the same defendant in Ontario with two additional plaintiffs.

32 The Court of Appeal found that the multiple actions were an abuse of process and ordered a stay of the Saskatchewan proceedings. It noted the absence of any suggestion that the multiple actions across jurisdictions served any legitimate interest of the plaintiffs and concluded that the courts were being used in a manner that served no proper purpose.

33 Further, the ruling in *Englund* affirmed that, in assessing whether the class actions are sufficiently similar to raise abuse of process concerns, the focus is on the substance of the actions, including the basis for the claims and the definitions of the proposed classes. Narrow technicalities and artificial distinctions, such as differences between the representative plaintiffs or the distinction between opt-in and opt-out jurisdictions, are ignored.

34 Even so, the Court of Appeal in *Englund* did not stay the action unconditionally. Rather, it decided at paras. 54 and 55:

> 54. We conclude that the Saskatchewan Action should be stayed on the basis of abuse of process. However, we do not believe the stay should be unconditional. There would be no rationale for it to remain in place if the respondents in fact discontinue the Ontario Action. In other words, the respondents are free to litigate in Saskatchewan if they so choose. The only qualification in this regard is discontinuance of their proceedings in Ontario. Our point is that they must elect whether they want to proceed in Saskatchewan or in Ontario.
>
> 55. In addition, it is appropriate that the respondents be entitled to apply to the Court of Queen's Bench to have the stay lifted if a class proceeding is certified in Ontario and no provision is made for it to include Saskatchewan residents. Generally speaking, in that situation as well, there will be no reason to hold the Saskatchewan proceedings in abeyance. However, the

decision whether to lift the stay in that situation will have to be made by a Chambers judge in light of all of the pertinent circumstances at the time.

35 Mr. Merchant argues that an order of the kind made by the Court of Appeal in *Englund* would also be appropriate in this case. He submits that it is acceptable for class actions to be taken concurrently in multiple jurisdictions with one selected to proceed ahead of the rest. This enables the proposed representative plaintiffs to choose what they consider to be the most favourable jurisdiction in which to prosecute the claim and it promotes judicial economy in a manner that is not prejudicial to the defendants. To that extent his submission has some merit.

36 However, it is not acceptable for plaintiffs to commence class actions in multiple jurisdictions and then leave the courts and the defendants guessing as to whether and when any particular action will proceed. That is what has occurred here, and it is one factor that distinguishes this case from the situation in *Englund*, *supra*. To recap, Mr. Merchant initially consented to a scheduling order in the Romano action designed to move that claim forward in Ontario. Two years later, he obtained leave to discontinue the action by assuring the Ontario court that the claim would be pursued in Saskatchewan. Now almost three years after this action was commenced, after the filing of the plaintiffs' motion for certification and after the delivery of related material by both sides, Mr. Merchant asserts that the matter will be pursued instead in a third jurisdiction, British Columbia.

37 This multi jurisdictional game of class action "whack-a-mole" would in itself be sufficient basis for an unconditional stay on the basis of abuse of process. However, it is compounded by the circumstances giving rise to the second, and not entirely unrelated, argument advanced by GSK.

***GSK Argument No. 2: The plaintiffs' failure to adhere to the court's scheduling orders and unwillingness to pursue this claim as a class action is fatal to its continuation as a class actions.***

38 A class action requires the presence of a genuine plaintiff who is ready, willing and able to pursue an action individually and on behalf of proposed class members. The plaintiffs' presence acts as a counter balance to the entrepreneurial interests of law firms sponsoring class proceedings (see *Caputo v. Imperial Tobacco Ltd.* (2005), 74 O.R. (3d) 728 (Ont. S.C.J.) at para. 41-42, [2005] O.J. No. 842 (Ont. S.C.J.); *Englund*, *supra* at para. 50).

39 While the court is aware of the practical realities of class action litigation, including the relationship between lawyer and client, it is settled that there must be a real plaintiff who, while heavily influenced by his or her lawyer, is in a position to give instructions for the carriage of the proceedings. The obligations on the part of the plaintiff are set out in both the CAA and the *Queen's Bench Rules of Court*. Section 6(1) of the CAA contains the basic criteria for certification of the action as a class action. Section 6(1)(e) requires the court to be satisfied that:

> 6(1) Subject to subsections (2) and (3), the court shall certify an action as a class action on an application pursuant to section 4 or 5 if the court is satisfied that:
>
> . . .
>
> (e) there is a person willing to be appointed as a representative plaintiff who:
>
> (i) would fairly and adequately represent the interests of the class;
>
> (ii) has produced a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action; and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

40 The CAA also contains specific directions to the court where, as here, a multi-jurisdictional class action, or a proposed multi-jurisdictional class action, has been commenced elsewhere in Canada. Sections 6(2) and (3) provide in part:

6(2) If a multi-jurisdictional class action, or a proposed multi-jurisdictional class action, has been commenced elsewhere in Canada that involves subject-matter that is the same as or similar to that of the action being considered pursuant to this section, the court shall determine whether it would be preferable for some or all of the claims or common issues raised by those claims of the proposed class members to be resolved in that class action.

(3) For the purposes of making a determination pursuant to subsection (2), the court shall:

. . .

(b) consider all relevant factors, including the following:

. . .

(iv) the location of the representative plaintiffs and class members in the various actions, including the ability of representative plaintiffs to participate in the actions and to represent the interests of the class members;

[emphasis added]

41 The requirement for a genuine representative plaintiff with a mandate to act in the best interests of the class as a whole by participating in the direction of litigation, instruction of class counsel and authorization of settlement is confirmed by Rule 82(2) of the *Queen's Bench Rules* which provides in part:

82(2) An application for a certification order pursuant to section 4 of the Act must be supported by an affidavit of the proposed representative plaintiff:

(a) deposing to the proposed representative plaintiff's willingness to be appointed;

. . .

(d) setting out sufficient information to establish that the proposed representative plaintiff would fairly and adequately represent the interests of the class and is aware of the responsibilities to be undertaken;

(e) exhibiting a plan for the class action that sets out a workable method of:

(i) advancing the action on behalf of the class; and

(ii) notifying class members of the action; and

(f) setting out sufficient information to establish that the proposed representative plaintiff does not have, on the common issues, an interest that is in conflict with the interests of other class members.

42 Merchant Law Group has confirmed that the plaintiffs are not willing to proceed with this claim. There is no suggestion that any other person may be willing and able to act in the place and stead of the plaintiffs. Indeed, a review of all of the evidence does not disclose any other potential class member resident in Saskatchewan — a prerequisite for a representative plaintiff pursuant to s. 4(1) of the CAA. This means that for the foreseeable future the fundamental requirements of the CAA and the *Queen's Bench Rules* cannot be satisfied. It also explains why counsel for the plaintiffs has resolved that he will not comply with the court's scheduling directions by proceeding with the action. In addition to the manner in which the claims have been pursued in multiple jurisdictions, these factors differentiate the circumstances of this case from the situation in *Englund*, *supra*.

43 In the absence of a useful judicial purpose the class action portion of the claim should not be left to hibernate as a footnote in GSK's financial statements on the speculative possibility that it might be revived by some unknown representative plaintiff at some future time. Unless there are compelling reasons to do otherwise, it should be unconditionally stayed on the basis that its continuation would be vexatious and an abuse of process.

44 Mr. Merchant submits that there are two compelling reasons why the normal approach to the abuse of process doctrine should be altered for the purposes of proposed class actions. First, he submits that the court should order a conditional stay because it has an overriding duty to potential class members. Second, he argues that the action should be conditionally stayed because of "limitation concerns". I will consider each argument in turn.

***Plaintiffs' Argument No. 1: The court has an overriding duty to potential class members***

45 Mr. Merchant argues that the court's decision on this application should not be based on whether there has been an abuse of process, but on what he says is a general duty on the part of the court to protect members of the proposed class. In support of that submission, he refers to certain Ontario decisions in which representative plaintiffs have applied for leave from the court to discontinue class actions. *Smith v. Crown Life Insurance Co.* (2002), 40 C.P.C. (6th) 371 (Ont. S.C.J.) at paras. 29-31, [2002] O.J. No. 5539 (Ont. S.C.J.); *Chopik v. Mitsubishi Paper Mills Ltd.* (2003), 29 C.P.C. (5th) 277, [2003] O.J. No. 192 (Ont. S.C.J.); and *Epstein v. First Marathon Inc. / Société First Marathon Inc.* (2000), 41 C.P.C. (4th) 159 (Ont. S.C.J.) at para. 72-76, [2000] O.J. No. 452 (Ont. S.C.J.))

46 In Ontario, court approval of discontinuance or abandonment of class proceedings is mandated both before and after certification by s. 29 of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6. There is a basic difference between the structure of that legislation and the CAA in Saskatchewan. Under the CAA, an action does not become a class action until it has been certified as a class action pursuant to Part II of the Act. Until certification, an action commenced under the CAA is an individual action governed by *The Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01 and the *Queen's Bench Rules of Court*. Section 2 of the CAA defines the terms "action" and "class action" as follows:

> 2 In this Act:
>
> "action" means an action as defined in *The Queen's Bench Act, 1998*;
>
> . . .
>
> "class action" means an action certified as a class action pursuant to Part II;

47 Prior to certification under the CAA, a plaintiff may settle or abandon an individual action without order of the court. A claim may be struck for disclosing no reasonable cause of action or otherwise pursuant to Rule 173 as with any other civil proceeding.

48 The court's duty to ensure that the proposed settlement and/or discontinuance of an action commenced under the CAA is fair, reasonable and in the best interests of the class as a whole arises only when the action is certified as a class action. That is so because s. 38(1) of the CAA confines the court's jurisdiction to approve the settlement, discontinuance or abandonment of a claim to a class action:

> 38(1) A class action may be settled, discontinued or abandoned only:
>
> (a) with the approval of the court; and
>
> (b) on the terms the court considers appropriate.

49 For these reasons, the argument that this action should be conditionally stayed because the court has an overriding duty to potential class members is rejected.

***Plaintiffs Argument No. 2: This action should be conditionally stayed because of "limitation concerns"***

50 Mr. Merchant submits that unless an order staying this action is conditional, future claims of potential class members might be barred by a limitation period. As I understand it, the argument is based on the premise that limitation periods are suspended under the CAA upon the commencement of a class proceeding. While that may be the situation in other jurisdictions,

under the CAA a limitation period is suspended for potential class members only when the action is certified as a class action effective as of the commencement of the action. Section 43(2) of the CAA states:

> 43(2) Any limitation period applicable to a cause of action asserted in an action that is certified as a class action is suspended in favour of a class member on the commencement of the action and resumes when:
>
> (a) the member opts out of the class action;
>
> (b) a ruling by the court has the effect of excluding the class member from the class action or from being considered to have ever been a class member;
>
> (c) an amendment is made to the certification order that has the effect of excluding the member from the class action;
>
> (d) a decertification order is made pursuant to section 12;
>
> (e) the class action is dismissed without an adjudication on the merits;
>
> (f) the class action is discontinued or abandoned with the approval of the court; or
>
> (g) the class action is settled with the approval of the court, unless the settlement provides otherwise.

51 In this case, no limitation period has been suspended with respect to proposed class members. Since there is no possibility that the claim will be certified as a class action, there is also no possibility that a limitation period will be suspended for potential class members. To the extent that the claim remains extant as an individual action, the limitation period has ceased to run as against the individual plaintiffs.

**Conclusion**

52 There will be an order unconditionally staying the within action as a proposed class action. This order will not apply to the plaintiffs' individual claims which, if they are not pursued, may in due course be the subject of an application for dismissal for want of prosecution.

*Application granted in part.*

2009 ONCA 377
Ontario Court of Appeal

Fantl v. Transamerica Life Canada

2009 CarswellOnt 2383, 2009 ONCA 377, [2009] O.J. No. 1826, 177
A.C.W.S. (3d) 886, 249 O.A.C. 58, 72 C.P.C. (6th) 1, 95 O.R. (3d) 767

# Joseph Fantl (Plaintiff / Respondent) and Transamerica Life Canada (Defendant / Respondent)

W.K. Winkler C.J.O., S.T. Goudge, J.M. Simmons JJ.A.

Heard: April 6, 2009
Judgment: May 7, 2009
Docket: CA C50166

Proceedings: affirming *Fantl v. Transamerica Life Canada* (2008), 2008 CarswellOnt 7270, 66 C.P.C. (6th) 203, 244 O.A.C. 183 (Ont. Div. Ct.); affirming *Fantl v. Transamerica Life Canada* (2008), 2008 CarswellOnt 2249, 60 C.P.C. (6th) 326 (Ont. S.C.J.)

Counsel: Alan J. Lenczner, Q.C., Naomi Loewith for Appellant, Kim Orr Barristers P.C.
Bonnie A. Tough, Jennifer M. Lynch for Respondent, Joseph Fantl
Mary Jane Stitt for Respondent, Transamerica Life Canada

***W.K. Winkler C.J.O.*:**

**Overview**

1 This appeal relates to a representative plaintiff's right to choose new counsel in a class proceeding, following the dissolution of the law firm originally retained by the plaintiff to prosecute the action.

2 The appellant is a law firm, Kim Orr Barristers P.C. ("KO"). Joseph Fantl is the representative plaintiff in a class proceeding brought against the defendant Transamerica Life Canada ("Transamerica"). Both Mr. Fantl and Transamerica are respondents in this appeal.

3 In 2006, Mr. Fantl retained the law firm of Roy Elliott Kim O'Connor ("REKO") to act in the prosecution of the intended class action lawsuit against Transamerica. A team of REKO lawyers worked on the matter. Toward the end of 2007, REKO dissolved.

4 Certain of the team of lawyers formerly engaged on the file joined the newly formed law firm of Roy Elliott O'Connor ("REO"). Others followed one of REKO's former partners, Won Kim, to form the appellant law firm KO, while the remaining lawyer chose to go elsewhere. Because of the disbanding of REKO, Mr. Fantl was forced to decide what firm to retain to continue the matter. He chose REO because he knew and was a friend of Peter Roy, and because he had some experience with, and respected members of, the firm. As such, he trusted them to carry the case forward.

5 Mr. Fantl served a notice of change of solicitors naming REO as counsel. KO brought a motion pursuant to s. 12 of the *Class Proceedings Act 1992*, S.O. 1992, c.6 (the "CPA"), asking for various forms of relief, including an order striking the notice of change of solicitors and an order requiring Mr. Fantl to retain KO. In the alternative, KO sought to have Mr. Fantl removed as representative plaintiff and two new representative plaintiffs (Yi-Yea (Riya) Kang and Jeong-Ae Seok) substituted in his stead. The motion judge dismissed the motion in its entirety. KO appealed the decision of the motion judge to the Divisional Court, which dismissed the appeal. KO appeals to this court, with leave. An expedited hearing was granted given that a settlement has been reached and the settlement approval hearing relating to the case is imminent.

6 The motion judge, in refusing to grant the relief requested, held that a representative plaintiff has a right to retain counsel of his or her choice. He found that the test to be applied in determining whether the plaintiff's choice of counsel should stand is whether the counsel is adequate. Thus, he adopted the same test for counsel as is required by s. 5(1) of the CPA in determining whether a representative plaintiff may carry an action forward.

7 In this context, the motion judge noted that while the court has a broad supervisory jurisdiction in class proceedings, it should not intervene in a plaintiff's choice of counsel unless the choice would deny putative class members adequate legal representation. He rejected the appellant's theory that the proper test to be applied is whether the plaintiff's choice is in the best interests of the class. Hence, he refused to engage in a comparison of the two law firms to determine which group was superior. The Divisional Court upheld the reasons of the motion judge on these central issues.

8 Following the dismissal of the motion, KO brought a competing action against Transamerica, with Ms. Kang as the proposed representative plaintiff (the "Kang action"). The Kang action overlaps significantly with Mr. Fantl's action.

9 The appellant advances the same arguments on this appeal as were made to the courts below, contending that the motion judge erred by applying the wrong test. The competence of REO to act as class counsel is not in issue. This notwithstanding, on a comparison basis applying the test of best interests of the class, the appellant submits that the plaintiff ought to be directed to retain the KO firm. Consequently, the plaintiff's choice of counsel ought to be set aside and new representative plaintiffs appointed in place of Mr. Fantl.

10 The respondent submits that the motion judge applied the appropriate test and suggests that the key consideration in the analysis should be whether the plaintiff's decision caused any prejudice to the class members. Since there is no dispute as to the competence of REO counsel, and since the settlement discussions have advanced to the point of a settlement approval hearing, the motion judge's decision not to interfere with Mr. Fantl's choice of counsel should be upheld.

11 I cannot accede to the appellant's submissions. In my view, the representative plaintiff is entitled to select, and is indeed responsible for selecting, class counsel. In a circumstance like this, when a decision properly comes before the supervisory court for review, the criteria to be considered in determining whether the plaintiff's choice of counsel can stand are: competence of counsel; whether the choice was based on any improper considerations; and whether the choice resulted in any prejudice to the class. In the present case, competence of counsel is conceded. There is no evidence of any improper purpose in the selection of counsel or of any prejudice to the class as a result of that decision. Furthermore, the Kang action, commenced after the motion judge dismissed the appellant's motion, is an abuse of process.

12 I would dismiss the appeal, and exercise my discretion under s. 134(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "CJA") and s. 13 of the CPA, to stay the Kang action. My reasons, which differ from those of the motion judge, follow.

**The Issues**

13 There are three central issues on this appeal. First, is the representative plaintiff in an intended class proceeding, who is required to retain new counsel after the proceeding has been commenced, entitled to select counsel of his or her own choosing or is the court, in the exercise of its supervisory jurisdiction under the CPA, always required to approve class counsel?

14 Second, regardless of the answer to the first question, if the selection of counsel comes before the court for review, what is the proper test to be applied in determining whether the plaintiff's selection of class counsel should stand?

15 Third, the appellant has asked this court to review whether Mr. Fantl should be replaced as the representative plaintiff. This requested relief bears on the status of a competing action, launched by the appellant following the dismissal of its motion, in which Ms. Kang is the representative plaintiff.

**Facts**

16 This appeal arises from a proposed class action against Transamerica that has yet to be certified. Mr. Fantl is not the original representative plaintiff in this action. The action was initially started by Michael Millman, a chartered accountant in British Columbia who owned an insurance policy issued by the company that is now Transamerica, and which contained an investment option known as the Can-Am Fund. Mr. Millman sought to sue Transamerica on the basis that: (1) Transamerica had overcharged him for management expenses; and (2) that the Can-Am fund had not tracked or replicated the results of the S&P 500 total return index as had been promised.

17 The lawyer retained by Mr. Millman referred the claims to Sutts, Strosberg LLP in Ontario for the purpose of commencing a class action. On December 29, 2003, a statement of claim was issued by Mr. Millman's new counsel against Transamerica.

18 Although there is disputed evidence as to the timing and roles of the parties, the motion judge found that by autumn 2005, the case had been transferred to the law firm REKO. He further found that, upon the transfer of the file, Mr. Kim became the supervising lawyer on the case. Shortly thereafter, Mr. Millman indicated that he was no longer prepared to act as the representative plaintiff in the case.

19 Mr. Fantl was a long-standing friend of REKO partner Mr. Roy, and had been seeking legal advice from the firm on an unrelated matter at about the time that the original representative plaintiff removed himself from the file. During discussions, it emerged that Mr. Fantl was also an investor in the Can-Am Fund operated by Transamerica. REKO's lawyers invited him to act as the new representative plaintiff in the action and he accepted.

20 In May 2006, Mr. Fantl signed a retainer agreement with REKO. The retainer agreement was between Mr. Fantl and the law firm, and not between Mr. Fantl and any of REKO's individual lawyers.

21 Between September 2005 and April 2007, the case progressed. The statement of claim was amended, material for the certification was prepared and cross-examinations were conducted. The certification motion did not proceed in May 2007, as scheduled, because Mr. Kim and counsel for Transamerica began to explore the idea of consent certification and a settlement of the management expenses claim. The parties indicated in a case conference on September 12, 2007 that there was a prospect of settlement but that the scope of the funds implicated in the claim was growing significantly, beyond just the Can-Am fund.

22 The motion judge found that Mr. Kim had been the partner at REKO with the most involvement in Mr. Fantl's case, and that Mr. Kim had been assisted in this work to varying degrees by six associate lawyers. The motion judge also noted Mr. Fantl's evidence that he had had minimal contact with Mr. Kim throughout the course of the class action and that Mr. Kim had not provided him with any reports or advice on the case, apart from one brief conversation.

23 For reasons not disclosed to the motion judge, REKO dissolved on December 31, 2007. Mr. Kim established the firm now known as KO, and REKO's other former partners established the new firm called REO.

24 Mr. Roy wrote to Mr. Fantl to inform him of REKO's dissolution and to seek instructions with respect to carriage of the class action. On January 5, 2008, Mr. Fantl wrote to REO to say that he had chosen the firm to act as his lawyers for the class action. He cited his "personal knowledge of Mr. Roy, his abilities and integrity as a lawyer and my confidence in his judgment" as among the reasons for his choice. In this regard, the motion judge noted that Mr. Fantl had been the best man at Mr. Roy's wedding. In his affidavit evidence, Mr. Fantl also noted that his choice of counsel was influenced by the fact that "REO has extensive class action experience and the senior partners have a great deal of experience in complex litigation, including settlement of complicated cases." Mr. Fantl was not cross-examined on his affidavit. REO served the notice of change of solicitors and came on the record on January 18, 2008.

25 KO subsequently brought a motion to set aside the notice of change of solicitors, and to disqualify Mr. Fantl from being the representative plaintiff in the class action. It argued before the motion judge that Mr. Fantl had breached his duty to the intended class members by choosing REO and that, based on the success and progress achieved by Mr. Kim in the action, it was in the best interests of the class that KO be appointed as solicitor of record. KO also argued that, in the alternative, the court should replace Mr. Fantl with two new proposed representative plaintiffs, Ms. Seok and Ms. Kang. Mr. Fantl argued that the

court's jurisdiction to govern the solicitor-client relationship was limited to the post-certification phase and that, in any event, Mr. Fantl had fulfilled his duty to the intended class members by choosing adequate counsel.

26 KO's motion was dismissed. The dismissal was upheld by the Divisional Court. Following the dismissal of the motion, KO brought a competing action against Transamerica, with Ms. Kang as the proposed representative plaintiff. The Kang action covers 25 of the 26 investment funds that are the subject of the proposed settlement agreement in the instant case. The only distinction between the two is that the Kang action does not include the Can-Am fund.

**Decision of the motion judge**

27 In his reasons, the motion judge characterized the "overarching issue in the case" as being whether the court has the jurisdiction to supervise the relationships arising in a class proceeding, both pre- and post- certification: para. 56. He held that, on the basis of the court's inherent jurisdiction to control its own process and the powers derived from s. 12 of the CPA, the court's jurisdiction to supervise a class proceeding "exists from the outset of the litigation and the Court has the jurisdiction to make orders to protect putative class members as potential parties to the litigation": para. 58.

28 Having determined that the court has the jurisdiction to supervise all relationships arising out of a class proceeding from the outset of the litigation, the motion judge turned specifically to a consideration of the solicitor-client relationship. He recognized that in an ordinary action, well established principles dictate that a litigant has the autonomy to choose counsel without court interference. However, he noted that these principles cannot be transferred directly to the class action context due to the responsibilities owed by the representative plaintiff, class counsel and the court to absent class members.

29 The motion judge acknowledged previous case law suggesting that a solicitor-client relationship - with all its concomitant duties and obligations - may not exist between class counsel and proposed class members in the pre-certification stage. However, he held that a *sui generis* relationship exists between class counsel and proposed class members, and that at least some of the responsibilities inherent in the solicitor-client relationship are owed by counsel to the proposed class.

30 In considering the proper test for determining whether Mr. Fantl's choice of counsel should stand, the motion judge reviewed the case law that had developed in relation to the adequacy of the representative plaintiff, carriage motions and the removal or change of counsel. Ultimately, he likened the fact situation of the instant case as being akin to that of choosing a solicitor of record at the outset of litigation. He thus applied the standard applied by the court on a certification motion: whether the representative plaintiff has selected "competent counsel that will adequately represent the proposed class if the action is certified": para. 105.

31 In so deciding, the motion judge noted that this standard did not require the representative plaintiff to choose the best or more superior counsel. In this respect, while he stated that "Mr. Kim might or might not be a better choice", Mr. Fantl's choice of REO as solicitor of record met the standard of competency and adequacy: para. 110. Accordingly, the motion was dismissed.

**Decision of the Divisional Court**

32 On appeal, the appellant submitted before the Divisional Court that the motion judge had applied the wrong legal test when determining whether Mr. Fantl had properly appointed REO as the new class counsel.

33 The Divisional Court reviewed the motion judge's conclusions and found that he had committed no error of law. In particular, the Divisional Court endorsed the motion judge's central conclusion that, "having selected competent counsel to represent the class, the fact there are other counsel who may be a better choice does not change the standard Mr. Fantl must meet": para. 37.

**Positions of the Parties**

34 The thrust of the appellant's argument is that, even though the litigation is being conducted by a representative or intended representative plaintiff, where a decision is required in the conduct of the proceeding, including one that occurs at the pre-certification stage, the decision of the plaintiff must receive the court's approval.

35 The appellant contends that this is necessitated by an overriding concern for the interests of the absent class members. Accordingly, in its submission, the test to be applied by the court is whether the decision made by the plaintiff is in the best interests of the class. This, says the appellant, is the test to be applied by a court throughout a class proceeding, regardless of the issue to be decided or the stage of the proceeding.

36 The respondents advance a more limited view of the supervisory role of the court in the exercise of its jurisdiction under the CPA. They caution that it is not appropriate for the court to "descend into the arena" and assume the responsibility of the plaintiff in conducting the litigation.

**Analysis**

37 In addressing the issues raised in this appeal, I am guided by the reasons of the Supreme Court of Canada in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.), which sets out the standards of review in appeals from a judge's order.

**Issue 1: Supervisory jurisdiction of the court**

38 It is now well settled that class proceedings are *sui generis* litigation. In part, this is because of the existence of the proposed class in addition to the putative representative plaintiff. As stated by Cullity J. in *Heron v. Guidant Corp.*, [2007] O.J. No. 3823 (Ont. S.C.J.), leave to appeal refused (2008), 232 O.A.C. 366 (Ont. Div. Ct.), at para. 10:

> From the commencement of a class proceeding the court, as well as the named plaintiff has responsibilities to members of the class....They are not parties to the proceeding but they are not strangers. Their rights are as much at stake as those of the plaintiffs. It is consistent with their *sui generis* status, and the objectives of the CPA, that their interests should not be vulnerable to the deficiencies in the ability of the named plaintiff to represent them.
>
> [Citations omitted.]

39 The existence of the absent class members, among other factors, is the reason that the court's supervisory jurisdiction is engaged from the inception of an intended class proceeding. It continues throughout the "stages" of the proceeding until a final disposition, including the implementation of the administration of a settlement or, where applicable, a resolution of all individual issues.

40 The supervisory jurisdiction of the court over the class proceeding is not in issue on this appeal. The parties acknowledge that the court has supervisory jurisdiction throughout the proceeding. They do, however, posit markedly different theories as to the circumstances in which this jurisdiction must or ought to be exercised.

41 While I do not agree with the appellant's position that the court must be actively engaged at every turn in the proceeding, I am equally circumspect about the "hands off" approach advocated by the respondents. Neither view accurately captures the role of the court in respect of a class proceeding.

42 The CPA is specific as to certain matters arising out of litigation conducted under the aegis of the statute that require court approval. These include, *inter alia*, the abandonment or discontinuance of an action, approval of settlements, notice to class members and class counsel fees: see ss. 29(1), 29(2), 20, and 32(2) of the CPA respectively. In addition to such enumerated and specific matters requiring court approval, the legislature has also seen fit to provide the court, under s. 12 of the CPA, with a broad, discretionary jurisdiction to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination". Although the court's ongoing supervisory jurisdiction is manifest in the CPA, this is not to say that every decision made by the plaintiff or counsel in the prosecution of the class action lawsuit requires the sanction of the court.

43 The motion under appeal was brought pursuant to s. 12 of the CPA. The appellant argues that a notice of change of solicitors should not have been delivered without first obtaining an order of the court on motion brought by the representative

plaintiff, so as to have the court approve the new class counsel. Further, the appellant contends that this determination should only be made on the basis of the "best interests of the class".

44 I disagree. The position advanced by the appellant appears to be an attempt to combine certain developed principles of class action jurisprudence so as to elevate the court's supervisory role over the proceeding to one of mandatory intervention. While it is true that the court has a responsibility to the absent class members, the prosecution of the action rests squarely with the representative plaintiff. The representative plaintiff in a class action lawsuit is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report.

45 This is clear from a reading of the CPA. In order to obtain certification, s. 5(1) of the CPA requires that the court be satisfied that 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". In other words, as stated by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.), at para. 41:

> In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class.
>
> [Citations omitted.]

46 As is also stated in this passage, an important part of this representative plaintiff's plan is the retention of "competent" counsel.

47 I do not view it as necessary for the plaintiff to seek and obtain approval of the court for every decision involving the selection or change of counsel. However, I am of the view that the case management judge charged with responsibility for the supervision of the proceeding should be immediately and directly notified of such a change. Further, if this decision is contested and properly comes before the court on motion, the court is well within its jurisdiction to review the plaintiff's decision.

**Issue 2: Test for reviewing a plaintiff's choice of counsel**

48 The parties vigorously disputed the test to be applied when the court reviews a representative plaintiff's choice of counsel. In his reasons, the motion judge correctly identified the issues and canvassed the relevant case law in deciding that question. In my view, he made no error in holding that the choice of counsel upon REKO's dissolution was a matter for Mr. Fantl to deal with and that his decision did not warrant interference by the court. Nonetheless, I would arrive at that result for different reasons and based on a different analysis than that of the motion judge.

49 The appellant has argued that this court should evaluate Mr. Fantl's choice of counsel by determining whether he was acting in the "best interests of the class" in so choosing. On the other hand, the respondent contends that the motion judge was correct in applying a test of adequacy to Mr. Fantl's choice of counsel. In my view, both approaches miss the mark. Once the court's jurisdiction is engaged, any review by the court of a decision as to choice of counsel must be directed to three factors:

(1) Has the plaintiff chosen competent counsel?

(2) Were there any improper considerations underlying the choice made by the plaintiff? and

(3) Is there prejudice to the class as a result of the choice?

50 Unless this inquiry reveals something unsatisfactory to the court, it ought not to interfere with the choice of counsel made by the plaintiff. The court is not a substitute decision maker for the plaintiff in the litigation. Accordingly, any intervention based on its supervisory jurisdiction must be limited to situations where there is cogent evidence that steps taken may have an adverse impact on the absent class members.

51 In formulating these criteria for review of the choice of counsel by the plaintiff, I am necessarily rejecting the argument of the appellant that the only test to be applied by the court is whether the choice is "in the best interests of the class". It must be remembered that the broad and guiding "best interests" principle developed in recognition of the distinction that must be made between the interests of individual class members and the interests of the class as a whole when the court is considering certain issues: see *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.), *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (Ont. S.C.J.), and *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (Ont. S.C.J.). Here, the context is very different.

52 Moreover, where the issue before the court is the plaintiff's choice of counsel, insofar as the "interests of the class" must be considered, they are sufficiently addressed under the prejudice criterion. Where there is no prejudice, the choice of "competent counsel" who has not been selected for any improper purpose will also be in the interests of the class.

53 By applying these criteria, the court avoids the "contest" approach proposed by the appellant, which pits two sets of competing lawyers against each other and undermines the role of the representative plaintiff in selecting counsel. Such an approach is neither necessary nor productive where, as here, competence is conceded and there is no evidence that the plaintiff has acted improperly or in a manner that prejudices the interests of the class.

54 The appellant contends that the "contest" approach is appropriate in the present circumstances because the choice of counsel is analogous to a carriage motion. I disagree. A carriage motion is a motion to determine which of two or more overlapping, competing intended class actions should be allowed to proceed and which should be stayed. A carriage motion involves a competition which, of necessity, requires a comparison of the competing proceedings. Unlike a carriage motion, there is no competition between proceedings here. It is for this reason that any analogy between a carriage motion and the present circumstances breaks down.

***Application of the test to the instant case***

55 The instant proceeding involves the choice of counsel upon dissolution of the class counsel law firm. The retainer agreement was entered into between Mr. Fantl and REKO, and not with Mr. Kim or any other individual lawyer. A team of lawyers at the predecessor firm dealt with the case.

56 On dissolution, some of the team formed the appellant, some formed REO and one lawyer joined another firm. Lawyers in each of these factions had participated in the work on the file to varying degrees. The lawyer who did the most work on the file was the associate who left and went to an unrelated firm.

57 The record indicates that, although Mr. Kim was the senior partner on the case, he did not take instructions from, or report to, Mr. Fantl, and that he only accompanied Mr. Fantl to cross-examinations. He attended one settlement meeting with the defendant at which defendant's counsel offered to settle the claim, expand the class definition and communicate this development to class members.

58 In the context of this file, and in the eyes of Mr. Fantl, there was more to the REKO firm than just Mr. Kim. Mr. Fantl was faced with three choices. He could go with the appellant, the REO firm or choose a different firm. He chose the REO firm.

59 The appellant argues that the failure to retain KO was akin to a dismissal of counsel. I do not accept this characterization of the facts before this court. The appellant was not terminated by the plaintiff. Indeed, KO had no relationship with the plaintiff capable of termination. Rather, its complaint is that the plaintiff did not choose to retain its lawyers after REKO's dissolution.

60 Turning to the first factor of the test, competence of counsel of choice was conceded in the present case. I note the appellant's submission that competence of counsel is not a useful benchmark since every lawyer in Ontario is competent and thus no motion challenging a plaintiff's choice of counsel is likely to ever be successful. I disagree. Where competence is a live issue, the court should consider under this head:

(1) The nature of the lawsuit;

(2) The complexity of the litigation;

(3) The fact that it was a class proceeding;

(4) The experience of counsel as to subject matter and class actions;

(5) The resources of counsel;

(6) The stage of the proceedings at which the review occurs; and

(7) Any other considerations the court might deem to be appropriate.

61 Moreover, when considering competence of counsel, the court must take into account the fact that, after certification, class counsel will be in a solicitor-client relationship with the class members, with all of the responsibilities that entails, extending until the implementation of a settlement or final disposition of any individual issues. In other words, given that the class may include a large number of people, this obligation may be significant and prolonged: see generally *Cassano v. Toronto Dominion Bank* (2007), 87 O.R. (3d) 401 (Ont. C.A.), and *Ward-Price v. Mariners Haven Inc.* (2004), 71 O.R. (3d) 664 (Ont. S.C.J.), at para. 7.

62 These criteria serve to advance an object of the CPA, namely to obtain first class representation for class members.

63 Turning to the second factor, there is no evidence of any improper purpose or motive on the part of the plaintiff in making his decision to retain REO. The appellant points to the plaintiff's friendship with Mr. Roy, one of the partners of REO, as the driving factor in choice of counsel. While that was a consideration, it was not the only factor for the plaintiff's choice of counsel. As noted by the motion judge and as indicated in the record, Mr. Fantl was attracted to REO because of the competence of counsel, which is not disputed, and its reputation in class action work.

64 In any event, I would not accept that the fact of an acknowledged friendship between the plaintiff and his counsel of choice would constitute an improper purpose in and of itself. An improper purpose would be one where the plaintiff was seeking to gain a personal advantage, the hope of an advantage not shared by the class members or was motivated in some way that was inconsistent with the interests of the class.

65 Turning to the third factor, to the extent that prejudice was argued by the appellant, this line of argument focused on the economic prejudice to the appellant rather than on any prejudice to the interests of the class. The appellant emphasized what was characterized as the policy arguments in support of entrepreneurial lawyers, which were said to advance one of the goals of the CPA - access to justice. Effectively, the appellant's argument is that it would be unfair for a plaintiff, upon dissolution of his or her counsel's law firm, to choose any lawyer other than the lawyer who had previously acted as the lead counsel. In other words, in a class action, the lawyer's time and effort on the file constitutes an equity investment by the lawyer in the case. It is argued that if representative plaintiffs are allowed to switch counsel at will, there will be less of an incentive for counsel to take on class actions and make an investment of time and effort that may be lost.

66 There is no question that class proceedings are entrepreneurial in nature. However, the proposition advanced by the appellant would only be supportable if the creation of an entrepreneurial class action bar was a policy goal underpinning the CPA. This argument fails because as far as the CPA is concerned, the entrepreneurial lawyer is a means to an end, not an end in and of itself. Were it otherwise, one of the criticisms of the CPA, that it promulgates plaintiff-less litigation benefiting only the lawyers involved, would be well founded. Such is not the case.

67 Sections 33(1) and (4) of the CPA, which provide for contingency fees and a multiplier effect on fees to reward risk and success, are intended to provide sufficient incentives for lawyers to take on class proceedings that would not otherwise be attractive. This is the entrepreneurial aspect of class proceedings legislation that enhances access to justice. The CPA does not, nor was it ever intended to, provide lawyers with a vested interest in the subject matter of the lawsuit entitling them to override the choices of the representative plaintiff in the litigation, including the choice of counsel.

68 In any event, Mr. Kim's investment of time and effort in the action while at REKO will be protected through the process of dissolving that firm.

69 In conclusion, in light of the three factors set out above, namely, that competence of counsel is not in issue, there is no evidence of any improper purpose or considerations in choice of counsel, and no demonstrated prejudice to the class, there is no reason to interfere with the choice of counsel by Mr. Fantl.

**Issue 3: Substitution of the representative plaintiff and the status of the Kang action**

70 Before Perell J., the appellant sought an order adding Ms. Seok and Ms. Kang as potential representative plaintiffs to replace Mr. Fantl as the plaintiff. Perell J. denied its request.

71 On appeal, the appellant argued that Mr. Fantl's decision not to retain the appellant, in the face of Mr. Kim's success on the file, suggests that Mr. Fantl will not best represent the class members, and, thus, ought to be removed. On behalf of Ms. Kang and Ms. Seok, it argued that they should be substituted as representative plaintiffs. The respondents opposed, saying that, as with the commencement of the Kang action, this is simply an attempt to determine who will represent the interests of the class.

72 Mr. Fantl has prosecuted the action to the point of settlement. There is no suggestion that he has been less than diligent in this respect. Indeed, Mr. Fantl stepped in to represent the class when the original representative plaintiff chose to abandon that role. He did so after being approached by solicitors from REKO, some of whom now stand with opposing interests on this appeal.

73 While not necessarily determinative, the choice to approach Mr. Fantl to act in the representative capacity indicates that none of the counsel had any concerns about his ability to perform that role at that time. Moreover, when the plaintiff assumed the representation of the class, it must have been implicitly understood by his solicitors that he would be the one providing instructions for the litigation of the action.

74 In light of these factors and my conclusion above that Mr. Fantl chose competent counsel, did not act with an improper purpose or act to the prejudice of the class, there is no basis to interfere with the decision of the motion judge not to remove or replace Mr. Fantl as the representative plaintiff in this action.

***Stay of Kang Action***

75 The appellant commenced the Kang action following the dismissal of the motion to strike the notice of change of solicitors and replace the representative plaintiff, notwithstanding its admission before the motion judge that such a move would be "disingenuous": para. 99. Indeed, the Divisional Court commented on this development in the following terms at para. 11 of its reasons:

> Most remarkable of all, and independent of this motion under appeal, the lawyer has started a separate class proceeding against Transamerica in the name of Ms. Kang, the proposed representative plaintiff. This is the same Ms. Kang whom the lawyer seeks to have added as representative plaintiff with Mr. Fantl, or, in the alternative, to replace Mr. Fantl, his former client, with Ms. Kang and Ms. Seok.

76 I agree with the observation of the Divisional Court that the bringing of the Kang action after having lost the motion before the motion judge was "most remarkable". The only purpose for doing this can be to provide a platform for a carriage motion to challenge the instant proceeding as the proper proceeding to take the action forward to settlement on behalf of the class.

77 Apart from the fact that the appellant brought the second duplicative proceeding, which would in my view be determinative in and of itself, a carriage motion would also involve the appellant in bringing a proceeding against its former client.

78 The essence of the respondents' argument is that the Kang action amounts to an abuse of process. I agree. Accordingly, pursuant to the jurisdiction conferred upon this court under s. 134(1) of the CJA and s. 13 of the CPA, I would stay the Kang action.

79 If allowed to proceed, the Kang action would inevitably be stayed in any event. Considering the factors outlined by Cumming J. in *VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2000), 4 C.P.C. (5th) 169 (Ont. S.C.J.), at para. 49, there is no question that Mr. Fantl's action would proceed over the Kang action given that it is so "significantly more advanced than the other": *Setterington v. Merck Frosst Canada Ltd.* (2006), 26 C.P.C. (6th) 173 (Ont. S.C.J.), at para. 22, and *Ricardo v. Air Transat A.T. Inc.* (2002), 21 C.P.C. (5th) 297 (Ont. S.C.J.), at para. 24.

80 Further, as this action is on the cusp of settlement, the delay caused by a carriage motion would only serve to postpone the class members' access to justice. Even the appellant recognized that time was of the essence in this case, given the imminent settlement approval hearing, when it sought and was granted an expedited hearing of this appeal. Therefore, regardless of whether the competing actions are analyzed through the lens of best interests of the class or through that of prejudice, I reach the same inevitable conclusion that the Kang action should be stayed. The class members are entitled to certainty.

**Conclusion**

81 In conclusion, I would dismiss the appeal. Further, I would grant a stay of the Kang action. Mr. Fantl shall receive costs of $10,000 for the appeal and $5,000 for the leave motion inclusive of disbursements and G.S.T. The appellant shall also pay to Transamerica its costs of $6,350 for the appeal and $2,000 for the leave motion, inclusive of disbursements and G.S.T.

***S.T. Goudge J.A.*:**

I agree.

***J.M. Simmons J.A.*:**

I agree.

*Appeal dismissed.*

2015 ONSC 6896
Ontario Superior Court of Justice

McCallum-Boxe v. Sony Corp.

2015 CarswellOnt 17439, 2015 ONSC 6896, 260 A.C.W.S. (3d) 24

# Gregory Jermaine McCallum-Boxe, Plaintiff / Moving Party and Sony Corporation, Sony Computer Entertainment Inc., Sony Corporation of America, Sony of Canada Ltd., and Sony Computer Entertainment America LLC, Defendants / Responding Parties

Edward P. Belobaba J.

Heard: November 5, 2015
Judgment: November 17, 2015
Docket: CV-14-504164-CP

Counsel: Casey Churko, Linh Pham, for Plaintiff
Dana Peebles, for Defendants

***Edward P. Belobaba J.*:**

1 This proposed class action has settled. Given the modest size and relatively unremarkable nature of this settlement, the plaintiff's motion for settlement approval would normally have been granted with a brief endorsement. What makes this matter remarkable and deserving of written reasons is the legal fees arrangement between the representative plaintiff and class counsel, the Merchant Law Group ("MLG"). In my view, this particular legal fees arrangement is the very antithesis of what is in the best interests of the class. And the fact that MLG does this in "many" of its class actions is, to say the least, disturbing.

**Background**

2 The class action is based on a consumer product warranty complaint. The rubber grips on some of the Sony PlayStation 4 video game controllers were deteriorating prematurely. When customers returned the defective controllers for in-warranty repair or replacement they were obliged to pay the shipping charge. MLG concluded that this was contrary to law.

3 Two actions were commenced, one in Saskatchewan and this one in Ontario. MLG sued for $10 million, thinking that the class size was significant — they estimated anywhere from several thousand to several hundred thousand class members. As it turned out, only about 400 customers had sent their controllers back for repair or replacement and paid the impugned shipping charge.

**The settlement agreement**

4 Both actions have now been settled under one agreement. The settlement agreement provides that each of the 400 customers will receive a $20 reimbursement. The parties agree that on average this amount will more than cover the customer's shipping costs. The total value of the settlement is therefore $8000. Counsel for the defendants suggests that this could be the smallest Canadian class action settlement on record.

5 The settlement agreement provides that the defendants will pay a $1500 honorarium to the Saskatchewan plaintiff and $3000 to the Ontario plaintiff herein. The settlement agreement also obliges the defendants to pay legal fees:

> Sony will pay legal fees in an amount to be determined by the Ontario Court, with a motion on notice to the Defendants, including submission of the Merchant firm's dockets to the Court.

6 I have no difficulty certifying the action for settlement purposes. I have reviewed the pleadings and the filed affidavit material and I find that the five requirements set out in s. 5(1) of the *Class Proceedings Act* [1] have been satisfied. I also have no difficulty approving the proposed settlement and the payment of the suggested honoraria. I am satisfied that the $20 reimbursement for shipping costs is fair and reasonable and that the settlement is in the best interests of the class. I am also satisfied that the two representative plaintiffs are entitled to the modest honoraria amounts.

**The legal fees provision**

7 The problem is the legal fees provision and the arrangement that MLG made with the representative plaintiff.

8 On its face, the legal fees provision is easily understood. In addition to the $8000 settlement amount, Sony agrees to pay legal fees directly to MLG in an amount to be determined by this court. MLG must provide their dockets to not only assist the court but also to allow for Sony's review and critique. Sony tried to argue that they were obliged to pay the legal fees to the class representative and not to MLG directly. I reject this interpretation and I note that my interpretation of this legal fees provision is supported by the affidavit material that was filed by both sides confirming their shared intention that the legal fees would be paid directly to MLG.

9 Turning then to the task at hand, how should this court determine the legal fees payable to MLG? In *Lavier v. MyTravel Canada Holidays Inc.*, [2] the Court of Appeal noted that where the legal fees provision is part of the settlement agreement, the court must still apply the norms set out in the CPA (i.e. those that normally apply to the court's approval of solicitor-client fee agreements) — namely, "whether a fee is fair and reasonable." [3] In making this determination, the court must assess "the risks assumed by class counsel and the results achieved for the class ..." [4]

10 To help me determine what amount would be fair and reasonable, I asked MLG in court if they were entitled to any compensation under the retainer agreement with their client, whether by way of hourly rates and multipliers or contingency amounts. I assumed that MLG, like most class counsel, had a written retainer agreement with a contingency fee arrangement.

**Class counsel's "arrangement"**

11 To my surprise, MLG advised that it had no written retainer agreement for the Sony class action. MLG explained (and follow-up affidavits from the representative plaintiffs confirmed) that in this case the class was not obliged pay any fees or costs whatsoever and that MLG intended to recover their legal fees from Sony "as part of the settlement agreement." MLG said it currently has similar arrangements in "many" of their class actions.

12 I must confess that I was somewhat shocked to hear this. An experienced class action firm was telling me in open court, and with a straight face, that "many" of its class action legal fee arrangements were like the one that was before me — no written retainer, no contingency fee provision, simply an agreement with the class representative that MLG would look to recover its legal fees from the defendant as part of the (hoped for) settlement agreement.

13 It must be obvious to anyone who gives this even a moment's thought, that this type of settlement-driven legal fees arrangement in class action litigation is fundamentally and profoundly unacceptable. It provides all the wrong incentives. The MLG arrangement discourages maximum commitment on behalf of the class because even if class counsel should win at trial, they will not be entitled to any compensation, whether from the recovery (no such agreement is in place) or via the plaintiff's claim for costs (no costs can be awarded because the representative plaintiff has no liability to pay legal expenses. [5] ) The MLG arrangement encourages only a minimal commitment on behalf of the class leading to sub-optimal settlements negotiated by class counsel who are primarily interested in recovering a generous legal fees payment.

14 The MLG arrangement will no doubt work for the defendant who is shrewd enough to negotiate a small settlement amount coupled with an attractive legal fees payment to class counsel, and still come out ahead. It most decidedly does not work for the members of the class. It is obviously not in their best interests. Their legal counsel is not only motivated to negotiate a

settlement in almost any amount, his or her very involvement in the negotiation with the defendant creates a glaring conflict of interest because every dollar that can be deducted from the class members' settlement amount is a dollar that can potentially be added to class counsel's legal fees amount.

15 Judges should as a rule approve legal fee arrangements that incentivize class counsel to press for the highest possible recovery for the class and should reject arrangements such as this that encourage premature, sub-optimal settlements negotiated by class counsel trying to extract an almost risk-free payment for themselves.

16 In short, the MLG arrangement - "don't worry about our legal fees, we'll get the defendant to pay them as part of the settlement agreement" - is, as I have already noted, the antithesis of a legal fees arrangement that is in the best interests of the class. I doubt that any Canadian judge concerned about the viability of the class action vehicle and the overall best interests of the class would ever approve such a one-sided agreement. MLG would be wise to quickly abandon this settlement-driven legal fees arrangement.

**Determining fair and reasonable legal fees**

17 Here, of course, the actual arrangement between MLG and the two representative plaintiffs, although in my view deplorable, is not before me for review and approval. What is before is the legal fees provision that is set out in the settlement agreement. And here, ironically, the actual settlement achieved, although a mere $8000, is fair and reasonable and, as I have already found, in the best interests of the class.

18 So, after a somewhat lengthy detour denouncing the settlement-driven MLG arrangement, I must return to the task at hand and acknowledge that I am still obliged to determine the amount that Sony should pay to MLG under the legal fees provision in the settlement agreement. [6]

19 MLG suggests a number of possible payment scenarios from partial to full indemnity, as well as one involving a 1.5 multiplier. All of the scenarios would result in a legal fees award ranging from $120,000 to $225,000. The defendants, not surprisingly, oppose any such payment. They criticize class counsel's dockets as being excessive; they remind the court that the value of the overall settlement is a meager $8000; and they suggest that no fees should be awarded and at most no more than $24,000, the amount that was spent by the defendants on a partial indemnity basis.

20 Several observations are in order. This is a legal fees award not a costs award and thus MLG is entitled in principle to be paid a fair and reasonable legal fees amount that is undiluted by the application of a partial indemnity standard. However, it is important to note, given the settlement-driven arrangement with the representative plaintiffs, that MLG did not assume much risk in this litigation and it is even more important to note that the legal fees awarded should be proportional to the result achieved, here a very modest $8000 settlement.

21 In my view, after taking all of these factors into account, I find that a fair and reasonable legal fees award is at most $30,000.

**Disposition**

22 The proposed class action is certified for settlement purposes. The settlement agreement is approved. The payment of the requested $1500 and $3000 honoraria to the two representative plaintiffs is approved. And, further to the settlement agreement, this court has determined that the defendants should pay MLG its legal fees in the amount of *$30,000*. Order to go accordingly.

*Motion granted.*

Footnotes

1 *Class Proceedings Act*, 1992, S.O. 1992, c. 6.

2 *Lavier v. MyTravel Canada Holidays Inc.*, [2013] O.J. No. 674 (Ont. C.A.)

3 *Ibid.*, at paras.26-27.

4 *Ibid.*, at para. 27.

5 *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2015 ONSC 6354 (Ont. S.C.J.) at para. 109: "It may seem a trite observation but for a litigant to have a claim for costs, he or she must have incurred a liability to pay for legal expenses. This is an old principle: the litigant must have a liability to pay his or her own lawyer in order to claim indemnification for that liability."

6 I cannot refuse to enforce the legal fees provision in the settlement agreement just because the underlying settlement-driven "arrangement" would not be approved if it was before the court — the latter is obviously not before the court for approval.

2022 BCSC 331
British Columbia Supreme Court

Moiseiwitsch v. Canadian National Railway Company

2022 CarswellBC 542, 2022 BCSC 331

# Carel Moiseiwitsch (Plaintiff) and Canadian National Railway Company and Canadian Pacific Railway Company (Defendants)

Christopher O'Connor and Jordan Spinks (Plaintiffs) and Canadian Pacific Railway Limited, Canadian Pacific Railway Company, Canadian National Railway Company, E-Verifile.Com, Inc. d.b.a. eRailSafe Canada, Attorney General of Canada, ABC Company No. 1, ABC Company No. 2, ABC Company No. 3, ABC Company No. 4, ABC Company No. 5, John Doe, Jane Doe (Defendants)

Hinkson C.J.

Heard: January 12, 2022
Judgment: March 3, 2022
Docket: Vancouver S217469, Kamloops 060588

Proceedings: affirmed *Moiseiwitsch v. Canadian National Railway Company* (2022), 2022 CarswellBC 2612, 2022 BCCA 321, Butler J.A., Horsman J.A., Voith J.A. (B.C. C.A.)

Counsel: R. Mogerman Q.C., M. Segal, M. Hogan, J. Gratl, for Plaintiff, Carel Moiseiwitsch
C. Dennis Q.C., V. Cheung, for Plaintiff, Christopher O'Connor and Jordan Spinks
N. Hughes, L. Burgess, for Defendant, Canadian National Railway Company
M. Eizenga, R. Curpen, D.A. Luca, L. Hurl, C. Lingley (Articled Student), for Defendant, Canadian Pacific Railway Company
J. DeWiel, A. Christ, S. Khazei, C. Cameron, for Defendant, Department of Justice Canada

***Hinkson C.J.*:**

**Overview**

1 On June 30, 2021, a wildfire destroyed the Village of Lytton and much of the area that surrounded it.

2 On August 18, 2021, Ms. Moiseiwitsch filed a notice of civil claim in a putative class action ("the Moiseiwitsch action"), seeking damages against the Canadian National Railway Company ("CN") and the Canadian Pacific Railway Company ("CP") for the damage caused by the wildfire. In these reasons for judgment, I will also refer to CN and CP collectively as the "Railway defendants".

3 On October 7, 2021, Messrs. O'Connor and Spinks filed a notice of civil claim in another putative class action ("the O'Connor/Spinks action"), seeking damages for the damage caused by the wildfire. The named defendants in the O'Connor/Spinks action are Canadian Pacific Railway Limited and the Canadian Pacific Railway Company, the Canadian National Railway Company, E-Verifile.Com, Inc. d.b.a. eRailSafe Canada, the Attorney General of Canada, ABC Company No. 1, ABC Company No. 2, ABC Company No. 3, ABC Company No. 4, ABC Company No. 5, John Doe, and Jane Doe.

4 On this application, Ms. Moiseiwitsch seeks carriage of the proposed class proceeding arising from the Lytton fire. The orders sought by Ms. Moiseiwitsch include:

1. An Order that the Second Action be conditionally stayed until the certification application in the herein Action commenced by Carel Moiseiwitsch against Canadian National Railway and Canadian Pacific Railway Company (collectively "CN and CP Railway"), Supreme Court of British Columbia, Court File No. S- 217469 (the "First Action") is decided, pursuant to Section 10 of the *Law and Equity Act*, RSBC 1996, c 253, and the inherent jurisdiction of this Honourable Court;

2. An Order that the commencement of further class proceedings in the Province of British Columbia against CN and CP Railway seeking to advance the same claims as those advanced in the First Action be prohibited without leave of the Court until the certification application in this action is decided.

3. An Order that the law firms of Camp Fiorante Matthews Mogerman LLP and Gratl & Company be granted carriage of the proposed class action proceedings in the Province of British Columbia.

4. An Order that Carel Moiseiwitsch shall be at liberty to apply for a continuation of the Order conditionally staying the Second Action if certification is granted in the First Action.

5. An Order that, if certification is not granted in the First Action, or the First Action is discontinued against all defendants or withdrawn, the stay of the Second Action and the prohibition against the commencement of further class proceedings in the Province of British Columbia shall both be lifted.

6. An Order that the O'Connor Plaintiffs shall pay the Plaintiff's costs in this application; and

5 Messrs. O'Connor and Spinks oppose the relief sought by Ms. Moiseiwitsch and seek orders to permit them sole carriage of the class action.

6 Counsel for the defendant Railways and the Department of Justice took no position on the application.

**Background**

7 Since June 30, 2021, the approximately 250 residents of Lytton and many of the residents of the surrounding areas, including members of the Lytton First Nation, all of whom are proposed class members in both competing actions, have been unable to return to their homes and businesses. They are living in temporary circumstances, unable to move ahead with rebuilding or planning for their futures.

8 The filing of Ms. Moiseiwitsch's action was covered in local news media. In it she alleges the Lytton Creek Wildfire ("the wildfire") was caused by heat and/or sparks emanating from a freight train owned by CP that was being operated by CN on CN-owned tracks.

9 Jordan Spinks is one of the representative plaintiffs in the O'Conner/Spinks action. He is a member of the Kanaka Bar lndian Band, and resides on one of the 56 reserves governed by the Lytton First Nation. On June 30, 2021, he witnessed smoke and flames on a CN Rail right of way at or near the bridge that crosses the Fraser River between Highways 97 and 99. He phoned his son's mother who alerted authorities as the fire rapidly spread. Mr. Spinks lost his job and was displaced from his home as a result of the wildfire.

10 Christopher O'Connor is the other representative plaintiff in the O'Connor/Spinks action and is a resident and a former mayor of Lytton, B.C. His home, vehicle, and other personal property were damaged or destroyed by the wildfire. He has lived in hotels and short-term rental accommodations since being displaced from his home.

**Factors to be Considered on a Carriage Application**

11 The factors to be considered on a carriage application have evolved and are intended to determine which competing actions will best advance the interests of the putative class members and promote the objectives of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*]: *Ewert v. Canada (Attorney General)*2014 BCSC 215at paras. 14 — 15, 18 [*Ewert* ].

12 While there is no universal formula of factors to be considered, counsel agree that the *Ewert* considerations are to be guided by the following non-exhaustive factors set out by Justice Perell in *Rogers v. Aphria Inc.*2019 ONSC 3698at para. 17 [*Rogers* ], which were adopted by Justice D.C. MacDonald in *Wong v. Marriott International Inc.*2020 BCSC 55at para. 24 [*Wong* ]:

(1) The quality of the proposed representative plaintiffs;

(2) Funding;

(3) Fee and consortium agreements;

(4) The quality of proposed class counsel;

(5) Disqualifying conflicts of interest;

(6) Relative priority of commencement of the action;

(7) Preparation and readiness of the action;

(8) Preparation and performance on carriage motion;

(9) Case theory;

(10) Scope of causes of action;

(11) Selection of defendants;

(12) Correlation of plaintiffs and defendants;

(13) Class definition;

(14) Class period;

(15) Prospect of success: (leave and) certification;

(16) Prospect of success against the defendants; and

(17) Interrelationship of class actions in more than one jurisdiction.

13 In *Wong* , at paras. 25 — 26, MacDonald J. clarified that:

[25] Different factors speak to different considerations on a carriage motion. As Perell J. explained in *Rogers*:

> [18] It is useful to note that: factors (1) to (3) concern the qualifications of the proposed Representative Plaintiffs; factors (4) to (8) concern the qualifications of the proposed Class Counsel; and factors (9) to (17) concern the quality of the litigation plan for the proposed class action. Thus, nine of the factors are about or are connected to case theory, which is understandable, because at the very heart of the test for determining carriage is a qualitative and comparative analysis of the case theories of the rival Class Counsel. [Footnote omitted.]

[26] The courts discourage a "tick the boxes" approach to carriage motions. The focus should be the broader goal of promoting the best interests of the class members and fairness to the defendants: *Strohmaier CA* at para. 41. When factors

are very similar, or have only minor differences, a court may assess them as neutral or not refer to them at all: *Strohmaier CA* at paras. 76 — 77. The circumstances of each case will determine how much weight should be given to each factor.

**Discussion**

14 I will address the applicable *Rogers* factors in turn. As explained by the case law, not all of the factors listed earlier require consideration in every case. I have determined that the class period, the plaintiff and defendant correlation, and the interrelationship of class actions in more than one jurisdiction are factors that are not relevant, and I do not consider them in my determination of this carriage application.

***(1) The Quality of the Proposed Representative Plaintiffs***

15 A proposed representative plaintiff will only be rejected by the Court when that plaintiff clearly will not or cannot represent the class.

16 This factor is often considered minor in a carriage contest. Ms. Moiseiwitsch agrees with that view, subject to one qualification regarding Mr. O'Connor.

17 Mr. O'Connor is a former mayor of Lytton, who is alleged by Ms. Moiseiwitsch to have ostensibly lost his position for disagreeing in 2014 with a past iteration of the local municipal counsel on some local matters. Ms. Moiseiwitsch alleges that Mr. O'Connor has had a fraught history with the Village of Lytton, its mayor, or its counsellors, all of whom are other potential class members, which ought to weigh against carriage being granted to the O'Connor/Spinks action.

18 Counsel for Messrs. O'Connor and Spinks contend that Mr. O'Connor was, and is, an engaged citizen, contributing to his community as editor of a local newspaper, inviting comment and encouraging a lively debate among his fellow citizens. They argue that where there is evidence of the direct involvement of a proposed representative plaintiff, in terms of directing the litigation and moving it forward, that plaintiff will be favoured over actions with minimal evidence that the representative played any meaningful role. Counsel says that the evidence before me shows that he is a thoughtful and engaged person who will adequately represent class members.

19 Counsel for Messrs. O'Connor and Spinks assert that the First Nations communities surrounding Lytton have been greatly impacted by the wildfire, and it is significant that they have a voice in the direction of their claims to give them confidence that their interests are properly advanced.

20 Counsel in the O'Connor/Spinks action argued that Messrs. O'Connor and Spinks better represent the impacted communities, including members of the Lytton First Nation. They contend that having a truly representative plaintiff is of particular significance in this case, given the magnitude and extent of the losses suffered by the proposed Indigenous class members on their traditional territories and reserve lands. They argue that mere communication with class members, as counsel for Ms. Moiseiwitsch asserts, is not a substitute for direct involvement of Mr. Spinks as a representative plaintiff.

21 Counsel in the Moiseiwitsch action argue that counsel for Messrs. O'Connor and Spinks overstate the importance of the inclusion of Mr. Spinks as a representative plaintiff. They argue that they have experience acting for Indigenous groups and individuals and have been class counsel in cases with largely indigenous class members. This argument properly addresses the consideration of the quality of counsel, and in my view, does not address the quality of the proposed representative plaintiffs.

22 While not a significant advantage, I find that there is a modest advantage to Counsel for Messrs. O'Connor and Spinks, due to the inclusion of Mr. Spinks as a proposed representative plaintiff.

***(2) Funding***

23 Ms. Moiseiwitsch submits that this factor strongly militates against carriage being granted in the O'Connor/Spinks action. Counsel for Messrs. O'Connor and Spinks argue that the factor is neutral.

24 I accept that, as a rule, legal fee arrangements that incentivize class counsel to press for the highest possible recovery for the class should be approved over those that encourage premature, sub-optimal settlements negotiated by class counsel trying to extract an almost risk-free payment for themselves.

25 In *Piett v. Global Learning Group Inc.*2021 SKQB 232at paras. 59 — 60 [*Piett* ], Justice McCreary reasoned that:

> [59] Plaintiffs' counsel argues that provisions of the *CAA* [Saskatchewan *Class Actions Act*] which prohibit class solicitation for fees without court approval only applies **after** a class action is certified. The argument is that prior to certification there are no "class members", just putative class members, and therefore, prior to certification, s. 22(2) of the *CAA* does not apply.
>
> [60] Respectfully, I do not agree. It is illogical and incongruous with the spirit and intent of the *CAA*, which is designed, in part, to protect the interests of class members, for the legislation to apply only after an action is certified as a class action. As noted by Justice Belobaba in *McCallum-Boxe v Sony*, 2015 ONSC 6896 at para 15 [*McCallum-Boxe*], the purpose of legislation which provides for judicial oversight over plaintiffs' costs is to ensure that the interests of the class are not prejudiced . . .
>
> [Emphasis in original.]

26 Section 19(7) of the *CPA* provides:

> (7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitors' fees and disbursements.
>
> [Emphasis added.]

27 The relevant clauses of the O'Connor/Spinks fee agreement read:

> 9. Disbursements will be paid firstly out of any amounts raised from members of the Class and then by the Solicitors. The Client shall not be obliged to fund any disbursements.
>
> . . .
>
> 11. The Solicitors will incur disbursements to an aggregate of $25,000 without immediate reimbursement but shall not be obliged to incur disbursements beyond that amount although they may do so in their discretion. Unpaid disbursements will be a first charge paid out of the proceeds of any Order, Judgment, or settlement.

28 I am prepared to take judicial notice that disbursements in class proceedings regularly exceed amounts far greater than $25,000.

29 The O'Connor/Spinks fee agreement contains no information as to what factors will go into counsel's exercise of discretion in deciding whether to incur additional disbursements.

30 It is unclear how counsel for Messrs. O'Connor and Spinks expect to enforce the disbursement clause in their fee agreement without first bringing a motion pursuant to s. 38(2) of the *CPA* for approval of the fee agreement. They cannot solicit funds from class members without leave of the court, pursuant to s. 19(7) of the *CPA*.

31 Ms. Moiseiwitsch contends that there are no funding issues regarding her action. She argues that the funding structure of the O'Connor/Spinks action requires class members to contribute funds to pay for disbursements, and this raises questions about the appropriateness of their funding structure.

32 Messrs. O'Connor and Spinks say that their fee agreement does not "provide that class members will be obliged to contribute funds to pay for disbursements". They say that their intention is to continue to fund disbursements in this case, and they are prepared undertake to the Court that they will do so.

33 They respond to the criticism that they will seek funding for their disbursements from class members by stating that the reference requiring disbursements after $25,000 are discretionary in their contingency fee agreement and, at worst, are inelegantly phrased. They represented to me that they would be pleased to undertake to delete that line from their contingency fee agreement.

34 The relevant clauses of the Moiseiwitsch fee agreement read:

> h. Disbursements incurred by the Firms will be paid from proceeds recovered from the Defendants, and that payment of disbursements incurred by the Firms are a first charge on any settlement funds or monetary award. If no damages or costs are recovered, then the Firms will be responsible for those and the Client will not be responsible for the disbursements. Legal fees will be calculated on the net recovery after deduction of disbursements.
>
> i. If the Firms incur costs for disbursements, the client agrees to authorize payment of interest on the amounts advanced at 10% per annum, accruing monthly from the date incurred.

35 The Moiseiwitsch fee agreement neither requires class members to fund the litigation nor limits her counsel's obligations to fund disbursements.

36 Counsel for Messrs. O'Connor and Spinks point out, however, that the Moiseiwitsch action contingency fee agreement accords discretion to counsel to select which disbursements to fund. They describe this as funding disbursements that are "reasonable and necessary", which is simply the well-known legal test for recovery of disbursements. In the result, they argue that the critique that there is a lack of description in their fee agreement as to how the exercise of discretion on disbursement funding will be carried out is without merit.

37 The Moiseiwitsch fee agreement charges class members interest on disbursements at "10% per annum, accruing monthly from the date incurred." That contingency fee agreement also indicates that the representative plaintiff "may be liable for any costs award that may be issued by the Court . . . " notwithstanding that under the "*...Class Proceedings Act...*in most cases the Court cannot make an award of costs... ". Under the O'Connor/Spinks action fee agreement, interest is not charged on disbursements, and the representative plaintiff will not be responsible for costs, if any.

38 However, on or around December 10, 2021, counsel in the Moiseiwitsch action changed their view about charging interest on disbursements, agreeing to "not charge interest on disbursements in this matter." If they are to have carriage of the action, I would require them to amend their fee agreement to state that they will not collect or charge any interest on disbursements in this case.

39 Given the oversight responsibilities of the Court with respect to class action fees and disbursements, and the concessions that the proposed plaintiffs have had to make, I find that this is a neutral factor.

***(3) Fee and Consortium Agreements***

40 The fee arrangement can be an important factor on a carriage motion, because it affects the interests of the class. In some cases, the fee arrangement is determinative of the issue of carriage.

41 Counsel for Ms. Moiseiwitsch contend that any fee agreement with a representative plaintiff is subject to court approval, so the fee agreement is only a starting point. The court, in its oversight role, has the ability to assess the reasonableness of a particular fee agreement, and it will determine what fee class counsel may take. The actual percentages ultimately awarded in respect of legal fees depends to a large extent on a number of factors considered at the time the action is resolved, in whole or in part. For this reason, they argue that the percentages agreed upon in the retainer agreement are typically a "ceiling" as opposed to a "floor".

42 The contingency fee agreement in the Moiseiwitsch action recognizes that any fee requires court approval and contains a proposed tiered fee as follows:

(a) Twenty percent of the Amount Recovered if such recovery occurs before the start of the hearing of the certification application;

(b) Twenty-five percent of the Amount Recovered if such recovery occurs after the start of the certification application; and

(c) Thirty percent of the Amount Recovered if such recovery occurs within 100 days of the scheduled start of the common issues trial.

43 Counsel for Ms. Moiseiwitsch contend that their fee agreement is consistent with fees awarded by the courts in other class actions. While that may well be the case, it is no answer to the disparity between the two fee agreements.

44 The contingency fee agreement in the O'Connor/Spinks action sets the contingency fees in the range of 20 — 25%:

I. For settlements before certification of the class action, the legal fees shall be a maximum of 20%, and may be less, of the total amounts recovered by the class.

II. For settlements after certification of the class action, the legal fees shall be a maximum of 22.5%, and may be less, of the total amounts recovered by the class.

Ill. For settlements after a common issues trial of the class action, the solicitors' legal fees shall be a maximum of 25%, and may be less, of the total amounts recovered by the class.

45 Counsel for Messrs. O'Connor and Spinks assert that their contingency fee agreement is more favourable to class members in two ways: first, it has a lower legal fee percentage on average; and second, it triggers escalation into a higher fee percentage at later points in the potential life cycle of the action relative to the fee agreement in the Moiseiwitsch action.

46 While fees are an important factor in a carriage motion, courts must be careful not to simply endorse the lowest fee as being in the best interest of the class. Lower fees may not provide the proper incentives for counsel to litigate a particular class or class actions in the future. However, given the magnitude of the claims in the putative actions, I give no weight to that concern.

47 Counsel for Messrs. O'Connor and Spinks argue that if counsel for Ms. Moiseiwitsch see fit to match the lower legal fees charged by their fee agreement, as they saw fit to match them on not charging interest on disbursements, then this factor will be neutral, but absent such an undertaking, then they argue that the factor of legal fees weighs in favour of granting carriage to them.

48 If counsel for Ms. Moiseiwitsch are to have carriage of the action, I would require them to amend their fee agreement to match the fee structure found in the O'Connor/Spinks fee agreement. I therefore find that this factor is a neutral one.

***(4) The Quality of Proposed Class Counsel***

49 Camp Fiorante Matthews Mogerman ("CFM") are class counsel in the Moiseiwitsch action. They have extensive experience and expertise in class actions and transportation litigation, having appeared on class proceedings and transportation safety matters at all levels of court in British Columbia and several times as class counsel in the Supreme Court of Canada.

50 CFM has experience with class action cases involving classes of individuals with significant personal losses arising from such events as aviation accidents, Hepatitis C contaminated blood supply, Ponzi schemes, changes to pension plans, and changes to fisheries licences. They are presently engaged as lead counsel or co-counsel on over 40 class actions at various stages of the litigation process, including the distribution of settlement funds to class members.

51 CFM has wide-ranging experience litigating claims arising from transportation accidents including product liability claims against aircraft operators, shipping operators, aerospace manufacturers, maintenance facilities, and regulatory authorities.

52 CFM has specific experience with the applications required to gain access to evidence gathered by the Transportation Safety Board of Canada, including on-board recording devices such as cockpit voice recorders.

53 Slater Vecchio LLP and Mathew Good are class counsel in the O'Connor/Spinks action. Slater Vecchio LLP has recent experience in the prosecution and settlement of class proceedings and has nine current class actions listed on its website, all of which were filed since May 2020. Slater Vecchio LLP has 23 class actions listed on the CBA national class actions database posted since May 2020. Mr. Good practices as a sole practitioner and currently has 42 actions listed as "[c]urrent class actions being litigated by Good Barrister . . . " on his website.

54 It is an advantage to the class to be represented by counsel who are highly experienced in class actions, as well as to have counsel who are connected with the class members' local community.

55 In *Strohmaier v. British Columbia (Attorney General)*, 2018 BCSC 1613 (B.C. S.C.) at para. 54 Justice Skolrood observed:

> [54] Courts have warned against permitting carriage motions to devolve into a "beauty pageant" in which competing law firms extol their respective virtues while at the same time subtly (or not so subtly) undermining the experience and credentials of other counsel: *Sharma v. Timminco Ltd.*, 2009 CarswellOnt 6583 (S.C.J.) at para. 18.

56 It is not for the Court to choose between different counsel according to their relative resources and expertise but rather to determine which of the competing actions is most likely to advance the interests of the class. However, some comparison is unavoidable.

57 Counsel in the O'Connor/Spinks action agree that counsel in the Moiseiwitsch action are well-qualified and experienced in class action litigation, but they submit that the collective experience and qualifications of counsel in the O'Connor/Spinks action make them just as well-suited to prosecuting the present claim.

58 CFM has complex product and transportation liability expertise, and I have no hesitation in finding that they are well-equipped to represent and work with Indigenous class members in this case.

59 I have no hesitation in finding that Slater Vecchio LLP and Mr. Good have the means and experience to advance and prosecute the O'Connor/Spinks action through trial to a high standard.

60 While I do not consider it to be a factor of great weight, I find that the greater and longer experience of CFM in class action litigation offers a slight edge to their carriage application.

***(5) Disqualifying Conflicts of Interest***

61 In the course of the submissions before me, I raised the potential for a conflict of interest on the part of Mr. Gratl, who was proposed as both a class member, as the owner of a building in Lytton affected by the wildfire, and as counsel. During the course of submissions, Mr. Gratl withdrew as proposed counsel.

62 Counsel for Ms. Moiseiwitsch contend, and I accept, that all putative class members in these cases share an overriding common interest in establishing liability against CN and CP and others, for the wildfire, leaving no conflict between class members with respect to that common issue.

63 The Moiseiwitsch action includes subclasses constructed to address potential conflicts between class members that might arise after resolution of the common issues. They say that there is no conflict between subclasses on the common issues. However, counsel for Messrs. O'Connor and Spinks say the following conflicts between class members will arise in the Moiseiwitsch action:

> a) There may be a conflict between a governmental entity and other class members if a governmental entity is found to be liable; and

b) Insured class members may be in a conflict with members of the subrogation subclass because insured class members may have the sole right to opt out of a class action or make decisions about their claim, depending on the terms of their contract with the insurer.

64 Counsel for Ms. Moiseiwitsch responded to these alleged conflicts by arguing that with respect to (a), there is no evidence in the record, and they are presently unaware of any evidence indicating that a governmental entity is at fault for the wildfire. They say that the argument that a governmental entity may ultimately be found at fault in this action is, at this time, pure conjecture.

65 With respect to (b), counsel for Ms. Moiseiwitsch say that counsel for Messrs. O'Connor and Spinks cannot point to any tangible policy or document that may give rise to a conflict between insured class members and the subrogation subclass, and thus their argument is based on assertions not supported by evidence.

66 I am not persuaded that the potential conflicts raised by counsel for Messrs. O'Connor and Spinks are more than speculation at this stage, and I do not find that they afford any greater advantage to a grant of carriage to counsel for Messrs. O'Connor and Spinks.

67 Counsel for Messrs. O'Connor and Spinks also contend that inclusion of governmental entities may prejudice individual class members because adjudication of governmental claims may be more complex and take longer. Counsel for Ms. Moiseiwitsch contends that this position is without substance because the Court has the ability to conduct the class proceeding in an expeditious manner that would result in little risk of delay to individual class members in the adjudication of their claims.

68 The argument with respect to the inclusion of governmental entities is similar to that relied upon by counsel for Ms. Moiseiwitsch with respect to the defendants named in the O'Connor/Spinks action that are not named in the Moiseiwitsch action. I see little merit in either, and the fact that the two submissions mirror each other neutralizes them both. I discuss this further under the heading "selection of defendants".

69 I find that this factor is a neutral one.

***(6) Relative Priority of Commencement of the Action***

70 The Moiseiwitsch action was filed on August 18, 2021, and service of that notice of civil claim was completed on August 24, 2021. Responses to notice of civil claim in the Moiseiwitsch action have been filed and served.

71 The O'Connor/Spinks action was filed on October 7, 2021, approximately seven weeks after the Moiseiwitsch action. Counsel for Messrs. O'Connor and Spinks have not provided evidence that they have completed service on the defendants named in their action. They will not be able to seek case management of their action until all defendants are served and the deadline for responses has passed.

72 Counsel in the Moiseiwitsch action concede that there is no first-to-file rule in British Columbia, and counsel for Messrs. O'Connor and Spinks argue that the difference of less than two months between the filing dates is meaningless.

73 The O'Connor/Spinks action filed the claim in the Kamloops registry because that is the closest registry to Lytton, and it is the courthouse where any trial ought to take place given many of the residents will attend the trial. However, I do not see that as a factor of any weight.

74 I find that at this stage of the proceedings, the priority of the commencement of the action is a neutral one.

***(7) Preparation and Readiness of the Action***

75 On September 10, 2021, counsel for Ms. Moiseiwitsch sent a request for the assignment of a judge to the Vancouver Registry of this Court, pursuant to Practice Direction 5.

76 On September 24, 2021, I assigned myself as the management judge in the Moiseiwitsch action and set the first judicial management conference in the action for October 15, 2021.

77 Pursuant to my direction, third party notices in the Moiseiwitsch action were due on December 17, 2021. However, on December 16, 2021, defendants in the Moiseiwitsch action notified the Court by letter that no third-party notices would be filed.

78 The morning of the first scheduled judicial management conference, counsel in the Moiseiwitsch action were notified of the existence of the O'Connor/Spinks action, which had been served on CP the previous evening. By then, counsel for the parties named in the Moiseiwitsch action had agreed upon a schedule for the exchange of certification materials, beginning with delivery of the plaintiff's certification record on December 20, 2021.

79 The explanation offered by counsel for Messrs. O'Connor and Spinks for the delay in the initiation of their action is that they were researching the proceedings in the so-called "Lac Megantic Litigation", in order to craft their case to take into account the steps taken and results achieved in that case.

80 Counsel for Ms. Moiseiwitsch contend that the difference of less than two months should be a meaningful consideration in this case, which is the relative readiness and the progress of each action since the date of the wildfire. They contend that it is clear from the record that their action is ready to proceed with certification and, if certified, to a common issues trial, but that the same cannot be said of the O'Connor/Spinks action.

81 A five-day hearing for the certification of the Moiseiwitsch action has been scheduled to commence on October 17, 2022.

82 Counsel for Messrs. O'Connor and Spinks contend that the position taken by counsel for Ms. Moiseiwitsch with respect to the timing of the initiation of their action incorrectly assumes that they do not appreciate the gravity of the losses to the class members or the necessity of acting with dispatch to secure evidence and advance towards certification. Counsel for Messrs. O'Connor and Spinks contend, and I agree, that what matters more than the date of filing is the ability of counsel to actually move the case towards certification and resolution or determination of the merits. They argue that they will be ready for a certification hearing on the same timeline as in the Moiseiwitsch action. Should they be granted carriage, then the availability of the Railway defendants and the Court has already been secured for October 17 — 21, 2022, which should remain available as scheduled for certification in the O'Connor/Spinks action.

83 Counsel for Ms. Moiseiwitsch provided evidence on this application regarding the progress of their experts' investigations for the purpose of establishing the readiness of their action, but they have not waived privilege over the experts' files. They retained Peter Senez of Senez Consulting Ltd. as an expert witness. Mr. Senez has experience undertaking forensic investigations into fires and complex transportation safety matters.

84 Counsel for Ms. Moiseiwitsch obtained access permits to enter the Village of Lytton and attended at the Village of Lytton with Mr. Senez on September 27, 2021. They also flew over the Village of Lytton and surrounding areas in a helicopter on September 28, 2021, in order to survey the damage and fire pattern.

85 Counsel for Ms. Moiseiwitsch have also retained Ian Naish as an expert witness. Mr. Naish is a professional engineer and rail safety consultant, and he was the former Director of Rail Investigations at the Transportation Safety Board. They assert that Mr. Naish possesses a focus on incident investigations and rail regulatory issues and has experience consulting in the areas of accident investigation, safety regulation, risk management, and safety management systems.

86 On November 9, 2021, counsel for Ms. Moiseiwitsch conducted a second site visit to the Village of Lytton with Mr. Senez and Mr. Naish. They performed a supervised inspection of the tracks on CN's right of way through the village, including the area where it is believed the wildfire originated. Mr. Senez and Mr. Naish inspected and documented the type and condition of the infrastructure at the site, including rails, switches, signals, signage, and greasing equipment, as well as the condition of the railbed and the type and extent of foliage in the right of way.

87 During the second site visit, counsel for Ms. Moiseiwitsch obtained photographic evidence of the CN rail tracks that run through the Village of Lytton. The photographs identify the manufacturer of the rails as Nippon Steel Corporation of Japan.

88 In his preliminary report, Mr. Senez relied on the National Fire Protection Association guidelines NFPA 921, *Guide for Fire and Explosion Investigation Services* which, at s 4.4.3.3, states that the "reliance on previously collected data and scene documentation should not be inherently considered a limitation in the ability to successfully investigate the incident."

89 In his preliminary report, Mr. Senez also said "it is not uncommon in the private sector to be engaged some time or even well after the occurrence of an event. . . . However, to proceed with a full investigation, access to the public sector data, as well as investigation information of related or impacted parties [is] needed since they had legislated, priority access or permitted access to the site, gathered evidence, interviewed witnesses, and potentially altered the immediate post-suppression condition through investigation."

90 Mr. Senez also said that the photographs he took show that the BC Wildlife Services report describing the area of origin of the fire appears to be accurate. He also referred to the various public authorities charged to investigate who will have, among other documents, "detailed ground and aerial photographs, video, field notes and other data from other investigations completed post-fire by BC Wildfire Services, the RCMP, and TSB . . . "

91 Counsel for Ms. Moiseiwitsch argues that the National Fire Protection Association Guide sets out the accepted fire investigation practice that all independent investigators should conduct an independent examination of the site.

92 Accepting that this standard of care is to be preferred, the weather conditions since the commencement of the O'Connor/ Spinks action have made such an investigation difficult. It may be that some of the evidence obtained by Ms. Moiseiwitsch's expert witnesses can be made available to overcome the delay in site visits by the experts retained by Messrs. O'Connor and Spinks.

93 Counsel for Ms. Moiseiwitsch say that they have been contacted by class members who have expressed interest in the litigation, and they maintain a database of those class members in order to provide them with direct notice of the progress of the litigation. They also maintain a Lytton Fire Class Action website for class members who are seeking updates on the progress of the litigation.

94 In addition to retaining Mr. Senez and Mr. Naish to conduct liability investigations, counsel for Ms. Moiseiwitsch retained an independent adjusting firm to assist in the investigation of losses and collection of damages data from class members for the purposes of quantifying damages.

95 Counsel for Ms. Moiseiwitsch say that they have had direct contact with class members in all of their proposed subclasses: governmental entities including the Village of Lytton, Nlaka'pamux Nation Tribal Council, and the Lytton First Nation; counsel representing insurance companies in the subrogated class; and individuals, including those who are insured and uninsured.

96 Counsel for Messrs. O'Connor and Spinks have retained two unidentified experts, whose credentials were not provided. As of yet, they have commissioned no reports from them. They state that there is "no issue" with obtaining written opinions from these experts prior to April of 2022.

97 Counsel for Messrs. O'Connor and Spinks also made various access to information ("ATIP") requests and freedom of information requests between October 28, 2021 and November 9, 2021.

98 Counsel for Messrs. O'Connor and Spinks have not undertaken a site visit, nor engaged with the defendants in their action to schedule a certification hearing.

99 There is no evidence in the record that counsel for Messrs. O'Connor and Spinks have taken any steps towards preparation of their application materials, other than retaining experts on a preliminary basis. There is also no evidence that the defendants in the O'Conner/Spinks action have consulted on or agreed to a certification schedule. Moreover, there is no evidence that

counsel in the O'Connor/Spinks action have made any progress on investigations into the identities or liability of the unidentified defendants.

100 Counsel for Messrs. O'Connor and Spinks concede that a certification application against the manufacturer of the railway tracks is unlikely to proceed in October 2022, as the manufacturer is a company based in Japan. However, they argue that this is no basis to delay the October 2022 certification application dates that are secured already, relying upon the decision of Justice Myers in *Ewert v. Nippon Yusen Kabushiki Kaisha*2017 BCSC 1442[*Nippon Yusen*]. Justice Myers rejected a certification adjournment application brought by some defendants, where one defendant, who had contested jurisdiction and then appealed that issue, would not be participating in the already scheduled certification application. Thus, counsel for Messrs. O'Connor and Spinks argue that a further certification hearing may be required to deal with the Japanese manufacturer, but that will not be the concern of the known defendants.

101 The delay in ATIP request responses may present difficulties for counsel for Messrs. O'Connor and Spinks, but at present, that is speculative.

102 Counsel for Messrs. O'Connor and Spinks say that the additional defendants named in their action are appropriately named defendants. Counsel for Ms. Moiseiwitsch argued that they will not be precluded from later adding these defendants to their action; however, if they apply to do so, their action will be delayed at a future point. Such an application might also involve some consideration of the *Limitation Act*, S.B.C. 2012, c. 13.

103 Despite the potential for the addition of further defendants in the Moiseiwitsch action, it is my view that the relative readiness of the actions weighs significantly in favour of Ms. Moiseiwitsch's application for carriage of the litigation. This is primarily because of the importance of a speedy resolution for the members of the proposed class.

***(8) Preparation and Performance on the Carriage Motion***

104 Courts have suggested that law firms seeking carriage should hire independent counsel to argue the motion on their behalf: *Quenneville v. Audi AG*, 2018 ONSC 1530 (Ont. S.C.J.) . In this case, all counsel were respectful of the skill and abilities of each other, so I see no reason to criticize counsel for Ms. Moiseiwitsch for speaking to the motion themselves.

105 I am satisfied that counsel for the plaintiffs in each action were well-prepared to argue the carriage motion, and they did so effectively. I find this factor to be neutral.

***(9) Case Theory***

106 Ms. Moiseiwitsch's theory of the case is quite straightforward. It is that one or both of the Railway defendants were responsible for the wildfire.

107 The O'Connor/Spinks action alleges that the wildfire was sparked by a train, or trains, negligently operated by CN and/or CP entities on right of way land that was negligently maintained by the Railway defendants and/or unknown entities, and that Transport Canada negligently carried out its rail industry oversight mandate. The plaintiffs advance claims in negligence and nuisance.

108 Counsel for Messrs. O'Connor and Spinks contend that their case theory reflects their careful study of the Lac Megantic Litigation in Quebec. They argue that in a case of this magnitude arising from the wildfire, the class is better off with a comprehensive claim that advances more than one theory of liability and avoids the gamble inherent in the Moiseiwitsch action. They argue that the Moiseiwitsch action is an attempt to put speed ahead of tapping all potential sources of liability. They point out particularly that the defendants in the Moiseiwitsch action have pleaded contributory negligence and thus set up the potential for limiting damages to their several liability only, which would cause the class to bear the pain of the absent defendants.

109 Based upon their counsel's review of the Lac Megantic Litigation, the O'Connor/Spinks action names both CN and CP and also several other specific defendants, some of whose identities are known at this time and others are currently unknown. Counsel for Messrs. O'Connor and Spinks say that their pleadings against all of these additional defendants are detailed and

precise, such that the current unknown entities would know they are the unknown party on reading the claim, and in the event that one or more of these entities is in fact one of the known and currently-named defendants, the Notice of Civil Claim adequately groups the allegations together by the defined terms "Rail Defendants" and "Occupying Defendants" at paras. 17 and 18, respectively. Thus they contend that no mischief or harm will come from leaving them unnamed if they do not exist separate from the named defendants.

110 As Justice Willcock explained in *Alragheb v. Francis*, 2021 BCCA 457 (B.C. C.A.) , at

> [29] . . . where the plaintiff is one of the persons at fault, the liability of all parties at fault (which in the absence of contributory negligence would have been joint and several) is severed. Contributory negligence severs the liability of the separate tortfeasors, in effect causing the plaintiff to bear the pain caused by absent, impecunious or uninsured tortfeasors. The *Act* does not otherwise call for the application of distinct rules of apportionment where there is contributory negligence (except that where there is several rather than joint liability, the court may have to determine the extent to which non-parties may have been at fault: see *Leischner v. West Kootenay Power & Light Co. Ltd.* (1986), 24 D.L.R. (4th) 641 (B.C.C.A.), *Reekie v. Messervey* (1989), 59 D.L.R. (4th) 481 at 491-2 (B.C.C.A.), and *Hongkong Bank of Canada v. Touche Ross & Co.* (1989), 74 C.B.R. (N.S.) 164 at 170 (B.C.C.A.)). The fact that liability is severed does not affect the rule that liability is apportioned by degrees of fault.

111 Counsel for Messrs. O'Connor and Spinks contend that contrary to the experience in the Lac Megantic Litigation, the narrow focus taken in the Moiseiwitsch action excludes potential additional defendants who may face liability exposure and wrongly assumes that the narrow selection of only CP and CN will lead to a relatively speedy resolution of the litigation.

112 While both actions allege liability against CP and CN, the responses to civil claim in the Moiseiwitsch action show that liability is contested. CP and CN assert that others, including but not limited to class members, are contributorily at fault. This sets up the possibility that, even if liability is found against one or both of CP and CN, they may be able to limit their exposure to several liability only. In that scenario, a finding of contributory fault by Transport Canada and subcontractors would be at the expense of the class's recovery.

113 Counsel for Messrs. O'Connor and Spinks argue that while the issues surrounding contributory liability will be front and centre in both the Moiseiwitsch action and the O'Connor/Spinks action, a determination of fault against others besides CP and CN in the O'Connor/Spinks action will not diminish the class's recovery in the same way that it would in the Moiseiwitsch action.

114 Pursuant to s. 1 of the *Negligence Act*, R.S.B.C. 1996, c. 333, each person at fault is severally liable for the damage occasioned by that person's fault only. Ms. Moiseiwitsch contends that contributory negligence of one class member does not sever liability for the class as a whole, as the *CPA* is procedural in nature and does not modify application of the *Negligence Act*. She correctly contends that if a class member is found to be at fault, liability will be several as it concerns that particular class member only. A blameless class member would not also be subject to several liability just because another class member was at fault. If the defendants are able to adduce some basis in fact for certification of common issues addressing the defence of contributory fault in respect of one or more class members, those class members could form a subclass that would be subject to such a defence.

115 However, the absence of certain defendants in the Moiseiwitsch action creates the potential for at least some class members realizing a lesser recovery if named or unnamed parties are found to be contributorily negligent.

116 I find that the O'Connor/Spinks theory of the case weighs significantly in favour of their application for carriage of the litigation.

***(10) Scope of Causes of Action***

117 The Moiseiwitsch action pleads both private and public nuisance, whereas the O'Connor/Spinks action pleads negligence as against Transport Canada, as well as nuisance, without specifying whether what is alleged is public nuisance, private nuisance, or both.

118 Counsel for Ms. Moiseiwitsch rightly contends that public and private nuisance are distinct legal doctrines and "other than their name, they do not have a great deal in common": Philip H. Osborne, *The Law of Torts*, 5th ed., 2015 (Irwin Law: Toronto), at p. 396.

119 I am not persuaded that such distinctions at this stage of the proceedings offers an advantage to either action; therefore, I view this factor as neutral.

***(11) Selection of Defendants***

120 The Moiseiwitsch action names CN and CP only. Counsel for Ms. Moiseiwitsch say that is because:

> (1) They are the primary, essential, and highly solvent defendants. If the case against them succeeds, no other defendants are required. If the case against them fails, it will also fail against any other defendant; and
>
> (2) Limiting the number of defendants makes the case much simpler, and therefore it will be quicker, less expensive, and more efficient. Adding other parties at this stage does much more harm than good because it increases cost and delay with no countervailing benefits.

121 The O'Connor/Spinks action names twelve defendants, of which five are identified and seven are unidentified.

122 The defendant E-Verifile.Com, Inc. d.b.a. eRailSafe Canada, is a British Columbia business that vets and trains subcontractors located in British Columbia for CN and CP.

123 The Attorney General of Canada ("AGC"), through Transport Canada ("TC"), is named in relation to that body's alleged failure to properly oversee federally-regulated railways and rail operators.

124 The five defendants named as ABC Companies, whose identities are currently unknown, are alleged to be involved in: the manufacture of trains and railway tracks, either sparking the wildfire or along which the wildfire was sparked; the training and vetting of railway subcontractors working on rail lines in British Columbia; monitoring the conditions of and around; responding to emergencies around the tracks of CP's Thompson Subdivision and/or CN's Ashcroft Subdivision on behalf of CP or CN; and fire prevention at or near Mile 98.3.

125 The two natural persons, identified currently as John Doe and Jane Doe, are alleged to have owned, occupied, had an interest in, and/or had care and control of the land on which the wildfire started and the immediately adjacent lands.

126 Counsel for Messrs. O'Connor and Spinks submitted that a comparison of the selections of defendants and associated case theories also strongly favours granting carriage to their action.

127 Counsel for Ms. Moiseiwitsch is critical of the O'Connor/Spinks action for not pleading private and public nuisance separately.

128 The elements of private nuisance were reviewed by the Court of Appeal in *Baker v. Rendle*, 2017 BCCA 72 (B.C. C.A.) . After reviewing Supreme Court of Canada jurisprudence on private negligence, Garson J.A. summarized:

> [41] In summary, the requirements for proof of private nuisance are two-fold. First, a plaintiff must prove a substantial, non-trivial interference with his use and enjoyment of his property. Second, he must establish that the interference is unreasonable. The focus is primarily on the effect on the complainant rather than on the alleged tortfeasor's conduct (*Antrim* at para. 28). Thus, contrary to the appellant's submission in this Court, a measure of subjectivity exists even at the stage of determining whether liability exists, and not merely when determining the extent of liability.

129 With respect to public nuisance, the Supreme Court of Canada reviewed the doctrine in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (S.C.C.) , and found at paras. 52 — 53:

[52] The doctrine of public nuisance appears as a poorly understood area of the law. "A public nuisance has been defined as any activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience": see *Klar*, *supra*, at p. 525. Essentially, "[t]he conduct complained of must amount to . . . an attack upon the rights of the public generally to live their lives unaffected by inconvenience, discomfort or other forms of interference": See G. H. L. Fridman, *The Law of Torts in Canada*, vol. I (1989), at p. 168. An individual may bring a private action in public nuisance by pleading and proving special damage. See, e.g., *Chessie v. J. D. Irving Ltd. (1982)*, 1982 Canlll 2918 (NB CA), 22 C.C.L.T. 89 (N.B.C.A.). Such actions commonly involve allegations of unreasonable interference with a public right of way, such as a street or highway. See *ibid*., at p. 94.

[53] Whether or not a particular activity constitutes a public nuisance is a question of fact. Many factors may be considered, including the inconvenience caused by the activity, the difficulty involved in lessening or avoiding the risk, the utility of the activity, the general practice of others, and the character of the neighbourhood. See *Chessie*, *supra*, at p. 94. The trial judge found, at p. 206, that "the configuration and design of the railway tracks on Store Street constituted an unreasonable interference to the public of its right of access". He noted that Store Street was a mixed retail, industrial, and commercial area, and that the Railways should have foreseen the hazard posed by the flangeways to riders of two-wheeled vehicles. He found, at p. 207, that the cost of that hazard should be borne by the Railways as a matter of policy:

> In this case, the defendant Railways clearly installed that particular flange-rail system without regard to vehicular traffic. It was chosen because it cost less, and it was longer lasting and better suited to the needs of the rail traffic. However, the result of this choice of flange-rail, which created an almost 4-inch gap, was to effectively increase the risks to vehicle traffic. The cost of that increased risk to others must fall on the defendant Railways. It is a "cost of running the system."

The Court of Appeal did not dispute the trial judge's finding that there was an unreasonable interference, but held that the Railways had a defence of statutory authority because "the flangeways were an inseparable consequence of requiring the tracks to be laid at street grade flush with street level and the roadway paved between the rails" (p. 68). The issue is whether the Court of Appeal erred in that conclusion.

130 Counsel for Messrs. O'Connor and Spinks contend that their nuisance plea is sufficiently particularized to encompass both private and public nuisance, and if it is not sufficiently clear, that can be remedied with the plaintiffs' amendment under Rule 6-1(1)(a) prior to service of a notice of trial.

131 In *Nippon Yusen*, one named defendant did not participate in the certification hearing. That defendant was properly served, had counsel on record, and filed an outstanding jurisdictional challenge. Counsel for Ms. Moiseiwitsch contends that the case does not permit counsel for Messrs. O'Connor and Spinks to proceed with a certification hearing against unnamed defendants that have not yet been identified or served with the notice of civil claim.

132 Counsel for Ms. Moiseiwitsch contends that the following defendants named by Messrs. O'Connor and Spinks are unnecessary parties:

a) The Federal Government, based on allegations with a low probability of success, and high probability of causing delay;

b) Various parties similar to those against which the plaintiff in the Lac Megantic litigation recovered settlement monies, despite the distinct factual background of that case;

c) Unnamed defendants, which are either unidentifiable and so serve no litigation purpose, or which should be named and served before proceeding to certification, resulting in delay; and

d) Subcontractors, of which there is no evidence and which are alleged to have been performing duties that are non-delegable.

133 Counsel for Ms. Moiseiwitsch contends that the only claims that are supported by the facts presently known are against: (1) CP, the owner and the operator of the alleged incident train, and (2) CN, the owner of the tracks on or near which the fire is alleged to have originated. While this may be so, it does not foreclose the possibility that facts may be discovered through such means as disclosure of documents or examinations for discovery.

134 Counsel for Ms. Moiseiwitsch argues that the O'Connor/Spinks action pleads that CN and CP used subcontractors for activities such as track maintenance, fire prevention, and emergency response related to their freight rail operations through the community of Lytton, and says that precedent indicates that even if evidence of subcontractors' negligence emerges, these activities give rise to non-delegable duties owed by the Railway defendants to the class members, such that liability would still rest entirely with the Railway defendants.

135 In *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145 (S.C.C.) , a non-delegable duty was defined as "the duty to ensure that the independent contractor also takes reasonable care": at para. 50. This duty may arise "because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another [ . . . so] as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised": at para. 32. The inherently hazardous and highly regulated context of freight rail operations in residential neighbourhoods is precisely such a situation.

136 Counsel for Ms. Moiseiwitsch accepts that railways owe duties to the nearby public and that when engaging a contractor to perform services involving "high risk calling for special precautions", the railway must ensure that reasonable care was taken "for the sake of those within its reasonable range" and cannot "renounce responsibility by employing others".

137 Activities which involve a risk of fire have been found to be hazardous activities to which non-delegable duties of care attach despite the use of contractors: see *Firestone Tire & Rubber Co. v. Stoochinoff*[*Stoochinoff et al*. 196444 D.L.R. (2d) 306B.C. S.C.](#) (B.C.S.C.) at 313.

138 Counsel for Ms. Moiseiwitsch accepts that statutory language can also impose a non-delegable duty. The O'Connor/Spinks action alleges subcontractor's activities relating to fire prevention and emergency response (including "monitoring the conditions of and around the tracks" and inspecting locomotives). Counsel for Ms. Moiseiwitsch contends that these activities would fall under the *Prevention and Control of Fires on Line Works Regulations*, SOR/2016-317 [*Regulations*], and other regulations issued under the *Railway Safety Act*, R.S.C. 1985, c. 32 (4th Supp.). The *Regulations* state that a railway company "must ensure" that fires are extinguished or controlled as soon as practicable. The *Regulations* also require the Railway defendants to develop and provide to the regulator detailed plans with regard to fire prevention and fire response, and it is unlikely that liability could be escaped by delegating their implementation to a contractor.

139 Counsel for Ms. Moiseiwitsch said that they decided not to name the AGC/TC as a defendant based on the prevailing law regarding its duty of care as a regulator and the absence of evidence suggesting fault on its part. However, should that evidence emerge, the plaintiff will apply to add AGC/TC as a defendant.

140 Counsel for Ms. Moiseiwitsch contends that whether the AGC owes a duty of care as a regulator is an issue that was addressed in *Carroll-Byrne v. Air Canada*2016 NSSC 354[*Carroll-Byrne* ], where the Nova Scotia Supreme Court considered whether to certify a class action against the AGC in the context of a plane crash that occurred at the Halifax International Airport on March 29, 2015. The Court found that the pleadings did not support a conclusion of proximity between TC as regulator and class members.

141 Justice Grauer considered the question of the AGC's duty of care as regulator in *British Columbia (Workers' Compensation Board) v. Flanagan Enterprises (Nevada) Inc*., 2017 BCSC 99 (B.C. S.C.) [*Flanagan Enterprises BCSC*]. There, the plaintiff alleged that the AGC, through TC, was negligent in knowingly permitting an unsafe aircraft and operator to operate in Canada. The central question in the case was whether the AGC, as regulator, owed a duty of care to the plaintiff.

142 At paras. 148 — 149, Grauer J., as he then was, found that the AGC owed no duty of care in the circumstances of the case, and no proximity between the plaintiff and TC:

> [148] Consequently, while the applicable regulatory framework imposes public duties on Transport Canada, I can find no basis for concluding that they give rise to a private law duty of care. The obligations imposed on Transport Canada are owed to the public at large, and while this does not preclude a finding of proximity, the regulatory framework neither expressly nor implicitly creates a proximate relationship. As the Court of Appeal observed in *Gill v Canada (Minister of Transport)*, 2015 BCCA 344:
>
> > [23] Further, the leading authorities establish that, as a general proposition, statutory duties or powers imposed on a regulator to promote the public interest do not create a duty of care to specific members of the public who benefit from the scheme [citing *Cooper* and *Edwards*]. That situation is to be distinguished from one in which the regulatory regime intends to benefit or protect the interests of particular persons or a discrete class of persons, in which case a duty of care may arise.
>
> [149] Here, given the NAFTA regulatory framework, the absence of the factors considered important in *Fullowka*, together with the absence of any factual basis suggesting a relationship or connection between Transport Canada and Mr. Forest that is distinct from or more direct than the relationship between Transport Canada and the flying public (see *Taylor v Canada (Attorney General)*, 2012 ONCA 479), I conclude that there was insufficient proximity between Transport Canada and Mr. Forest to give rise to a *prima facie* duty of care on the part of Transport Canada.

143 The Court of Appeal affirmed Grauer J.'s conclusion in *British Columbia (Workers' Compensation Board) v. Flanagan Enterprises (Nevada) Inc.*2018 BCCA 459at para. 14 [*Flanagan Enterprises BCCA*].

144 However, each duty of care analysis is necessarily a fact-specific exercise, and the conclusions reached in *Carroll-Byrne* and *Flanagan Enterprises* demonstrate only that the negligence claim asserted by Messrs. O'Connor and Spinks against AGC/TC as regulator will raise complex legal and factual questions that will require a detailed analysis into the proximity of the plaintiff to TC.

145 Counsel for Ms. Moiseiwitsch contend that naming the AGC as a defendant invites unnecessary delay and increases the likelihood of pre-certification motions and appeals, all in relation to a claim against a party that is unlikely to succeed and is not supported by any evidence. They argue that it is in the best interests of the class members to engage positively with the federal government on rebuilding efforts, rather than spending resources pursuing claims against them in the absence of evidence of fault.

146 In the section above under "Disqualifying Conflicts of Interest", I commented on the incongruity between the position of Ms. Moiseiwitsch that she could apply to add the government as a party later in the proceedings if that was thought to be appropriate. I find that position suggests that there may ultimately be merit in having the government entity as a party, and if they are added to Ms. Moiseiwitsch's action at a later date, that will result in delays in that proceeding.

147 Counsel for Ms. Moiseiwitsch advise that they have consulted directly with class counsel in the Lac Megantic Litigation and will continue to explore ways in which that litigation may inform the prosecution of claims arising from the wildfire, which suggests at a minimum that they are not entirely dismissive of the lessons that might be learned from that litigation.

148 Counsel for Ms. Moiseiwitsch contends that the Lac Megantic derailment and the wildfire are factually distinct in two important respects: the immediate and overriding concern in the Lac Megantic Litigation was the insolvency of the railway, whereas CN and CP are among the largest corporations in Canada, with market capitalizations of $61.9 billion and $117.2 billion, respectively, and are required by statute to carry third party liability insurance policies covering a minimum of $1 billion per occurrence.

149 In addition, the derailment and explosion of oil tanker cars in Lac Megantic pointed immediately to the possibility that the nature of the train's cargo, not just the method of its operation, may have caused or contributed to the tragedy.

150 Counsel for Ms. Moiseiwitsch correctly contend that there is no advantage to naming parties that are not readily identifiable, as a defendant may be substituted for an unidentified defendant only if the test for misnomer is met, which requires that the actual defendant would know that they are the John Doe defendant on reading the claim. The unnamed defendant must be identifiable with particulars as to who they are, and must be an actual entity, not a hypothetical one. They concede, however, that if there were some benefit to adding these parties now to avoid limitations issues, the limitation period in this case will not expire until June 30, 2023.

151 Counsel for Ms. Moiseiwitsch further contends that even assuming that counsel for Messrs. O'Connor and Spinks intend to proceed with their claim against Nippon Steel Corporation, before proceeding to certification they will have to amend their claim, have it translated to Japanese, and serve it on Nippon Steel Corporation in accordance with the Hague Convention — a process which, in the case of Japan, engages the Ministry of Foreign Affairs in Tokyo and the appropriate district court and may take a year or longer.

152 I find that the selection of defendants by Messrs. O'Connor/Spinks weighs significantly in favour of their application for carriage of the litigation.

***(12) Class Definition***

153 The Moiseiwitsch action proposes the following class definition:

a. All natural or legal persons with loss of real or personal property or business losses;

b. All natural or legal persons with a subrogated claim for recovery of insurance indemnity paid in relation to the damage and other losses;

c. All government entities with loss of real or personal property or business losses; and

d. All persons who sustained personal injuries.

154 The O'Connor/Spinks action proposes the following class definition:

a. All individuals who suffered personal injury or death in the Lytton Fire;

b. All individuals who were displaced by the Lytton Fire;

c. All individuals or legal persons who suffered real/personal property losses in the Lytton Fire; and

d. All individual or legal persons who suffered interference or interruption of their business as a result of the Lytton Fire.

155 Ms. Moiseiwitsch contends that the class definition in her action is preferable, as it more accurately captures those affected by the wildfire.

156 Messrs. O'Connor and Spinks argue that inclusion in the Moiseiwitsch action of a "Governmental Entity Subclass" is problematic for two reasons. First, if a government entity turns out to be liable, for example in relation to maintaining the land or mitigating the risk of wildfires, there will be a conflict of interest between class members in the Moiseiwitsch action.

157 Additionally, Messrs. O'Connor and Spinks say that apart from Crown corporations, it is unclear whether "governmental entities" are persons with standing to advance a claim under the *CPA*. The primary difference in class definition is the inclusion in the Moiseiwitsch action of a governmental entity subclass and a subrogation class, which their class definition does not include. Messrs. O'Connor and Spinks argue that the inclusion of the sub-classes in the Moiseiwitsch action creates potential

for conflict with the interests of individual class members who, for example, have lost their homes, and may add delay and complexity for the claims of natural or legal persons.

158 Messrs. O'Connor and Spinks say that there is the potential for a conflict of interest between members of the "Subrogation Subclass" as defined in the Moiseiwitsch action and class members who are insured by members of the subrogation subclass, because the insured class members may have the sole right to opt out of a class or to make decisions about their individual claim as required, depending on the terms of their contract with their insurer.

159 In my view, these potential difficulties should not determine the motion before me. There are pros and cons for the two class definitions, and I consider this factor to be a neutral one.

***(13) Prospect of Success: (Leave and) Certification***

160 Counsel for Ms. Moiseiwitsch anticipate delivering their certification record on December 20, 2021. As set out above, they have engaged with the defendants in their action to schedule a 5-day certification hearing commencing October 17, 2022. A schedule for exchange of materials is in place for the certification hearing in the action.

161 Counsel for Messrs. O'Connor and Spinks argue that with a certification hearing scheduled for October 2022, which is still over nine months away, the suggestion that the Moiseiwitsch action is materially more advanced (because of a difference of seven weeks in filing dates and the delivery of certification application materials just three weeks before this application) is overstated and not supported by Mr. Senez's report, which identifies the information and data still needed to complete a full investigation.

162 Counsel for Messrs. O'Connor and Spinks contend that they are ready and prepared to conduct a certification hearing in April 2022 or mid-2022, subject to availability of the Court and the defendants. However, they offered no evidence to support that contention. They also have not offered evidence as to whether they have completed service of all named defendants, canvassed the availability of defence counsel, or agreed upon a proposed schedule for the exchange of materials.

163 Counsel for Messrs. O'Connor and Spinks appear to concede that proceeding to a certification application against unidentified parties will almost certainly result in delay for two reasons. First, it is doubtful any ruling on certification could bind a party that was not named, not served with the notice of civil claim, and did not have notice of the hearing. This creates the risk of having to revisit certification at a later date once those entities have been identified, the pleadings have been amended, and those defendants have been served. Second, it is unclear if the pleadings in the case would be considered closed if the unidentified entities have not appeared in the case. This could significantly delay the process of document production.

164 These submissions likely cut both ways if Ms. Moiseiwitsch decides to add any of the defendants named in the O'Connor/Spinks action to her action at a later date. Overall though, I find that this factor weighs modestly in favour of granting carriage of the claim to Ms. Moiseiwitsch.

***(14) Prospect of Success against the Defendants***

165 Whether the Court grants carriage to the Moiseiwitsch action or the O'Connor/Spinks action, both seek damages for individuals, governments, and businesses that have been affected by the wildfire. I accept the submission by counsel for Ms. Moiseiwitsch that it is likely that both actions will face robust opposition from the defendants at certification and on the merits.

166 Counsel for Messrs O'Connor and Spinks argue that the recent decision of *Nelson (City) v. Marchi*2021 SCC 41[*Marchi* ] further reinforces their decision to name Transport Canada as a defendant. *Marchi* clarified what constitutes a "core policy decision" rendering a government or public authority immune from liability, and it arguably expanded the scope of government liability.

167 The O'Connor/Spinks notice of civil claim alleges clear and direct failures by TC that, if proven on the merits, could lead to a finding of liability against AGC/TC.

168 Counsel in the Moiseiwitsch action assert that there will likely be no duty of care against TC in this railway incident based upon their own experience in the *Flanagan Enterprises BCSC*. However, that case was based upon a different factual matrix, where the alleged liability of TC was "not for anything it did directly involving [the plaintiff] or any other member of the flying public, but rather for failing to prevent the consequences of the acts or omissions of others": *Flanagan Enterprises BCSC* at para. 119.

169 Counsel for Messrs. O'Connor and Spinks argue that there is evidence that CP and CN use subcontractors as a general practice, and they point to limitation date concerns, which, with a certification hearing set for October 2022, and time for the rendering of a written decision, and a likely appeal by the losing party, may elapse.

170 They argue that the critique about a non-delegable duty, which Ms. Moiseiwitsch's counsel characterizes as a matter of law, misses the benefit that additional exposed defendants may still contribute to the plaintiffs' case in two ways: first, in proving the case against CP and CN through document discovery and examinations for discovery; and second, in potentially contributing financially to a settlement.

171 At this early stage in these actions, I am unable to find that claims against the additional defendants in the O'Connor/Spinks action have no possibility of success.

172 I find this factor to be a neutral one at this early stage of the proceedings.

**Conclusion**

173 Upon my consideration of the applicable *Rogers* factors in determining who should have carriage of the class action with respect to the Lytton Creek Wildfire, I grant carriage of this action to Messrs. O'Connor and Spinks.

174 Factor 1 (quality of the proposed representative plaintiffs) gives a modest preference to carriage being granted to Messrs. O'Connor and Spinks action, but factors 4 (quality of proposed class counsel) and 14 (prospect of success) offer a modest preference to carriage being granted to Ms. Moiseiwitsch's action. I do not consider that these modest advantages are dispositive of the carriage issue, and I find that they tend to cancel each other out.

175 That leaves factor 7 (preparation and readiness of the action) as significantly favouring a grant of carriage to Ms. Moiseiwitsch and factors 9 (case theory) and 11 (selection of defendants) as significantly favouring a grant of carriage to Messrs. O'Connor and Spinks.

176 I have concluded that although factor 7 presently favours Ms. Moiseiwitsch, Messrs. O'Connor and Spinks have sufficient time to catch up in terms of preparation and readiness of the action. However, I find that Ms. Moiseiwitsch's case theory and selection of the defendants cannot overcome the difficulties I have discussed above with respect to those factors.

177 I find that the rest of the factors discussed above provide no advantage to either Ms. Moiseiwitsch or Messrs. O'Connor and Spinks.

178 Subject to the accommodation discussed in para. 15 above, I therefore grant carriage of the action arising from the wildfire to Messrs. O'Connor and Spinks.

179 Corollary to that grant, I order that Ms. Moiseiwitsch's action is stayed until the certification application in the O'Connor/Spinks action is decided, pursuant to s. 10 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and the inherent jurisdiction of this Honourable Court.

180 In addition, I order that the commencement of further class proceedings in the Province of British Columbia against the defendants named in the O'Connor/Spinks action, seeking to advance the same claims as those advanced in that action are prohibited without leave of the Court until the certification application in this action is decided.

181 I further order that Messrs. O'Connor and Spinks have liberty to apply for a continuation of the Order conditionally staying the Moiseiwitsch action if certification is granted in their action.

182 If certification is not granted in the O'Connor/Spinks action, or that action is discontinued against all defendants or withdrawn, the stay of Ms. Moiseiwitsch's action and the prohibition against the commencement of further class proceedings in the Province of British Columbia shall both be lifted.

183 I make no order for costs to either Ms. Moiseiwitsch or Messrs. O'Connor and Spinks.

*Motion dismissed; M's action stayed.*

2006 ABQB 902
Alberta Court of Queen's Bench

Northwest v. Canada (Attorney General)

2006 CarswellAlta 1713, 2006 ABQB 902, [2006] A.J. No. 1612, [2007] A.W.L.D. 2241, [2007] A.W.L.D. 2243, 154 A.C.W.S. (3d) 1021, 45 C.P.C. (6th) 171

# Flora Northwest, Adrian Yellowknee, Michael Carpan, Kenneth Sparvier, Dennis Smokeyday, Rhonda Buffalo, Marie Gagnon, Simon Scipio, as representatives and claimants on behalf of themselves and all other individuals who attended Residential Schools in Canada, including but not limited to all Residential Schools clients of the proposed Class Counsel, Merchant Law Group, as listed in part in Schedule 1 to this Claim, and the John and Jane Does named herein, and such further John and Jane Does and other individuals belonging to the proposed class, including John Doe I, Jane Doe I, John Doe II, Jane Doe II, John Doe III, Jane Doe III, John Doe IV, Jane Doe IV, John Doe V, Jane Doe V, John Doe VI, Jane Doe VI, John Doe VII, Jane Doe VII, John Doe VIII, Jane Doe VIII, John Doe IX, Jane Doe IX, John Doe X, Jane Doe X, John Doe XI, Jane Doe XI, John Doe XII, Jane Doe XII, John Doe XIII, Jane Doe XIII, being a Jane and John Doe for each Canadian province and territory, and other John and Jane Does Individuals, Estates, Next-of-Kin and Entities to be added (Plaintiffs) and Attorney General of Canada (Defendant)

T.F. McMahon J.

Heard: October 12-13, 2006
Judgment: December 14, 2006
Docket: Calgary 0501-09167

Counsel: Mr. K.M. Baert for Plaintiffs, National Certification Committee
Mr. D.P. Carroll, Mr. P.J. Faulds, Q.C. for Plaintiffs, National Consortium of Counsel
Ms C.A. Coughlan, Mr. P. Vickery for Attorney General of Canada
Mr. W.R. Donlevy for Catholic Settling Church Entities
Mr. S.J. Page for Protestant Settling Church Entities
Ms J.A. Summers for Merchant Law Group
Mr. J.K. Phillips for Assembly of First Nations
Ms K. Trace for Certain Catholic Non-Settling Entities

***T.F. McMahon J.*:**

**Introduction**

1 This motion in Alberta seeks certification of a class action under the *Class Proceedings Act*, S.A. 2003, c. C-16.5 ("CPA") and approval of a settlement of that action (the "Settlement"). The same motion is also brought in Ontario, Quebec, Manitoba, Saskatchewan, British Columbia, Nunavut, Yukon and Northwest Territories. Certification would result in the same class action being brought in all nine jurisdictions. Underlying these motions are several class actions in other jurisdictions and thousands of individual actions in all nine jurisdictions. All arise from claims by former students of Indian Residential Schools and their families resulting from the operation of the schools established under Canada's authority and operated initially by various religious organizations and later by Canada between 1920 and 1997.

2 The Settlement is supported by all the parties. The claims are unique in many of the issues raised. The Settlement is equally unique and likely without precedent in its scope.

**Background of the Alberta Litigation**

3 It is estimated that nationally there are approximately 79,000 former students encompassed by the proposed Settlement. Beginning in about 1994 more than 10,000 former students sued. The Plaintiffs say that at this point the jurisdictional breakdown is this:

| Jurisdiction | Plaintiffs in Active Litigation |
|---|---|
| Alberta | 3,950 |
| British Columbia | 830 |
| Manitoba | 1,157 |
| New Brunswick | 1 |
| Northwest Territories | 29 |
| Nova Scotia | 582 |
| Nunavut | 191 |
| Ontario | 657 |
| Quebec | 89 |
| Saskatchewan | 2,949 |
| Yukon | 103 |
| Total | 10,538 |

4 It will be seen that the largest number of Plaintiffs is in Alberta, about 37.5%. The vast majority are in the prairie provinces of Alberta, Saskatchewan and Manitoba, about 76.4%. These numbers do not, of course, reflect the entire class or the current places of residence of the entire class. In addition there were about 5,000 claims advanced through an ADR process established by Canada.

5 Because Alberta had no class action legislation until April 1, 2004, the actions here came under case management by this Court beginning in 1999. The claims included intentional torts, negligence, loss of language and culture, breach of fiduciary and statutory duties. The Alberta test cases had been scheduled for trial when the settlement discussions began.

**Court to Court Communication**

6 It should be recorded that in this case all counsel consented, and indeed urged, the responsible courts in the nine jurisdictions to communicate with one another during deliberations. The goal was to achieve consistency in decisions, where possible, and without infringing upon the independence of each court. That process has been very helpful and is to be encouraged when cross-border class action proceedings arise. A similar process has been codified in guidelines adopted in B.C. and Ontario in the insolvency area. As a result, I have had the opportunity to review the draft reasons of several of my colleagues.

**Certification**

7 Given that the parties have reached a proposed settlement, S. 4 of the CPA applies:

> **4** Where a plaintiff has reached a settlement with a defendant in respect of a proceeding prior to the proceeding's being certified but certification of the proceeding as a class proceeding is being sought as a condition of the settlement for the purpose of imposing the settlement on persons who will be class members in respect of the proceeding if the proceeding is certified as a class proceeding, those persons, on the application for certification being commenced, constitute a settlement class with respect to the proceeding for which certification is being sought.

8 For certification to occur, the requirements of S. 5(1) must be satisfied:

> **5**(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of 2 or more persons;

(c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

(e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,

(i) will fairly and adequately represent the interests of the class,

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

(iii) does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

. . . . .

(3) Where the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e), the Court is to certify the proceeding as a class proceeding.

(4) The Court may not certify a proceeding as a class proceeding unless the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e).

(5) Notwithstanding subsection (3), where an application is made to certify a proceeding as a class proceeding for the purposes of binding members of a settlement class, the Court may not certify the proceeding unless the Court has approved the settlement.

9 All parties support certification, conditional upon settlement approval.

10 In Alberta, the most recent appellate authority on certification of class proceedings is *Ayrton v. PRL Financial (Alta.) Ltd.* (2006), 384 A.R. 1, 2006 ABCA 88 (Alta. C.A.). The Court confirmed again that the policy reasons behind class proceedings legislation are access to justice, judicial economy and behaviour modification.

11 In the circumstances of this case, consideration of the required elements of S. 5 can be brief. The pleadings disclose the causes of action described earlier. There is an identifiable settlement class of persons.

12 The claims raise common issues which include:

1. Whether the Defendants breached a duty of care owed to the settlement class members to protect them from harm.

2. Did the Defendants breach a fiduciary duty or a treaty right of the settlement class members.

3. Can the Court make an aggregate assessment of damages.

13 A class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. I take into account the factors described in S. 5(2). In addition, it can briefly be said that the alternative of continuing with the thousands of individual actions, with the risk of inconsistent decisions between jurisdictions, is not attractive. Certification and settlement brings the prospect of recovery as well to perhaps 60,000 additional claimants who have not sued.

14 Lastly, the named representative Plaintiffs satisfy the requirements of S. 5(1)(e).

**The Proposed Settlement**

15 The proposed Settlement comprises four main elements:

1. *Common Experience Payments ("CEP")*

A CEP will be paid to each former student alive as at May 30, 2005 and who resided at an Indian Residential School before December 31, 1997. The payment will be $10,000 for the first year of attendance and $3,000 for each full or part year thereafter. The payment is intended to recognize the common experience of all former students and is based upon attendance alone. It is estimated that there may be up to 79,000 such claimants. Canada has designated $1.9 billion for these payments and will increase that amount if needed. There is also agreement as to the disposition of any surplus if CEP paid out does not reach $1.9 billion.

2. *Independent Assessment Process ("IAP")*

Claimants may seek additional compensation for physical or sexual abuse or for other defined wrongful acts — all collectively called "Continuing Claims". Canada will establish an adjudicative process by which adjudicators will hear from claimants and witnesses and award compensation. There is a point system to fix compensation. There is an appeal process if the claimant is dissatisfied. An award can range from $5,000 to $275,000. In addition there can be an award for proven actual income loss to a maximum of $250,000. There may be as many as 15,000 IAP claims. No cost estimate has been provided but the cost could exceed the CEP. The cost of administering this program will be very significant. Again, no cost estimate has been provided.

3. *Truth and Reconciliation, Commemoration and Healing.*

The Settlement contemplates a Truth and Reconciliation Commission to provide forums for individuals to come forward; to educate and record the history of the residential schools system. In addition there will be commemoration events and healing programs. The total budget for this part of the Settlement is $205 million.

4. The various church organizations are to provide cash and in-kind services for programmes for class members and their families.

16 In addition to these elements Canada agrees to pay some of counsel's legal fees and on certain terms. The Settlement provides opting out provisions and addresses implementation of the Settlement, assuming approval. Finally, the Settlement provides that unless it is approved in its entirety and by all Courts, it will terminate.

**Administration of the Settlement**

17 The proposed Settlement will take years to unfold. It contemplates continued Court supervision and involvement in several areas including the following:

- addition of institutions
- CEP application process
- CEP appeal procedure
- resource disputes for the IAP
- receive reports from and supervise the Trustee
- dispute resolution

18 Winkler J. of the Ontario Superior Court of Justice in his draft reasons properly makes the point that approving courts must be satisfied, particularly on behalf of absent class members, that those class members are not surrendering litigation rights

merely to become entangled in an under-resourced and unworkable extra-judicial resolution process. The specific concerns which he raises relate to the execution or performance of the undertakings made in the Settlement, particularly by Canada. Generally, I share those concerns. The Settlement contemplates the continued involvement of the Courts. So does the legislation.

19 The administration of the Settlement should, in my view, be from a centre which is geographically positioned where most claimants reside. Remoteness between authority and the claimants has long been an issue and should not continue.

20 I am concerned specifically about one matter regarding the CEPs. Plaintiffs' counsel are to receive all of their fees for CEP work within 60 days of the implementation date. The result is that they will be paid before their clients receive any money. Thus there is no incentive for counsel to assist their existing clients with the preparation, filing and validation of their applications for their CEP and any appeals. I would prefer an undertaking to be filed with the Court from each of the Plaintiffs' counsel that they will undertake that work at no additional cost for each one of their clients. Absent that, I need to see a plan which will protect those clients.

21 For those eligible CEP recipients who have not retained counsel, they will have to rely upon the notice program to learn of their rights under the Settlement. Those persons will number in the tens of thousands. There does not seem to be any means planned by which they can obtain assistance to perfect their applications or their appeals. That too should be addressed.

22 These issues do not arise in respect of the IAP because the legal fees are not paid in advance of the claimants' award. Nevertheless, the complexity and volume of IAP claims will generate significant administrative costs. The parties must craft a mechanism for the IAP Oversight Committee to report to the Court and carry out the Court's directions as necessary.

**Test for Settlement Approval**

23 S. 35 of the CPA requires Court approval of a class action settlement but provides no standard or test for such approval. Other jurisdictions state the test as whether the settlement is fair, reasonable and in the best interests of the class as a whole. That test is itself reasonable and I adopt it. *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.), aff'd (1998), 41 O.R. (3d) 97 (Ont. C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372 (S.C.C.).

24 A settlement need not be perfect; it need not be the best for every class member. Settlements by their nature are a product of negotiations and compromises. The law looks to whether the settlement falls within a range of reasonableness. *McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 2474 (Ont. S.C.J.); *Sawatzky v. Société Chirurgicale Instrumentarium Inc.* (1999), 71 B.C.L.R. (3d) 51 (B.C. S.C.).

**Factors in Assessing the Settlement**

25 There are a number of relevant factors to consider in assessing this Settlement. Given that all counsel urge approval and that relatively few objections have been heard, I can be brief.

***1. Likelihood of Success and the Risk of Loss***

26 Any litigation carries legal risks. The greater the risk of loss the more urgent the need to settle on the best possible terms. Here the risk to the Plaintiffs was great. There were novel claims advanced, including loss of language and culture. The Plaintiffs also faced serious limitation defences. As well, Canada could claim some statutory immunity to intentional torts. Canada's liability for torts generally is limited to vicarious liability only: *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, S. 3.

27 The Defendants might have argued that the operation of the schools met the prevailing standards in the early years in which they operated and thus no breach of duty might be found. The Plaintiffs' attack on government policy might be found to be not justiciable. Certain derivative claims would face serious attack. In summary, the Plaintiffs faced very significant risks in this litigation.

***2. Time and Cost of Outstanding Litigation***

28 The earlier the settlement, the greater the litigation cost avoided. In this case, although the Alberta test cases were essentially ready for trial, that was not true in other jurisdictions. Even in Alberta there was the prospect of appeals and of a party's refusal to accept a test case judgment as representative. Additional expense and delay would have been significant.

***3. The Terms of the Settlement***

29 Does the Settlement on its face seem fair and reasonable? Given the lengthy litigation, at least in Alberta, and the intense negotiations towards settlement with all parties in agreement, there is an appearance of reasonableness to the Settlement. Also, the CEP part of the Settlement is effectively a "no fault" payment.

***4. Recommendation and Experience of Counsel***

30 All counsel here support the Settlement. Many of the ones known to this Court are experienced and capable.

***5. The Personal Circumstances of the Plaintiffs***

31 Many of these claimants are elderly. Too many have died since the actions began. Time is not on their side. Early settlement is critical.

***6. Third Party Recommendations***

32 Approval of the Settlement is urged by the Honourable Frank Iacobucci who led the Settlement discussions, and by the Assembly of First Nations.

***7. The Number and Nature of Objections***

33 In Alberta only 87 persons objected. Some said that the CEP was inadequate in quantum, others said that the cut-off date of May 30, 2005 (by which date only those claimants then alive are eligible for CEP) is unfair. Some say the descendants of former residents should receive the CEP. Still others complained that money alone is inadequate and that the government must apologize. One group of 64 persons complained of the fees of the Merchant Law Group and the treatment they have received from that law firm. Twenty-two objectors who appeared at the hearing addressed the Court. The short answer to these relatively few objections is that after protracted and difficult litigation and then intense settlement discussions, this is without doubt the best settlement available. For those who are unwilling to accept that opinion, there is the ability to opt out. If the opt out group exceeds 5,000 nationally, then the Settlement is terminated, subject to Canada's right to waive this provision.

***8. Does the Settlement meet the objectives of improved access to justice; deter future wrongs and promote judicial economy***

34 Here there are thousands of former students who have not brought claims. Many no doubt could not afford to; or live in remote areas or did not culturally or otherwise comprehend the process. They now have access to an amount of compensation that they would not otherwise have. The non-financial elements of the Settlement may offer some deterrence, if deterrence is needed, in a modern Canada. The benefits to lessening the trial burden on judicial systems already strained is obvious.

35 In the result, I conclude that the Settlement for class members is fair and reasonable and in their best interests.

**Legal Fees in Respect of CEP**

***1. The Settlement — Article 13***

36 The Settlement provides by Article 13 that the Plaintiffs' legal fees and disbursements plus applicable taxes will be paid by Canada from a separate fund. Most, if not all of Plaintiffs' counsel took retainer agreements from their clients which entitle them to a percentage of the money recovered. Given that Canada has agreed to pay the fees, the CEP recovery by class members will not be diminished by legal fees. From Canada's perspective that was an important element of the Settlement and it obviously advances the interests of the class members.

37 The Settlement recognized three groups of Plaintiffs' counsel: the National Consortium, independent counsel, and the Merchant Law Group. The Settlement provides that no counsel who signed the Settlement or who accept a payment of legal fees from Canada will charge any fees or disbursements in respect of the CEP. Any recovery under the IAP is not subject to this restriction and is subject to whatever fee arrangements counsel make with their client.

38 The Settlement provides that the per client fee for a member of the independent counsel group will be based upon the lesser of work in progress as at November 20, 2005 or $4,000 plus reasonable disbursements and taxes. There is a verification process available to Canada.

39 As to the National Consortium (a group of 19 law firms) the Settlement provides for a payment of $40 million plus reasonable disbursements and taxes.

40 In respect of the Merchant Law Group, there is a detailed verification process agreed to. By a collateral agreement between only Canada and the Merchant Law Group and attached as a schedule to the Settlement, it was agreed that the fees for that law firm would not exceed $40 million and would not be less than $25 million, unless otherwise agreed.

***2. The Proposed Orders***

41 The proposed certification and settlement approval order declares that the Settlement is fair and reasonable and is incorporated by reference into the order. Plaintiffs' counsel has proposed an additional order dealing only with legal fees. That order declares that Canada shall pay the fees as provided in Article 13, which Article is expressly approved. It further orders the particular payment of $40 million to the National Consortium plus reasonable disbursements and taxes, and declares those fees to be fair and reasonable.

***3. Support for the Fees***

42 There is unanimous support from all counsel for the Settlement as to fees. Counsel for the National Consortium of Plaintiffs' counsel naturally urges that their fees of $40 million be approved as fair and reasonable. The group of lawyers comprising "Independent Counsel" also supports the request for Court approval of their fees to be paid by Canada.

43 The Merchant Law Group has agreed to a verification process respecting their fees and supports approval of that process. A dispute has arisen in respect of compliance with this process which I need not deal with here.

44 Canada argues that the fees, except for Merchant, are fair and reasonable and should be approved. As to Merchant, Canada urges Court approval of the Settlement respecting the Merchant fees, including the verification process.

45 The Third Party church organizations also seek Court approval of the legal fees. The Assembly of First Nations, an association of Band chiefs, supports the fee payments and urges Court approval.

46 In short then, the payor (Canada) and the payees (the law firms) have agreed in writing on either the amounts to be paid or the means of determining those amounts. All of them say that the fees and the process to verify fees are fair and reasonable. The churches echo that opinion. The distinguished federal representative in the settlement negotiations, the Honourable Frank Iacobucci, offers the same opinion.

47 Lastly, the executive branch of the Government of Canada has twice approved the legal fees and the verification process; first by approving the agreement in principle on November 22, 2005 and secondly by approval of the Settlement on May 10, 2006.

***4. Opposition to the Fees***

48 Some objections to the legal fees from individual Plaintiffs in Alberta have been received, describing the amount in respect of the Merchant Law Group as "offensive" and "outrageous".

***5. Should the Court be Involved in the Approval of these Fees?***

49 Although no party raised this issue, there is a question whether judicial approval of these legal fees is required in circumstances where the fees are paid by the Defendant. The fees relate only to the CEP. The payor and the payees accept the fees and the process for determining the fees as being fair and reasonable. The class members have no direct financial interest in the fees in the sense that their recovery of the CEP is not diminished by those fees.

50 There is no statutory requirement for Court approval of these agreed upon fees or their verification process. S. 39 of the CPA provides that a contingency fee agreement is "not enforceable" unless a) at or before the certification hearing the agreement is approved by the Courts and b) *after* the settlement agreement is approved the Court ensures that the fees and disbursements payable under the agreement are fair and reasonable in the circumstances.

51 S. 39(7) provides that if the contingency agreement is not approved or followed then the Court may determine the fees and disbursements or direct a process for determining the fees and disbursements.

52 However, all parties agree that S. 39 is not engaged in this case. That is so because Canada and not the class is paying these legal fees. Payment is not being made under the contingency or retainer agreements held by the lawyers. These fees do not come out of or diminish the class members' recovery. It is only when the class members are paying the fees that the CPA expressly requires Court approval of those fees. The Alberta class action legislation followed upon the report of the Alberta Law Reform Institute No. 85 dated December 2000. Page 156 of that report provides the rationale for Court approval of legal fees in class proceedings:

> This is necessary to protect the interests of class members whose recovery will be reduced by the lawyer's fees and generally to prevent abuses of the system.

53 So Court approval of these legal fees under S. 39 is not required in these circumstances.

54 S. 35 of the CPA requires Court approval of the settlement of a class proceeding before it is binding. All parties seek Court approval of legal fees and the verification process on the basis that the fees are part of the overall settlement; and S. 35 requires approval of the settlement of a class proceeding.

55 But the settlement contemplated by S. 35 is a settlement in which the class members have a direct financial interest. Court approval of a settlement between competent contracting parties is not usually required. It is not the Court's role to approve uncontested legal fees between a lawyer and a third party payor in the absence of incapacity at law or some statutory requirement.

56 The rationale for Court approval of a settlement in class proceedings is that, once approved, all class members, even those who never sued and are not present, will be bound and all members will pay their share of the legal fees, subject of course to any opting out provisions. In this case the class members have no direct financial interest (except perhaps as taxpayers) in whatever amount Canada has agreed to pay to Plaintiffs' counsel. Canada can pay whatever it chooses to pay if the lawyers will accept. Canada may view the social or political need to end this litigation as overriding any reservations it may have as to legal fees. Those are not issues for judicial consideration.

57 The position taken by all parties is that the Court should retain jurisdiction to approve legal fees in class proceedings even when the class members are not paying and S. 39 is not applicable.

58 Canada argues that the public interest requires Court supervision of the legal fees because, in this case, the public treasury is the source of the funds. That does not, however, respond to the issue where the payor may be in the private sector. It is also argued that there can be the appearance or even the risk of real collusion between plaintiffs' counsel and the defendant in the absence of judicial review.

59 Although the CPA does not require the parties to submit an agreement as to legal fees for judicial approval where the fees are not being paid pursuant to a contingency fee agreement between the lawyer and the plaintiffs, I am persuaded that there

is a principled reason for Court review of legal fees where approval is sought by the parties. In order to preserve the integrity of class proceedings and to guard against any abuse, such as improper favourable treatment of fees in exchange for a lessor class settlement, Court review is warranted.

***6. Should the Court Permit the Approval of the Class Settlement to be Conditional upon Court Approval of Legal Fees?***

60 The link between the approval of the Settlement and the approval of legal fees arises from the following articles of the Settlement:

> **Article 2.02 Effective in Entirety**
>
> None of the provisions of this Agreement will become effective unless and until the Courts approve all of the provisions of this Agreement, except that the fees and disbursements of the NCC will be paid in any event.
>
> **Article 4.05 Consent Certification**
>
> . . .
>
> (2) Consent certification will be sought on the express condition that each of the Courts, pursuant to the applications for consent certification under Section 4.05(1), certify on the same terms and conditions; including the terms and conditions set out in Section 4.06 save and except for the variations in class and subclass membership set out in Sections 4.02 and 4.04 of this Agreement.
>
> **Article 4.06 Approval Orders**
>
> Approval Orders will be sought:
>
> (a) incorporating by reference this Agreement in its entirety;
>
> . . .
>
> (h) ordering and declaring that the fees and disbursements of all counsel participating in this Agreement are to be approved by the Courts on the basis provided in Articles Four (4) and Thirteen (13) of this Agreement, except that the fees and disbursements of the NCC and the IAP Working Group will be paid in any event.
>
> **Article 16.01 Agreement is Conditional**
>
> This Agreement will not be effective unless and until it is approved by the Courts, and if such approvals are not granted by each of the Courts on substantially the same terms and conditions save and except for the variations in membership contemplated in Sections 4.04 and 4.07 of this Agreement, this Agreement will thereupon be terminated and none of the Parties will be liable to any of the other Parties hereunder, except that the fees and disbursements of the members of the NCC will be paid in any event.

61 The result is that unless each Court approves the legal fees and the verification process as being fair and reasonable and orders their payment, the class members settlement, even if standing alone it is fair and reasonable, will "terminate". That in my view is both unfortunate and unfair to class members, none of whom have any financial interest in the quantum of these legal fees. It is true that in return for Canada undertaking to pay the fees, the lawyers surrender any right to claim fees in respect of a CEP from clients who receive such payment. Thus it can be said that class members have an interest in Canada assuming the burden for the legal fees, but they have no interest in the amount of those fees.

62 The conflict was avoided in a case upon which the Plaintiffs rely: *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 4022 (Ont. S.C.J.), where at paragraph 59 the Court said:

> I turn to the final issue and that is the approval of the fees which DuPont has agreed to pay Class Counsel as part of the settlement. I am able to separate my consideration of this aspect of the overall settlement from my approval of the basic settlement itself due to the fact that Mr. Eizenga advised me that he is prepared to separate the approval of the settlement proper from the approval of the fees so that the settlement could proceed. In other words, counsel were prepare to "take their chances" on the fees issue in order to allow the settlement itself to move forward. I wish to commend plaintiff's counsel for the manifest fairness they demonstrate in taking that position.

63 Counsel before me refused to acquiesce to a separate consideration of the fees. All parties maintain that it is essential to this Settlement that all Courts must approve the entirety of the Settlement, including Article 13 regarding legal fees, or the Settlement terminates. That is, the Court cannot approve the settlement for the class members and vary the fee agreement. It is impossible to determine who represented the interests of the class members when that arrangement was made. Certainly not Canada. Plaintiffs' counsel would have been conflicted. Counsel for the Assembly of First Nations (AFN) says that his client was without conflict and approved the deal. But his client is an association of chiefs. I have no evidence of their mandate to speak for and bind the class members. Plaintiffs' counsel cites a brief oral decision of Slatter J. (as he then was) in *Roth and Fifield v. Her Majesty the Queen in Right of Alberta*, an unreported decision dated December 20, 2005. This decision appears to be the only other Alberta decision on a class settlement. The case dealt with class proceedings arising from alleged underpayment to and overpayment of recovery from recipients under the *Assured Income for the Severely Handicapped Act*, R.S.A. 2000, c. A-45 and predecessor statutes. Alberta, a defendant, paid the fees of class counsel under the settlement agreement. However, the issue I now consider was not put before Slatter J.

64 Canada, supported by the AFN, argues that it was critical to them that the entire CEP be received by the eligible recipients, without deduction for legal fees under any retainer agreements. The only way to accomplish that, they said, was for Canada to pay the fees in return for Plaintiffs' counsel surrendering their claims to a percentage of the recovery under their retainer agreements. Plaintiffs' counsel would only accept that trade off if they had certainty as to their fees or the formula to determine their fees.

65 The argument is understandable but it does not address the underlying problem. When the settlement for the class members is made conditional upon approval of the agreed legal fees, the class members cannot and do not receive independent legal advice as to the merits of their settlement alone. The opinion of Plaintiffs' counsel in respect of the fairness of the class settlement can be perceived to be influenced by counsel's view on the adequacy of their fees. I say "perceived" because in the course of the seven years of case management of this litigation in Alberta I have been struck, but not surprised, by the skill and dedication of nearly all counsel involved. Their loyalty to their clients' interests is not in question.

66 However, if S. 39 applied, fairness of the legal fees would be determined only *after* the underlying settlement was approved. The Settlement in this case, linking the two approvals, is inconsistent with S. 39. The legislature has carefully separated the two approvals. There is good reason for that. To ensure the independence of the advice the class members receive as to their settlement, the class settlement must be resolved first and not be made conditional upon the lawyers' fees being approved. That principle applies with equal force when the fees are paid by a third party such that S. 39 does not apply.

67 Nevertheless I am persuaded that this litigation is unique. This is not merely about commercial interests and resolving a dispute. This Settlement is between Canada and its First Nations people. It is about responding to historic wrongs. It concerns claimants who are elderly and for whom time cannot wait. Beyond compensation, there are social and political issues that this Settlement seeks to address. In all those circumstances I am not prepared to sacrifice a settlement for the class members in order to address the legal fees separately. That issue can and will be left for another day.

68 I specifically do not wish to be seen as endorsing a practice of linking approval of a class settlement to approval of legal fees. Such linkage runs counter to the careful scheme of two separate approvals contemplated by the CPA and creates an unanswerable conflict no matter who is the payor. In cases where the defendant pays the legal fees, a process parallel to S. 39 should in my view be followed in all but the rarest of cases.

***7. Factors to Assess the Reasonableness of Legal Fees***

69 The test is whether the fees sought are reasonable: *Gariepy v. Shell Oil Co.*, [2003] O.J. No. 2490 (Ont. S.C.J.).

70 The relevant factors include the following:

1. The time expended by counsel.
2. The complexity of the issues.
3. The degree of responsibility assumed by counsel.
4. The monetary value in issue.
5. The importance of the matter to the clients.
6. The degree of skill and competence demonstrated by counsel.
7. The results achieved.
8. Ratio of the fees to recovery.
9. Whether a multiplier should be applied and if so at what level.
10. Whether in contingency cases the fees as a matter of policy are sufficient to provide an economic incentive to counsel.

***8. Review of these Legal Fees***

*a. Independent Counsel*

71 The Settlement provides that each lawyer in this group who had either a retainer agreement or a substantial solicitor-client relationship with a former student as at May 2005 would be paid for outstanding work in progress as at November 20, 2005, to a maximum of $4,000. In return the lawyer would not charge any fees in respect of the CEP. The Settlement provides a verification process, both as to the number of clients and the amount of the outstanding work in progress. The Settlement also provides for payment of fees at a normal hourly rate for the time spent negotiating the Settlement and for any work required during the course of the administration of the Settlement once approved.

72 The evidence is that independent counsel represent more than 4,000 former students. The group consists of 19 separate law firms. This group has been involved in the active pursuit of this litigation for many years. Many of these lawyers have been successfully involved in the alternate dispute resolution process as well.

73 Given the likely average CEP received by each of their clients, the agreement to accept a payment of only work in progress to a maximum of $4,000 is obviously fair and reasonable.

*b. National Consortium*

74 The National Consortium consists of 19 law firms across the nine jurisdictions. They represent between 7,500 and 8,000 claimants. In return for a proposed fee of $40 million to be divided amongst the 19 firms, they surrender any fees due under retainer agreements for CEP and undertake not to charge fees on the CEP recovery to current and future clients. The affidavit of Darcy Merkur, a lawyer with one of the member law firms, confirms the following facts.

75 This group pursued or supported litigation in eight of the nine jurisdictions. Their work began as early as 1994. The group actively pursued extra-legal activities as well in order to increase pressure on Canada. They co-ordinated efforts with the AFN and appeared with clients at parliamentary committee hearings. In Alberta, members of this group took the lead over

the course of seven years of case management to move cases through numerous interlocutory motions, extensive document production, and some 245 days of examinations for discovery. Eight experts were retained and briefed and reports obtained at the expense of the lawyers. Pretrial briefs were prepared. Nationally, the group's disbursements totalled nearly $2.5 million and they recorded more than 100,000 hours of time. The issues raised in the litigation were extremely complex. The $40 million when distributed will see the individual firms receive as little as $96,000 to as much as $7.8 million. In the case of many firms, there were a number of lawyers working on the litigation over the course of time. In 2005 this group was involved in protracted and intense negotiations leading towards settlement. The settlement amount allocated for the CEP is $1.9 billion. The degrees of responsibility and skill brought to the litigation in Alberta was generally high. There were a few counsel who chose to be passengers, but most readily assumed the responsibilities and conducted themselves in accord with the highest standards. The results achieved are impressive. The risks faced by counsel were extraordinary. There were significant legal issues to answer; there was the prospect of years of trials and appeals with no or very little reward at the end. Those are only the legal risks. There were political uncertainties as well. Canada was not an ordinary defendant.

76 The matter of legal fees was a subject of intense negotiations leading to settlement. This was no "friendly" deal. It was recognized that the National Consortium included both class counsel and counsel for thousands of individual Plaintiffs. Many had contingency agreements, some of which called for fees of 15%, 25% and more. The National Consortium provided a calculation of its fees under existing retainer agreements and class action fees. The estimate of fees range from $72.75 million to $92.5 million. Settlement was reached at $40 million.

77 On all of these facts I am satisfied that the proposed fee to the National Consortium is fair and reasonable and should be approved. I am supported in my conclusion about those fees by the opinion of the federal representative who led the settlement discussions; by Canada, who will pay the fees; and by the AFN, which claims to be something of a "neutral" party in the matter of fees. The simple fact is that but for the legal skills and strategies employed by these and other lawyers, these claims were very likely to die like the rest of the claimants in a very few years. $1.9 billion in CEP is going to flow to the surviving claimants because and only because of the determined efforts of Plaintiffs' counsel. They have earned their compensation.

*c. Merchant Law Group*

78 This law firm ("Merchant") commenced class actions in six jurisdictions. In Alberta they commenced thousands of individual actions before Alberta's class action legislation was in place. Throughout the case management of the action in Alberta, however, Merchant was of little assistance and was generally unhelpful in moving the test cases forward. They were often absent from case management conferences. The Settlement provides that the fees of Merchant will be determined in accord with the Agreement in Principal dated November 20, 2005 and a collateral agreement made between Canada and Merchant attached as Schedule V and also dated November 20, 2005. That collateral agreement provided for a four step verification process, ending with a determination by the Saskatchewan Court of Queen's Bench. That collateral agreement further provided that Merchant would be paid a minimum of $25 million and a maximum of $40 million. The extensive verification procedure arose from the concerns of the federal representative Frank Iacobucci, Q.C. as expressed in his affidavit of August 10, 2006:

> 2. The discussions of legal fees with Tony Merchant, Q.C., representing the Merchant Law Group ("MLG"), were particularly long and complex. As described in detail at paragraph 26 of this affidavit, I had and continue to have a number of very serious concerns about the information put forward by MLG to justify its position on legal fees. These concerns include:
>
> (a) uncertainty about the number of former residential schools students who had retained MLG;
>
> (b) lack of evidence or rationale to support the MLG's claim that it had Work-in-Progress of approximately $80 million on its residential school files; and
>
> (c) an apparent discrepancy between the amount of class action work MLG represented it had carried out and the amount of class action work it had actually done.

79 He further deposed that "without this verification there is no way to determine whether $40 million in legal fees is a reasonable and equitable amount to pay to MLG." Presumably it would for the same reason be equally difficult to determine if $25 million is a reasonable amount. A fair and reasonable fee cannot be determined merely by counting the number of retainer agreements held by Merchant, particularly given the circumstances under which some of those agreements were alleged to have been obtained. A fair and reasonable fee is to be earned by useful work; not merely by obtaining signatures on a form or recording time on internal records.

80 At the hearing, counsel for Merchant when asked directly, acknowledged that that firm supported the motion to approve the Settlement. Yet in its 136 page written submission Merchant argues that this Court must either order payment of $40 million to it or reject the entire Settlement. Apart from that dazzling conflict with the interests of its clients, that position conflicts with Merchant's own collateral agreement with Canada and with its stated position at the hearing. In any event, I am asked only to approve the Settlement which, in respect of Merchant's fees, describes a verification process. That verification process is, in my view, fair and reasonable and is thus approved. I need not and do not approve any specific sum in respect of Merchant fees or disbursements.

**Legal Fees for the Independent Assessment Process**

81 Article VI in Schedule D of the Settlement creates the independent assessment process. That process is a substitute for the current ADR process and is intended to provide a forum for the resolution of the "continuing claims". Those claims include allegations of physical and sexual assault and certain other defined wrongful acts. There could be as many as 15,000 such claims. Awards will range from $5,000 to $275,000. Proven actual income loss may be awarded in addition, to a maximum of $250,000. Canada will also pay an additional 15% of the award, plus disbursements, where a client has been represented by counsel, as partial reimbursement for legal fees. It can be expected that counsel will charge in excess of that 15%. The three groups of Plaintiffs' counsel represented here have agreed to "cap" their fees at 30% for "standard" track matters. The result is that for IAP claims, the total fees could dwarf the amount payable in fees for CEP claims. The Settlement deliberately does not address fees for IAP claims as it does for CEP claims. The affidavit of D. Merkur says at paragraph 18:

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

82 However, the Court cannot take a "hand's off" approach. The suit having been certified as a class proceeding, the Court is obliged to ensure the fairness and reasonableness of all fees. While S. 39 of the CPA should apply, these circumstances involving thousands of IAP claims, to be resolved over a period of years, calls for a different solution. I concur with my colleagues in other jurisdictions and direct that the legal fees arising from IAP claims are to be approved in Alberta in the manner prescribed by S. 39, but before the adjudicator who heard the claim. Schedule D to the Settlement requires that the adjudicators have law degrees and relevant experience. In determining the appropriate fees, they will have regard to all relevant factors, including the greatly reduced risk at this stage, the absence of examination for discovery and the simplified adjudicative process. Also, there can be no double recovery. Plaintiffs' counsel cannot be paid a second time for the services to which the fees approved by Article 13 relate. The adjudicators will perform the function of a taxing officer pursuant to the Alberta Rules of Court and have regard to the Code of Professional Conduct regarding lawyers' fees.

83 Claimants must have the right of appeal from the adjudicators to the approving court on the matters of fees.

84 It may have been preferable had Canada, instead of paying an additional 15% of these awards, merely contracted with lawyers in each jurisdiction to represent IAP claimants at arm's length, much as legal aid does in many provinces. However, that was not done, so this procedure is necessary.

85 After the hearings, Plaintiffs' counsel suggested that the NAC mediate or decide fee disputes. That group, however, lacks the necessary independence.

**Form of Orders**

86 The proposed form of order certifying the action and approving the Settlement requires some minor corrections which were discussed with counsel at the hearing.

1. Paragraph 13 would have the Court declare the Settlement "fair, reasonable, adequate and in the best interests of the class members". S. 35 of the CPA requires only that the Settlement be "approved" and the Order should be limited to those words. The Settlement is no doubt approved because it is fair and reasonable and in the best interests of the class members but those are the reasons, not the result. The term "adequate" is superfluous.

2. Paragraph 14 of the Order would have the Court go beyond approval and order that the Settlement "*shall* be implemented and the parties are *directed* to comply with its terms, subject to any further Order of this Court" (underlining added). The Settlement however goes well beyond providing relief at law. For example, it contemplates certain truth and reconciliation national events whose purpose is to engage and educate the public through mass communication. The Settlement further contains a "commemoration policy directive" as Schedule J, designed to assist in healing and reconciliation. The carrying out of these and like terms are matters of social and political policy for the executive and legislative branches of government to determine. The Courts should not be called upon to order government to comply at this stage. See *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Ont. S.C.J.) at para. 77; *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (Ont. S.C.J.) at para. 153.

In the context of the overall Settlement, approval by the Court is sufficient.

3. Paragraph 34 of the proposed Order needs to be clarified given the definition of "Eligible CEP Recipient" in paragraph 1(k).

**Conclusion**

87 In addition to the concerns raised by the courts in other jurisdictions, I require the following matters to be addressed for reasons already given:

1. Establish a plan for assisting CEP claimants through and including appeals.

2. Establish a plan for Court supervision and direction for the IAP.

3. Agree that the Adjudicators will set the legal fees for IAP claims, subject to the clients' right of appeal to the Court.

88 In my view, none of these go to the substance of the Settlement. Instead, they relate to the manner of the administration of the Settlement, which is the responsibility of the courts.

89 Upon the parties providing a satisfactory response to these matters, the appropriate Orders will issue certifying the class proceeding and approving the Settlement.

*Motion granted.*

2022 ONSC 6359
Ontario Superior Court of Justice

Persaud v. Talon International Inc.

2022 CarswellOnt 16822, 2022 ONSC 6359

# ASHLEKA PERSAUD and TEN EIGHT VACATIONS LTD. (Plaintiffs) and TALON INTERNATIONAL INC. (Defendant)

Perell J.

Heard: October 6, 2022
Judgment: November 10, 2022
Docket: CV-17-569023-00CP

Counsel: Sean A. Brown, Christopher Lupis, Laura Bassett, Paul D. Mack, for Plaintiffs
Symon Zucker, Nancy J. Tourgis, for Defendant
Joseph P. Groia, Adam J. Wygodny, for Proposed Intervenors, MSTW Professional Corporation, Mitchell Wine, and Levine Sherkin Boussidan P.C.

***Perell J.*:**

## A. Introduction

1 This is a certified class proceeding against Talon International Inc. ("Talon") on behalf of abortive purchasers of hotel units in what was known as the Trump Tower in downtown Toronto. [1] The motion now before the court is a settlement and fee approval motion under the *Class Proceedings Act, 1992*. [2] It is a very troublesome motion.

2 The first troublesome feature of the motion is that the settlement for which approval is sought is a mediocre success.

a. The Plaintiffs, Ashleka Persaud and Ten Eight Vacations Ltd. (collectively "Ms. Persaud"), and Class Counsel (Mack Lawyers and Flaherty McCarthy LLP), bring a motion for approval of a settlement with a settlement fund of $5.75 million. They also seek approval of Class Counsel's fee of approximately $2.2 million, all inclusive of fees, taxes, and disbursements. The counsel fee and the costs of administration will reduce the settlement fund to approximately $3.4 million for a class of uncertain size.

b. In theory, there could be a maximum of 154 abortive purchasers of hotel units who might be claimants, but it seems that there may be perhaps 20 to 40 Class Members likely to make claims to a share of the settlement fund amongst the approximately 130 locatable Class Members that received notice of the proposed settlement. The prizes for the successful claimants are *pro rata* refunds of their deposits. The average deposit was approximately $225,000. For direct purchasers of hotel units in the Trump Tower, the refund is capped at 75% of their deposit. For indirect purchasers of hotel units in the Trump Tower, the refund is capped at 25% of the deposit.

c. To succeed in obtaining a partial deposit refund (in effect partial rescission), the Class Member must prove to the Claims Administrator by a paper record that he, she, or it relied on the sales material prepared by Talon. Under the Settlement Agreement, there is an appeal to a Claims Adjudicator and then a more apparent than real right of appeal to the court if a claim is disallowed. Significantly, any settlement funds not taken up are returned to Talon.

d. As I shall explain further below, this is a mediocre success.

3 The second troublesome feature of the immediate case is that it is uncertain how much of the $3.4 million net settlement fund will be taken up by Class Members.

a. This is troublesome because if the settlement fund is not fully taken up, the residue is returned to Talon or more accurately to Talon's deposit insurer.

b. Given the passage of time and the relocation of some of the Class Members and given the circumstance that many of the Class Members are not Ontario residents, it remains to be determined the extent to which Class Members will take up the opportunity to make claims and the extent to which they will be able to prove reliance and receive a payment from the settlement fund.

c. The possibility of a substantial portion of the settlement fund being remitted to Talon depreciates the quality of the settlement and complicates determining what is the appropriate contingency fee to Current Class Counsel.

4 The third troublesome and also unusual feature of the motion for settlement and fee approval is the involvement of "Former Class Counsel."

a. Levine Sherkin Boussidan P.C., Mitchell Wine, and MSTW Professional Corp. are the Former Class Counsel in this class action or their successor law firms.

b. Mr. Wine says that he has a fee sharing agreement with Paul D. Mack, of Current Class Counsel, for a share of Class Counsel's fee from the settlement fund.

c. Mr. Mack denies any such agreement. The alleged fee sharing agreement is the subject matter of a separate lawsuit between Former Class Counsel and Paul Mack and Mack Lawyers (the "*Wine v. Mack* Action"). [3]

d. How to deal with Former Class Counsel's claim for a share of Current Class Counsel's fee is an unprecedented problem in the immediate case.

5 The fourth troublesome feature of the motion, which is related to the modest success of the settlement and to the involvement of Former Class Counsel, is that there is an extensive and complex factual background for the settlement. The factual background spans over 20 years and begins years before the commencement of the class action.

a. The lengthy complicated factual narrative for this class, including the involvement of Donald Trump before his ascendancy and descendancy to the presidency of the United States, requires close scrutiny because it is the context for evaluating the litigation risk, the providence of the proposed settlement, the contribution of Former Class Counsel, the contribution of Current Class Counsel, and the key issue of whether the court should in accordance with the *Class Proceedings Act, 1992* approve the settlement agreement, Current Class Counsel's counsel fee, and the alleged fee sharing agreement.

b. Of critical significance is that the factual background involves persons or corporations who are not Class Members but who could have been Class Members. These putative Class Members retained Former Class Counsel to sue Talon outside of the class action. Mr. Wine relies on his success for these other clients in the actions outside of the immediate class action in the *Wine v. Mack* Action and as one of his perches for approval of the fee sharing agreement in the immediate case.

6 Thus, the matters now before the court requires me to rule on three far from ordinary requests for court approvals pursuant to the *Class Proceedings Act, 1992*. Notwithstanding the above and other troublesome features of the motion before the court, which will become apparent in the discussion below, for the reasons that follow:

a. I approve the settlement. While far from an exemplary outcome for the class, it is a modest success. The settlement is preferable and better than the only alternative to a negotiated agreement, which is prolonging this litigation with an even more uncertain outcome.

b. I approve a class counsel fee to a maximum of *$2.2 million*, all inclusive, of which *$1.25* million, inclusive of fee, taxes, and disbursements, is payable forthwith, with the balance payable, if at all, subject to court approval, after the distribution of the settlement is completed and the actual take-up by the Class Members is determined. This is a fair and reasonable counsel fee and appropriate given the modest success of the settlement. This counsel fee and any future counsel fee is exclusively for Current Class Counsel.

c. With respect to the troublesome matter of the fee sharing agreement between Former Class Counsel and Current Class Counsel, it was rightfully conceded by all the parties, that this is a matter within the jurisdiction of the *Class Proceedings Act, 1992*. However, on this fee approval motion, I am in no position to decide: (a) whether the fee sharing agreement exists, and (b) if it exists, whether the agreement is legal.[4] Nevertheless, what I can do on this motion is to assume that the fee sharing agreement exists and that it is lawful. Based on those assumptions, I do not approve the fee sharing agreement.

i. As the factual background will reveal, Former Class Counsel had been disqualified. Its litigation risk ended with the disqualification. Former Class Counsel had been paid for its former services with the award of costs for the certification motion. No more is owing to it.

ii. Former Class Counsel could not and did not contribute to the settlement. Former Class Counsel cannot take credit for the modest success of the settlement. Former Class Counsel has no intellectual property entitlement for having commenced the class action.

iii. Assuming the fee sharing agreement exists and that it is lawful, it would not be fair or reasonable for the court to approve a fee sharing agreement with Former Class Counsel for a share of a contingency fee earned by Current Class Counsel.

**B. Factual Background**

7 As foreshadowed, the factual background to this troublesome settlement and fee approval motion is extensive. The following description of the factual background derives from my involvement in adjudicating a summary judgment motion in two test cases involving the hotel units of the Trump Tower[5] and from my role as case management judge of the immediate class action.

8 It is necessary to examine the factual background in some detail because it bares the issues of: (a) the litigation risk in continuing the class proceeding; (b) the worth of the settlement agreement; (c) the fee request of current Class Counsel; (d) the alleged existence of a fee sharing agreement between current Class Counsel and Former Class Counsel; and (e) whether the settlement, the counsel fee, and the fee sharing agreement should be approved in accordance with the *Class Proceedings Act, 1992*.

9 The story begins in the *early 2000s* when Talon (Talon International Inc., Talon International Development Inc., Toronto Standard Condominium No. 2267) and its principals Val Levitan and Alex Shnaider entered into agreements with Donald Trump Sr., and Trump Toronto Hotel Management Corp, and Trump Marks Toronto LP, to develop a mixed-use project in downtown Toronto at 325 Bay St. The development was a 71-storey building to house two condominium corporations. One condominium corporation was a conventional residential condominium of 118 units. The other was a luxury hotel under the name Trump International Hotel with 261 hotel units.

10 Talon's sale of the hotel units in the condominium appeared to be the sale of "security," under the *Securities Act*,[6] and by letter dated *April 28*th, 2004, pursuant to s. 74 of the Securities Act, Talon's lawyers applied to the Ontario Securities Commission (the "OSC") on Talon's behalf for an exemption from the requirement to file a prospectus. In *May 2004*, the OSC issued a ruling exempting Talon from having to file a prospectus. The OSC directed how the hotel units should be sold. The OSC required that before entering into an agreement of purchase and sale with a prospective purchaser, Talon should deliver an offering memorandum in the form of the disclosure statement required under the *Condominium Act, 1998*.[7]

11 After the OSC's ruling, and while the Trump Tower was under construction, Talon began to market hotel units. Talon opened a sales centre. Prospective purchasers of the hotel units were provided with documents purportedly in compliance with the directive of the OSC. Amongst the documents that the purchasers received before they signed agreements of purchase and sale was a document called "Estimated Return on Investment" (the "Estimate"). The Estimate set out the hypothetical revenue stream from the hotel units and the anticipated expenses for the units. The Estimate predicted a return on investment. It was subsequently alleged that the Estimates contained numerous misrepresentations of revenues and expenses.

12 The marketing of the units continued for many years during construction. The purchasers were provided with marketing materials including the Estimate. The purchasers were given materials in purported compliance with the disclosure requirements of the *Condominium Act, 1998*. The purchasers signed a variety of agreements including Talon's standard form agreement of purchase and sale. The purchasers paid deposits.

13 It shall become important to note that the hotel unit deposits are insured pursuant to an insurance policy issued by Lombard Canada Ltd. The policy remains in place. As it happens, Talon itself is now insolvent and the only recoverable asset is the deposits. Pursuant to s. 81 of the Condominium Act, 1998 [8] and its regulations, the Class Members' deposits are either being held in trust by Talon's lawyers, the Toronto law firm of Harris, Sheaffer LLP, or are insured deposits.

14 In *2007*, Ms. Persaud and her husband Jason Boccinfuso, who is a police officer, learned about the Trump Tower from a computer search. Ms. Persaud had no direct contact with any Talon representative. Mr. Boccinfuso contacted Ms. Zak, a Talon sales agent. Ms. Zak told Mr. Boccinfuso that an investment in a hotel unit would be very profitable. Mr. Boccinfuso saw a PowerPoint presentation and reviewed the Estimate.

15 On *March 7, 2008*, Ms. Persaud signed an agreement of purchase and sale to acquire a hotel unit. By this time, five of Mr. Boccinfuso's police officer colleagues had agreed to participate in the purchase. Ms. Persaud's agreement was for Unit 1615 at a purchase price of $910,000. Ms. Persaud and Mr. Boccinfuso incorporated Ten Eight Vacations Ltd., to take title. The $227,500 deposit for the purchase was paid. The agreement of purchase and sale provided that the deposit would be forfeited if the purchaser defaulted in closing the transaction.

16 In *2012*, after many construction delays and extensions of the agreements of purchase and sale, the purchasers were given interim occupancy of the hotel units. On *February 24, 2012*, Ms. Persaud through Ten Eight Vacations Ltd. took interim occupancy of Unit 1615, and Ms. Persaud, Mr. Boccinfuso, and his five police officer colleagues began making interim occupancy payments.

17 The interim occupancy period lasted until *December 12, 2012*, which was the date scheduled for final closing. By this time, because of poor occupancy rates, the purchasers of the hotel units were losing between $4,000 to $5,000 per month. The Estimates were wrong, overstating revenue, understating disclosed expenses, and failing to disclose some expenses. On December 12, 2012, Ms. Persaud did not complete the purchase of Unit 1615. Only 50 transactions closed.

18 Because some purchasers, including Ms. Persaud, refused to close their transactions, lawsuits followed. One of Talon's lawsuits (action CV-14-498306) was an action in which Ms. Persaud was the defendant. In that action, Talon sought to forfeit the deposit and to claim damages for breach of contract. Ms. Persaud defended, but she overlooked making a counterclaim for the return of her deposit.

19 Following the abortive closings, some of the purchasers retained Levine Sherkin Boussidan P.C. to commence individual actions for rescission and damages for misrepresentation and breach of the *Securities Act*. There were 22 plaintiffs in 20 actions with respect to 27 hotel units. Of the 20 actions, 17 involved transactions that did not close and three actions involved purchases that did close. Of the 22 litigants, only seven resided in Ontario. Mr. Wine was litigation counsel for the actions. Amongst the individual litigants were Mr. Sarbit Singh and Ms. Se Na Lee.

20 In *2013*, Justice Janet Wilson was assigned to case manage the actions.

21 On *February 11, 2014*, the action between Talon and Ms. Persaud, mentioned above, (action CV-14-498306) was commenced.

22 On *November 24, 2014*, Levine Sherkin Boussidan P.C. wrote the OSC and requested the Commission to investigate alleged breaches of the *Securities Act* by Talon, including the distribution of the document entitled "Estimated Return on Investment" as contrary to the OSC's ruling. Nothing much came of this request to the OSC, and the resolution of the dispute between Talon and the purchasers was left to the courts.

23 Levine Sherkin Boussidan P.C.'s clients in the actions before the courts sought rescission or damages based on three legal theories. First, the purchasers alleged that Talon and the other defendants negligently misrepresented the Estimate, and that the purchasers were entitled to rescission and damages. The critical issues in this first theory were proving that: (a) the Estimate was an actionable misrepresentation; and (b) the purchaser was misled because he or she or it relied on the Estimate. Second, the purchasers advanced a statutory misrepresentation claim under s. 130.1 of the Securities Act. The key issues here were: (a) whether the Act applied; and (b) whether the Estimate was an actionable misrepresentation. Reliance, however, was presumed for the statutory claim, which was the major advantage of the statutory claim. Third, the purchasers alleged that the defendants had violated the OSC's ruling making the agreements of sale illegal contracts for which the purchasers were entitled to rescission and damages, without proving reliance.

24 Relying on these three theories as the basis for rescission and recovery of the deposits and damages, in *2015*, Mr. Singh and Ms. Lee in their respective individual actions brought a motion for summary judgment. This summary judgment motion was designed to be a test case for the actions that were being case managed by Justice Wilson.

25 I was assigned the summary judgment motion, which was argued on *June 25 and 26, 2015*. On *July 10, 2015*, I dismissed the motion for summary judgment.[9] I also dismissed the action as against the principals of Talon and against the Trump Defendants. Mr. Singh and Ms. Lee appealed to the Court of Appeal. Mr. Wine was counsel for the appellants.

26 On *October 13, 2016*, the Court of Appeal affirmed my decisions that: (a) Mr. Singh's and Ms. Lee's second and third legal theories for a summary judgment for rescission or damages were unsuccessful; and (b) the action against the Trump Defendants should be dismissed. However, the Court of Appeal held that I erred in dismissing the action against the principals of Talon because they had not been joined in the summary judgment motion.[10] Further, the Court of Appeal held that after I had found that four of the five elements for negligent misrepresentation had been made out against Talon, I erred in holding that Mr. Singh and Ms. Lee had failed to establish that they had reasonably relied on the Estimate. Moreover, the Court of Appeal held that the provisions in the standard form agreements of purchase and sale that exculpated Talon were unenforceable as unconscionable terms. The Court of Appeal also left it open for Mr. Singh and Ms. Lee to seek damages for fraudulent misrepresentation. In the result, Mr. Singh's agreement was rescinded. Mr. Lee was granted a judgment for damages with a trial to determine the quantum of the damages.

27 The Court of Appeal awarded Mr. Singh and Ms. Lee costs of $180,000 for the motion for summary judgment and a further $35,000 inclusive of disbursements and taxes for the appeal.[11]

28 Talon was not prepared to treat the outcome in the *Singh v. Talon* appeal as dispositive of the claims by purchasers who had paid deposits but who had not closed their hotel unit purchases, and on *February 3, 2017*, while still a defendant in an action brought by Talon, Ms. Persaud and Ten Eight Vacations Ltd. transformed themselves from regular litigation clients of Levine Sherkin Boussidan P.C. into Representative Plaintiffs. They instructed the firm to commence a proposed class proceeding against Talon in which they would represent all the purchasers of the hotel units.

29 On *February 8, 2017*, Ms. Persaud amended her Statement of Claim in the proposed class action. On behalf of the putative Class Members, the Plaintiffs sued for rescission of the agreements to purchase the hotel units and for a refund of the deposits paid by the putative Class Members. The class was defined as:

all purchasers, except "Excluded Purchasers", defined below, of hotel condominium units (the "Hotel Units") in the hotel portion (the "Trump Hotel") of the Trump International Hotel and Tower (the "Trump Tower") who: (a) signed or who had signed on their behalf agreements of purchase and sale with the developer; the Defendant ("Talon"); (b) paid or who had paid on their behalf deposits or portions of deposits to Talon; and (c) did not complete their transactions with Talon. The "Excluded Purchasers" are: (a) purchasers against whom Talon has obtained a judgment forfeiting their deposit(s); and (b) purchasers who have obtained a judgment against Talon for repayment of their deposit(s).

30 Reiterating the legal theories that had been used in the test cases, Ms. Persaud advanced six causes of action. Five causes of action were advanced in support of claims for rescission and for refunds of the deposits; namely: (1) Talon contravened the ruling of the OSC voiding the exemption and, therefore it unlawfully sold securities without a prospectus; (2) Talon made misrepresentations contrary of the *Securities Act* and was liable for a statutory cause of action; (3) Talon made misrepresentations contrary to the *Condominium Act, 1998* and was liable for a statutory cause of action; (4) Talon was liable for negligent misrepresentation; and (5) Talon was liable for fraudulent misrepresentation. The sixth cause of action was for rescission of the releases signed by purchasers who had settled their claims against Talon after October 13, 2016. (If the releases were set aside, then these purchasers could advance the other five causes of action.)

31 On *August 16, 2018*, Ms. Persaud moved to have her proposed class action certified, and she asked that the class action be consolidated with the action in which she was a defendant but had omitted to assert a counterclaim.

32 On *September 13, 2018*, the action was conditionally certified as a class proceeding. [12] I certified only the causes of action for negligent misrepresentation and fraudulent misrepresentation. I certified the rescission cause of action to set aside the releases signed by the subclass of purchasers who signed releases after October 13, 2016. I certified the following three common issues:

(1) In this class proceeding is there issue estoppel with respect to the findings of fact and law of the Court of Appeal in Singh v. Trump, 2016 ONCA 747?

(2) Did Talon make fraudulent misrepresentations? If so, what is the appropriate remedy?

(3) Did Talon make negligent misrepresentations? If so, what is the appropriate remedy?

33 I concluded that the preferable procedure criterion was satisfied. In an observation that is pertinent to the analysis later in this decision about the worth of the settlement agreement, I stated at paragraph 154 of my certification decision:

154. If Talon were successful on all three common issues, there is a dispositive result in favour of Talon and the action would be dismissed. If the Plaintiffs were successful on the estoppel issue, and the Plaintiffs also proved fraud, then there would be a dispositive result in favour of the Class Members. If the Plaintiffs were successful on the estoppel issue but the Plaintiffs did not prove fraud, the litigation would be substantially advanced and there would be individual issues trials to determine individual reliance by the Class Members.

34 At paragraphs 157 to 185 of my certification decision, in a passage that is pertinent to several issues discussed later in this decision about settlement and fee approval, I had the following to say about the representative plaintiff criterion:

**General Principles: Representative Plaintiff Criterion**

157. The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan. [...]

**Analysis: Representative Plaintiff**

[...]

164. There is, however, one major problem. The problem with respect to Ms. Persaud's qualifications to be a representative plaintiff is that she has selected Levine, Sherkin, Boussidan to be Class Counsel and that firm is also lawyer of record for the plaintiffs in sixteen individual actions.

165. The plaintiffs in those sixteen actions are putative Class Members. The plaintiffs in those sixteen actions must each make a decision whether to participate in the class action or to opt-out.

166. While conceding that the plaintiffs in each of the sixteen actions must obtain independent legal advice about whether to opt out of the class action, it is apparent that Levine, Sherkin, Boussidan wish to continue to act for the plaintiffs in the sixteen individual actions and also be Class Counsel for Ms. Persaud and her fellow Class Members. This is not permissible. Class Counsel cannot act for a representative plaintiff and also act for putative Class Members who have opted out of the class action. [13]

167. Levine, Sherkin, and Boussidan argue that they have no conflict of interest in simultaneously acting for the plaintiffs in the sixteen actions and the Class Members because it has not been suggested that there is a conflict of interest and they have not been disqualified from acting simultaneously for the plaintiffs in the sixteen actions.

168. This argument is fallacious for two reasons. First, whether it has been suggested or not, there is indeed a conflict of interest in the law firm acting for the plaintiffs in the sixteen actions. The truth is that Levine, Sherkin, and Boussidan do have a conflict of interest, but it is inchoate or a waivable conflict arising from joint retainers with the plaintiffs in the sixteen actions.

169. The law firm has the inchoate conflict of interest associated with a joint retainer. Rule 3.4-5 of the *Law Society of Ontario's Rules of Professional Conduct* requires that in cases of joint retainers, where a conflict of interest develops that cannot be resolved, the lawyer cannot continue to act for both or all of the clients and may have to withdraw completely. The firm has joint retainers with the plaintiffs in the sixteen actions and those clients can waive the conflict in accordance with the *Rules of Professional Conduct* promulgated by the Ontario Law Society.

170. At the moment, the conflicts of interest associated with Levine, Sherkin, and Boussidan's joint retainers for the plaintiffs in the sixteen actions are not particularly acute because the plaintiffs in the sixteen actions are collectively seeking a judgment against Talon and the other defendants, and all of the plaintiffs in the sixteen actions are united in pursuing a claim against the defendants.

171. There is a pending summary judgment motion and thus the Plaintiffs in the sixteen actions are further advanced in their litigation than the Class Members. Conflicts of interest amongst the clients of the sixteen actions retainers, however, may yet arise and become quite acute, particularly if there are settlement negotiations with the plaintiffs in the sixteen actions.

172. There, however, is nothing inchoate or waivable in the conflict of interest arising from action for the plaintiffs in the sixteen actions and simultaneously acting for the Class Members.

173. For present purposes, the point to emphasize is that Levine, Sherkin, and Boussidan's argument that they have no conflicts of interest in acting for the plaintiffs in the sixteen actions is incorrect, and the firm's conflicts of interest will be exacerbated if it were to act simultaneously for the plaintiffs in the sixteen actions and also the Class Members, who are already being asked to give instructions to pursue fewer remedies and to pursue fewer defendants than the plaintiffs in the sixteen actions are pursuing.

174. The second reason why Levine, Sherkin, and Boussidan's argument is incorrect, is that with joint retainers outside of the Class Action, Levine, Sherkin, and Boussidan have a conflict of interest in acting for the Class Members who as a collective are entitled to an unconflicted representation. It is not for the court to waive those conflicts and indeed the conflicts are irreconcilable and the *Class Proceedings Act, 1992* directs that the court not certify a class action if there is a conflict of interest.

175. In the context of class proceedings, there are three types of conflict of interest that require examination: [14] (1) conflicts of interest arising from a lawyer's direct financial interest in the class proceedings, which are an inherent conflict allowed by the entrepreneurial model of the class proceedings legislation; (2) conflicts arising from a divergence of interest between the representative plaintiff and class members; and (3) conflicts arising from the lawyer's divided loyalties arising outside of the class proceeding. In the immediate case, all three types of conflict of interest would be present should Levine, Sherkin, and Boussidan simultaneously act for the plaintiffs in the sixteen actions and for the Class Members.

176. As already noted, Class Members will seek a different set of remedies against Talon from the remedies being sought by the plaintiffs in the sixteen actions, and there is a different set of defendants in the sixteen actions and the class action that only includes Talon as a defendant. That is not an unconflicted representation, and it is a retainer that will raise enormous problems in settling the class action.

177. For certain, the Class Members cannot be used as a lever to increase the pressure on the defendants in the sixteen actions to settle the sixteen actions. There is an obvious conflict in Levine, Sherkin, and Boussidan purporting to act on a contingency fee basis for a collective while at the same time having joint retainers with the plaintiffs in sixteen individual actions.

178. There is the inherent conflict of interest of entrepreneurial class actions, where Class Counsel may be incentivized to recommend a settlement that provides a very provident recovery from contingency fees and an escape from the risks of litigation but which settlement may provide miserly access to justice for the Class Members. If Class Counsel also acts for the sixteen plaintiffs and the Class Members, the conflicts would propagate.

179. For example, the sixteen plaintiffs may be best served if the Class Members settled cheaply because the proportion of the deposits not returned to the Class Members will be the monetary resource for payment of the damages claims of the sixteen plaintiffs, claims not being advanced by the sixteen plaintiffs.

180. For example, the Class Members may be best served if they retained a greater proportion of the deposits and the sixteen plaintiffs received less for their deposits because the proportion of the deposits not returned to the plaintiffs in the sixteen actions will be the monetary resource for the Class Members' claims for costs and pre and post-judgment interest.

181. Further, the Class Members and the plaintiffs in the sixteen actions may differ on tactics and strategy. There is a strong potential for conflicting instructions to Levine, Sherkin, and Boussidan regarding the prosecution of the claims in the sixteen actions and the singular claim for rescission in the class action.

182. In my opinion, it would be inappropriate to make it a condition of the certification decision that Levine, Sherkin, and Boussidan remove itself as lawyer of record for the sixteen plaintiffs who after obtaining independent legal advice may decide to opt out of the class action. It is, however, appropriate to recognize that Levine, Sherkin, and Boussidan are disqualified as Class Counsel.

183. I note that if Levine, Sherkin, and Boussidan are disqualified as Class Counsel, then their conflict in advising the plaintiffs in the sixteen actions whether to participate instead in the Class Action is not removed, and, as already acknowledged by Levine, Sherkin, and Boussidan, the firm's clients should obtain independent legal advice about whether they should participate in the Class Action.

184. Therefore, I shall allow Ms. Persaud sixty days to retain a new Class Counsel and subject to court approval of her choice, her action shall be certified as a class action.

185. If Ms. Persaud fails to satisfy the above condition, then I shall dismiss her motion to certify the action as a class action, but her action may continue as an individual action to be consolidated with action CV-14-498306.

35 Thus, in *September 2018*, I conditionally certified the class action. The precondition for certification was that Ms. Persaud replace Levine Sherkin Boussidan P.C. with new Class Counsel within 60 days, failing which her motion for certification would be dismissed, but her action would be consolidated with the action in which she was a defendant. I disqualified Levine Sherkin Boussidan P.C. I ordered that Ms. Persaud's choice of new Class Counsel must be approved by the Court.

36 On *October 11, 2018*, Ms. Persaud filed a Notice of Appeal of the conditional certification to the Court of Appeal. Her principal ground of appeal was with respect to the disqualification of Former Class Counsel.

37 Talon brought a motion to quash the appeal on the grounds that it was an interlocutory order for which the appellate court was the Divisional Court. On *November 13, 2018*, Ms. Persaud abandoned her appeal to the Court of Appeal and filed a motion for an extension of time to appeal to the Divisional Court.

38 On *December 14, 2018*, Justice McCarthy granted Ms. Persaud an extension of time to appeal to the Divisional Court, which required leave, and he stayed the term of the conditional certification order until the determination of the motion for leave and any subsequent appeal should leave be granted.

39 On *February 12, 2019*, the Divisional Court dismissed Ms. Persaud's motion for leave to appeal.

40 The condition in the certification decision was not satisfied within the 60-day period or the extended period provided by the stay, and in *April 2019*, Talon brought a motion to have the action decertified.

41 In the decertification motion, Talon's counsel, Symon Zucker, filed an affidavit that deposed that Talon had six settlements and four tentative settlements with putative Class Members who would opt out of the Class Action. He deposed that in addition to the 16 lawsuits being prosecuted by Levine Sherkin Boussidan P.C., there were three other lawsuits by putative Class Members prosecuted by other counsel and these plaintiffs would be opting out of the class action. He deposed that two putative Class Members had already succeeded in obtaining judgments against Talon, but Talon had appealed.

42 The decertification motion, however, was never set down for a hearing.

43 Ms. Persaud found it difficult to retain new Class Counsel because it was not known how many Class Members had resolved their claims for deposits and the extent to which there was money available for refunds to Class Members with outstanding claims. In other words, Ms. Persaud with the assistance of Former Class Counsel was having difficulty recruiting and persuading replacement Class Counsel that the potential recovery of deposits was worth the litigation risk.

44 Levine Sherkin Boussidan P.C. believed that 204 of the hotel units were under contract and that 50 transactions had closed, leaving 154 hotel units with unperformed contracts where deposits were paid in whole or in part. Levine Sherkin Boussidan P.C. was aware of approximately 25-30 hotel units that had been the subject of litigation, but the firm was not aware of the disposition of the deposits for the other 124-129 hotel units. Levine Sherkin Boussidan P.C. estimated that the average deposit paid to Talon was between $200,000 to $250,000, and thus the law firm believed that the value of the deposits for the hotel units for which deposit recoveries could be sought was between $24.8 million to $32.25 million. [15]

45 In her effort to recruit new Class Counsel, Ms. Persaud, with the assistance of Levine Sherkin Boussidan P.C., brought a motion to compel Talon to provide information about the outstanding claims for deposits. The disclosure motion was successful, and on *April 23, 2019*, I ordered Talon to produce: (1) copies of the agreements of purchase and sale or assignments of the agreements for which deposits or insurance policies are being held; and (2) confirmation of the amounts of the deposits paid respectively for each of those agreements of purchase and sale. [16]

46 Finally, a year after the conditional certification, Ms. Persaud found a possible replacement for Former Class Counsel. In *October 2019*, Ms. Persaud retained Mack Lawyers and Flaherty McCarthy LLP to replace Levine Sherkin Boussidan P.C. as Class Counsel. Ms. Persaud signed a new Contingency Fee and Retainer Agreement dated *October 7, 2019* The contingency fee agreement provides that Class Counsel may seek Court approval for a contingency fee of 33.3%. Before signing the Contingency

Fee and Retainer Agreement, Flaherty McCarthy LLP and Mack Lawyers agreed to indemnify Ms. Persaud from any adverse cost consequences in the event that the action was ultimately unsuccessful.

47 It took some time for Talon to provide the information that I ordered disclosed in April 2019, and I scheduled a case management conference on *April 17, 2020*. At the case conference, Talon withdrew its decertification motion, and it consented or did not oppose the appointment of Flaherty McCarthy LLP and Mack Lawyers as Class Counsel. I was satisfied that Current Class Counsel were qualified to replace Former Class Counsel. This action was unconditionally certified as a class action. [17]

48 On *June 15, 2020*, I heard a motion: (a) to revise the Certification Order; and (b) for approval of the Notice of Certification to the Class Members. I held that it was not necessary to revise the Certification Order and I approved the Notice of Certification. [18]

49 In *July 2020*, by a motion in writing, Ms. Persaud represented by current Class Counsel sought her costs of the certification motion, which would be payable to Former Class Counsel, and also the costs of preparing costs submissions. On *July 20, 2020*, I awarded costs on a partial indemnity basis of *$35,000*, all inclusive, for the certification motion and costs of $1,000, all inclusive, for the costs submissions. [19]

50 On *September 1, 2020*, Notice of Certification was distributed to purchasers of 131 of the hotel units. The opt out deadline was *November 16, 2020*. The purchasers of 25 units opted out of the class action.

51 Throughout *2021* there were on again, off again settlement negotiations between Current Class Counsel and Talon and its deposit insurer.

52 On *November 16, 2021*, Former Class Counsel — as plaintiffs and as lawyers of record for the plaintiffs — commenced an action against current Class Counsel for a share of the future fees earned by Current Class Counsel. By notice of action issued on November 16, 2021 MSTW Professional Corporation, Mitchell Wine and Levine Sherk in Boussidan P.C. sued Paul Mack and Mack Lawyers (the "*Wine v. Mack* Action"). [20] Former Class Counsel sought: (a) declaration that they are entitled to a portion of the counsel fees *to be earned* by the Current Class Counsel; (b) damages of $2 million arising from Current Class Counsel's failure to pay Former Class Counsel the amount of fees to which they are entitled; and (c) punitive and aggravated damages in the amount of $200,000.

53 I was not advised about the court action and the feud between Former Class Counsel and Current Class Counsel.

54 On *March 26, 2022, March 28, 2022*, and *June 16, 2022*, Clifford Hendler, an experienced mediator presided at settlement discussions between Current Class Counsel and Talon. Eventually, the parties agreed to a settlement with a gross settlement fund of $5.75 million. The parties agreed to a general framework for the claims administration process.

55 On *June 17, 2022*, counsel for Mr. Mack in the *Wine v. Mack* Action sent an email message to Former Class Counsel's counsel in the *Wine v. Mack* Action. The email message stated:

> Dear Counsel:
>
> Re: MSTW Professional Corporation, Mitchell Wine and Levine Sherkin Boussid an Professional Corporation Court File No. CV-21-672206
>
> I have reviewed the Statement of Claim as it relates to the above referenced matter. Apart from the fact that there is no properly pleaded cause of action, there is no claim as against Paul Mack and Mack Lawyers. Our recommendation to our client is to bring a motion under Rule 21 on the basis that there is no properly pleaded cause of action and that this matter is exclusively under the *Class Proceedings Act*, R.S.O. 1992 (*inter alia*, Sections 12 and 32). However, prior to doing so, we are serving the attached Demand for Particulars and Request to Inspect. Your clients' claim for legal fees would be a claim in the class proceeding which would have to be approved by the court. What should occur, in our opinion, is that your client should seek an attendance before the case management judge in the class action proceedings and request that he/she direct that your client be added to the service list. At the fee approval stage, your client can make any claims in as it relates to fees.

If your client is not agreeable to dismissing the action as against Paul Mack, we will be seeking costs on a full indemnity basis and proceeding by way of a motion pursuant to *inter alia*, Rule 21. Please note that this letter is written with prejudice and will be relied upon in any subsequent court proceedings including seeking costs on a full indemnity basis.

Yours very truly, TEPLITSKY, COLSON LLP per: Jonathan Kulathungam

56 Once again, I was not advised of this feud between Former and Current Class Counsel.

57 Meanwhile, Current Class Counsel and Talon set about to draft a formal settlement agreement. The drafting of the Settlement Agreement was complicated by the involvement of counsel for Northbridge Insurance, the parent corporation for the deposit insurer. On *July 7, 2022*, the parties signed a formal Settlement Agreement.

58 Ms. Persaud supports the settlement as set out in the Settlement Agreement. Current Class Counsel recommends the Settlement Agreement as fair and reasonable and in the best interests of the Class Members.

59 On *July 19, 2022*, I approved the notice and the notice plan for the settlement approval hearing. [21]

60 The notice was distributed, and Class Counsel also sent emails to the Class Members who had contacted them directly. There have been no objections to the settlement.

61 Current Class Counsel will have spent approximately 1,500 hours from the time they were retained in 2019 until the return of the Settlement Approval motion. If the settlement is approved, Current Class Counsel anticipate expending 100 to 200 hours to implement the Settlement and to make reports to the parties and to the court.

62 The settlement and fee approval motion was scheduled for October 6, 2022.

63 On *September 19, 2022*, Ms. Persaud delivered her Motion Record for the settlement approval and fee approval motion. The motion was supported by the affidavit dated September 17, 2022 of Ms. Persaud and by the affidavit dated September 17, 2022 of Mr. Paul Mack.

64 Meanwhile, on *September 23, 2022*, Current Class Counsel delivered a Statement of Defence in the *Wine v. Mack* action. I was not advised of the delivery of the Statement of

65 On *September 29, 2022*, Former Class Counsel delivered a motion to intervene in the settlement approval and fee approval motion. Former Class Counsel's motion was supported by the affidavit dated September 30, 2022 of Mr. Wine. In their motion to intervene, Former Class Counsel sought:

a. if necessary, leave to intervene in the within proceeding as an added party;

b. if necessary, an Order approving the Fee Sharing for the purposes of ss. 12, 32, and 33 of the Class Proceedings Act, subject to the determination of the *MSTW Professional Corporation, Mitchell Wine and Levine Sherkin Boussidan Professional Corporation v. Paul Mack and Mack Lawyers* (the "*Wine v. Mack* Action"), [22] and

c. if opposed, the costs of this Motion.

66 Rather than paraphrase it, I shall set out below the relevant parts of Mr. Wine's affidavit. Mr. Wine deposed:

1. I was the lawyer of record for the plaintiffs from the commencement of the within proceeding through to the certification of the within proceeding as a class action [...]

3. At the time the within proceeding was commenced, I was a lawyer at the law firm of Levine Sherkin Boussidan Professional Corporation ("LSB"), although I currently practice through MSTW Professional Corporation ("MSTW") [...]

4. LSB and I were the lawyers for the plaintiffs from the commencement of the within proceeding.

[...]

6. Subsequent to the Certification Decision, the Moving Parties took steps to identify new counsel for the plaintiff herein, Ashleka Persaud ("Persaud"), experienced in the carriage of class actions. Although Persaud is the plaintiff, most of my conversations with Persaud occurred through her husband and authorized agent, Jason Boccinfuso ("Boccinfuso"). [...]

7. Subsequent to the Certification Decision, Boccinfuso repeatedly acknowledged that the within proceeding was my idea in the first place and that if the within proceeding succeeds then that success was based upon an earlier decision I obtained in the Court of Appeal for Ontario, which decision is reported as *Singh v. Trump*, 2016 ONCA 747[...]

8. During these discussions, Boccinfuso consistently stated that it was important that I remain involved in the instant proceeding as much as possible because of my intimate knowledge of the within proceeding and because the Singh Decision significantly contributed to the success of the within proceeding and, therefore, I should share in the fees that would ultimately be earned in the within proceeding.

9. Subsequent to the Certification Decision, I identified another law firm experienced in prosecuting class actions, Landy Marr Kats LLP ("LMK"), and entered into discussions with members of that firm to transfer carriage of the within proceeding to that LMK, subject to the approval of Persaud and the Court, which included the opportunity for the Moving Parties to: (a) remain involved in a manner consistent with the Certification Decision; (b) re-assume carriage or co-carriage once circumstances allowed; and, (c)participate in the fees to be earned in the within proceeding.

10. While I was engaged in discussions with LMK, which discussions I reported to Persaud and Boccinfuso, Boccinfuso asked me to consider transferring carriage of the within proceeding to Boccinfuso's long-time lawyer, Paul D. Mack, and Mr. Mack's firm, Mack Lawyers (Mr. Mack and his firm being "Mack").

11. In response to Boccinfuso's request that I consider Mack assuming carriage of the within proceeding, I advised Boccinfuso that I had concerns about Mack's lack of experience in dealing with class actions and that the Court would have to approve any person seeking carriage of the within proceeding.

12. On or about March 19, 2019, I received a telephone call from Mr. Mack who spoke as if it was a foregone conclusion that he would be assuming carriage of the within proceeding. I did not share that view and, after some unsatisfactory discussion, I ended that call by hanging up on Mack. I reported this phone call to Boccinfuso and Persaud.

13. Between March 19 and March 22, 2019, Boccinfuso tried to persuade me to work with Mack on the within proceeding in a manner consistent with the Certification Decision with any fees earned divided between Mack and me.

14. In light of my March 19, 2019, telephone call with Mack, and Mack's lack of experience with class actions, I was skeptical that Mack was an appropriate choice for class counsel but, at Boccinfuso's request, I agreed to meet with Mack in Oshawa to discuss the matter.

15. On or about March 22, 2019, I met with Mack, as well as Boccinfuso and Boccinfuso's father, at a cigar club in Oshawa (the "Meeting"). During the Meeting, Mack and I agreed: (a) to work together on the within proceeding in a manner consistent with the Certification Decision; (b) that the fees that might ultimately be earned would be shared between them in a way that was fair to each of us; and (c) that I would resume carriage or co-carriage of the within proceeding if and when it became possible to do so within the terms of the Certification Decision (the "Agreement").

16. By email dated October 7, 2019, Mack advised me that he was in discussions with another law firm to prosecute the within proceeding and that if I had any concerns then I should forthwith advise Mack of them. I did have concerns because the terms of the Agreement did not allow for another law firm to play a permanent role in the prosecution of the within proceeding.

17. Subsequent to Mack's October 7, 2019 email, I repeatedly tried to communicate with Mack by telephone and email to express my concerns about Mack working with another law firm, but Mack did not respond to any of my telephone calls or my emails. I found this surprising because, to that point in time, Mack had been fairly good in the timeliness of his communications with me.

18. Mack failed to engage with me on this issue for six weeks. In fact, he wrote to me on November 15th and ignored my emails and phone calls. Finally, on November 20, 2019, Mack advised me that he had made an agreement with another law firm but confirmed my entitlement to share in the fees by, in relevant part, writing "It is very difficult to know just how to work a fair deal — but I can advise that there is a 'carve-out' of a portion of the legal costs that (hopefully) will allow us to recognize value added." [...]

19. Subsequent to Mack's email dated November 20, 2019, Mack resiled from the Agreement and denied ever having made the Agreement. Mack continues to deny the Agreement.

20. The Agreement, and Mack's breach of same, are the subject of an action the Moving Parties commenced in the Superior Court of Justice, at Toronto, having the title *MSTW Professional Corporation, Mitchell Wine and Levine Sherkin Boussidan Professional Corporation v. Paul Mack and Mack Lawyers* bearing Court File No. CV21-672206, which action was commenced by Notice of Action issued November 17, 2021 (the "Wine Action"). The Wine Action claims damages Mack for, amongst other things, breach of the Agreement or, in the alternative, on the basis of *quantum meruit* and unjust enrichment for a reasonable share of the entrepreneurial legal fees. [...]

21. On June 17, 2022, Mack's lawyers in the Wine Action served a Demand for Particulars and Request to Inspect Documents. [...]

22. Between June 17, 2022, and September 23, 2022, the lawyers for the parties to the Wine Action exchanged correspondences but were unable to reach a resolution acceptable to said parties.

23. In the meantime, and unbeknownst to me at the time, on July 19, 2022, the Honourable Justice Perell approved the form and content of the proposed Notice of Settlement Approval Hearing for the approval of the proposed settlement of the within proceeding (the "Proposed Settlement"). The Notice of Settlement Approval Hearing discloses that the Proposed Settlement, amongst other things, contemplates a payment by the defendant herein, Talon International Inc. ("Talon"), of five million and seven hundred and fifty thousand dollars ($5,750,000) (the "Gross Settlement Fund") and the payment of 33.3% of the Gross Settlement Fund (i.e. $1,914,750) to the lawyers for the plaintiffs herein (the "Contingency Fee").

24. On or about August 29, 2022, I learned of the Proposed Settlement and on August 29, 2022, my lawyers in the Wine Action wrote to Mack's lawyers in the Wine Action and, amongst other things, advised them that I had learned of the motion brought by the plaintiffs to the within proceeding for approval of class counsel's fees and asked that Mack's lawyers confirm by September 6, 2022, that they will disclose the Wine Action to this Honourable Court. [...]

25. On September 7, 2022, Wine's lawyers, having received no response from Mack's lawyers to the email of August 29, 2022, followed-up with Mack's lawyers and requested the courtesy of a response. [...]

26. On September 16, 2022, Mack's lawyers wrote to the Moving Parties' lawyers but did not confirm that Mack would be disclosing the Wine Action to this Honourable Court.

27. On September 17, 2022, the Moving Parties' lawyers again asked Mack's lawyers whether they will be disclosing the Wine Action and the claims made therein to this Honourable Court. [...]

28. On September 23, 2022, Mack's lawyers delivered a Statement of Defence to the Wine Action, which denies the Agreement and the Moving Parties' entitlement to receive any monies from Mack at law or in equity, under cover of correspondence wherein Mack's lawyers advised that Mack will not be disclosing the Wine Action to the Court hearing the motion to approve the settlement of, and class counsel's fees for, the within proceeding; and that if the Moving Parties

are going to do so then Mack's lawyers ask that the Demand for Particulars, Request to Inspect and Statement of Defence be disclosed to the Court. [...]

29. The Moving Parties take no position on the motion to approve the Proposed Settlement and lack the information sufficient to take a position with respect to the quantum of fees being sought by counsel.

30. The Moving Parties seek leave to intervene (1) to ensure that the Court is aware of the fee dispute between the Moving Parties and Mack, and (2) to ensure that any Order approving said settlement and fees not impede the Moving Parties' prosecution of the Wine Action.

31. The Moving Parties are concerned that the Order made approving the Proposed Settlement could adversely affect the Moving Parties by impairing the Moving Parties' prosecution of the Wine Action and ask that any Order made by this Honourable Court when it determines whether or not the Court will approve the Proposed Settlement be made without prejudice to the Wine Action.

32. The Moving Parties ask that this Honourable Court approve the Agreement for the purposes of ss. 12, 32, and 33 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, subject to the determination of the Wine Action, so that the issues in the Wine Action may be determined on its merits.

33. I make this affidavit in support of the motion brought by the Moving Parties and for no other or improper purpose.

67 Mr. Wine appends to his affidavit, his Statement of Claim in the action against Current Class Counsel (the *Wine v. Mack* Action). The Statement of Claim is a recital of the same narrative and the same allegations made in his affidavit. For present purposes, the following additional allegations should be noted. They are set out in the concluding paragraphs of the pleading, as follows:

30. As a result, the Defendants are in breach of contract entitling the Plaintiffs to damages.

31. In the alternative, the Plaintiffs plead that they are entitled to recovery on the basis of the doctrines of *quantum meruit* and unjust enrichment.

32. In assessing the value of Wine's contribution to the Class Action, the Plaintiffs plead it should be based on the entrepreneurial portion of the Class Action legal fee to be earned.

33. To calculate the entrepreneurial portion of the fee, the Plaintiffs plead the docketed hours spent by Mack and other lawyers involved in the Class Action should be deducted from the total fee to be paid to the lawyers for the Class Action. The balance of the legal fees to be paid are the entrepreneurial fees to be earned in the Class Action.

34. The Plaintiffs plead their entitlement to recovery under the doctrines of *quantum meruit* and unjust enrichment should be based upon a reasonable share of the entrepreneurial legal fees to be earned.

35. In the further alternative, the Plaintiffs plead they are entitled to a referral fee for agreeing on March 22nd, 2019 to transfer representation in the Class Action to the Defendants.

68 In the *Wine v. Mack* Action, as noted above, Current Class Counsel have delivered a Statement of Defence. For present purposes, the pertinent portions of that pleading are as follows:

**STATEMENT OF DEFENCE**

[...]

4. There is no properly pleaded cause of action.

5. There is no basis to claim punitive or aggravated damages.

6. The Defendant Mack is a lawyer licensed to practice law in the Province of Ontario and operates his practice under the business name Mack Lawyers from Oshawa, Ontario. Mack has been a lawyer for over 4 decades.

7. On or about February 28, 2018, a motion was brought to certify a class in a class action bearing Court File CV-17-569023-00CP ("Class Action"). The Class Action involved the purchase of hotel condominium units by purchasers in the former Trump Hotel in Toronto.

8. On or about September 13, 2018, prior to the involvement of Mack, an order was issued by Justice Perell certifying the Class Action making the Certification CONDITIONAL on Mitchell Wine ("Wine") ceasing to be counsel because of conflict of interest ("Perell J. Order").

9. The Perell J. Order was appealed, the appeal was dismissed.

10. The representative Plaintiff and her husband Jason Boccinfuso ("Boccinfuso") contacted Mack to seek his advice and to retain him to act for the Defendants [sic] in the Class Action.

11. Contrary to what is set out in the Statement of Claim, there was no agreement reached on March 22, 2019 or any other date with the Plaintiffs in the within action. The Defendants specifically deny *inter alia*:

(a) Paragraph 22 of the Statement of Claim: there was no agreement that Wine and Mack "agreed to work together." The simple fact was that pursuant to the Order of Perell J., Wine could not represent the Class.

(b) Paragraph 23 of the Statement of Claim: there was never any agreement that the fees "that might ultimately be earned in the Class Action would be shared between Wine and Mack."

12. Ultimately, the Plaintiffs in the Class Action retained Paul Mack and Sean Brown of Flaherty, McCarthy LLP to act as counsel for the Class.

13. There was no contract between the Defendants and the Plaintiffs. Accordingly, there was no breach of contract. There could be no breach, when there was no contract.

14. The Defendants specifically deny that the Plaintiffs are entitled to recover on the basis of *quantum meruit* and/or unjust enrichment.

15. The Plaintiffs have suffered no damages and the Defendants put the Plaintiff to the strict proof thereof. In fact, the Plaintiffs were paid for their efforts and time up to the Perell J. Order.

16. There is no basis in law or in equity as to the Plaintiffs' claim for the "entrepreneurial portion of the Class Action legal fee to be earned."

17. There is no basis in law, in equity or in contract to any claim for "referral fee" as set out in paragraph 35 of the Statement of Claim.

18. The Defendants specifically deny paragraph 36 and the Plaintiffs' claim for punitive and aggravated damages. There is no such basis.

19. The Defendants served a Demand for Particulars and Request to Inspect. The Plaintiffs have refused to respond to both the Demand for Particulars and the Request to Inspect.

20. The Defendants seek an order dismissing this action in its entirety with costs on a substantial indemnity basis and in the alternative, a partial indemnity basis.

69 On *October 6, 2022*, the settlement approval and fee approval hearing was argued. I granted Former Class Counsel intervenor status as a party for the fee approval motion. I otherwise reserved judgment.

70 As a housekeeping matter, I direct the parties to take out an order granting Former Class Counsel intervenor status as a party to the fee approval motion.

**C. The Terms of the Settlement Agreement**

71 The key terms of the settlement agreement are as follows:

1. The Defendant makes no admission of liability. The Defendant pays $5.75 million, all inclusive, (the "Settlement Amount") to a Claims Administrator The payment is revisionary as described below.

2. The Defendant pays the claims adjudication expenses including, but not limited to, interest, costs, fees, class counsel fees, disbursements, and taxes.

3. The "Net Settlement Amount" means the Settlement Amount minus (1) approved Class Counsel fees (including HST and disbursements) and (2) a $150,000 holdback intended to pay for Claims Administration and Claims Adjudication Expenses.

4. Assuming Class Counsel's fees and disbursements are approved, this draws down the Settlement Amount by $1,914,750 for legal fees, $248,917.50 for HST applicable to legal fees, and $15,000 for disbursements inclusive of HST. These sums are a first charge upon the Settlement Amount and may be deducted by Class Counsel from the Settlement Amount before transferring the Net Settlement Amount.

5. Assuming that Class Counsel's fees, HST and disbursements are fixed and approved, and assuming the entirety of the $150,000 holdback is required to pay for Claims Administration and Claims Adjudication Expenses, the net Settlement Amount will be $3,421,332.50.

6. Ricepoint Administration Inc. is to be appointed and act as the Claims Administrator.

7. Clifford Hendler is to be appointed and act as the Claims Adjudicator.

8. The claims bar deadline is 100 days after the date on which the Notice of Settlement Approval is first provided in accordance with the Notice Plan.

9. In accordance with the Settlement Agreement and Distribution Protocol, to establish that he or she is an Eligible Claimant, a Class Member shall:

a. provide Proof of Identification to the Claims Administrator;

b. complete the Claim Questionnaire and Attestation, which will include:

i. confirmation as to whether the Class Member signed an Agreement of Purchase and Sale directly with Talon (*Direct Purchaser*), or acquired their interest in a Hotel Unit by way of an Assignment Agreement with a person or corporate entity who purchased a Hotel Unit (*Indirect Purchaser*);

ii. proof of payment under the agreement whether to Talon or to an Assignor;

iii. the reason or reasons why the Class Member chose to purchase a Hotel Unit;

iv. the Class Member's occupation at the time of purchasing the Hotel Unit;

v. confirmation that the Class Member: received or did not receive the Estimated Return on Investment documentation; from whom the Class Member received the documentation; and when and what the Class Member received;

vi. confirmation that the Class Member relied upon the Estimated Return on Investment documentation and the basis upon which they relied on the documentation;

vii. production of any documentation between Talon and the Claimant after entering into the Agreement of Purchase and Sale or Assignment Agreement, including without limitation: any settlement agreements, mutual releases or judgments in favour of the Claimant or in favour of Talon; and

viii. production of the Estimated Return on Investment documentation and if not production, an explanation as to why it is not produced.

10. The Claim Questionnaire and Attestation, and any further documentation provided by the Eligible Claimant to the Claims Administrator shall be provided to the Defendant's Counsel for review. The Defendant's Counsel shall, upon receiving same, provide its written response to the validity of the Eligible Claimant's Claim within 30 days of receipt by the Defendant's Counsel.

11. The Claims Administrator will make the initial determination as to whether a Class Member is an Eligible Claimant.

12. If there is a dispute as to who is an Eligible Claimant, it will be determined by the Claims Adjudicator. The Claims Adjudicator shall have 10 days to make a determination as to whether the Eligible Claimant is an Approved Claimant.

13. To be an "Approved Claimant", a Class Member must

a. submit the Claim Questionnaire and Attestation prior to the Claims Bar Deadline;

b. not have previously opted out of the class proceeding;

c. not have previously obtained a valid judgment against Talon for a deposit refund;

d. not have previously had a valid judgment obtained against them by Talon for forfeiture of the refund;

e. not be an Ineligible Claimant, meaning they are not a corporate entity or person who purchased a Hotel Unit for the purpose of re-selling the unit by direct sale or assignment;

14. The Claims Adjudicator shall determine if an Eligible Claimant is an Approved Claimant on the basis of the documentation produced by the Claimant and the written response provided by the Defendant's Counsel as set out above.

a. Among other things, the Claims Adjudicator may be required to determine the validity of a settlement as between the Claimant and Talon entered into after October 13, 2016, which is the date of the Court of Appeal's decision in Singh v. Trump, 2016 ONCA 747.

15. The Claims Adjudicator shall have the sole discretion to complete a video interview with an Eligible Claimant via video-conference call where the Claims Adjudicator is of the view that such an interview is necessary to determine whether an Eligible Claimant is an Approved Claimant. The Claims Adjudicator shall record the video interview. The video interview shall be released with the Claims Adjudicator's decision of whether an Eligible Claimant is an Approved Claimant.

16. The decision of the Claims Adjudicator is subject to an appeal on an error of law only. The procedure for the appeal is as required by the *Rules of Civil Procedure*. [I take this to be a reference to Rules 54 and 55 with respect to the confirmation of a report of a referee.]

17. An Approved Claimant will be entitled to compensation based on whether they were a Direct Purchaser or Indirect Purchaser of the Hotel Unit.

a. A Direct Purchaser's share of the Settlement Fund is limited to a *pro rata* basis up to 75% of the total original deposit amount paid, with no interest payable under the *Condominium Act, 1998*, or the *Courts of Justice Act*, and no payment towards costs. (The reduction reflects the litigation risk facing each Direct Purchaser should he or she be required to participate in an individual issues trial.)

b. The recovery of an Indirect Purchaser is limited to a pro rata basis up to 25% of the total original deposit amount paid, with no interest payable under the *Condominium Act, 1998* or the *Courts of Justice Act* and no payment towards costs. (The reduction reflects the much more significant litigation risk facing each Indirect Purchaser should he or she be required to participate in an Individual Issues Trial.)

18. Any surplus amounts remaining in the Escrow Account following the payment of Claims Administration and Claims Adjudication Expenses and Class Counsel Fees, and which are not distributed to Approved Claimants pursuant to the Distribution Protocol shall be considered further deposit monies that are forfeited to and in favour of the Defendant and shall accordingly revert to the Defendant and be paid to such entity as the Defendant may direct.

19. The Claims Administrator shall send Notice to Class Members, by regular lettermail to the address or addresses for each Class Member based on information in the Defendant's documents, including letters to the lawyer representing the class members when they entered into the Agreement of Purchase and Sale as identified in the defendant's documents.

20. Class Counsel will post the Notice at the website under the domain name *www.TalonClassAction.com*. Class Counsel will create a Facebook Page providing Notice to Class Members.

72 In seeking approval of the settlement, in paragraphs 27-28 of her supporting affidavit, Ms. Persaud deposed as follows:

27. I acknowledge that the proposed settlement is imperfect. However, it is still fair and reasonable in the circumstances. It gives a significant recovery to Direct Purchasers because they have the best chance of success if the matter proceeded through the litigation process. A reduction from their full recovery is reasonable and reflects the risk they face in litigation. As well, there is still recovery available for Indirect Purchasers even though their legal claim is tenuous if they never dealt directly with the Defendant.

28. Both Direct and Indirect Purchasers will be assisted by the Claims Administrator through the Claims Administration and Claims Adjudication process. They will be required to complete a fairly straightforward Questionnaire and produce the same information and documentation that would be required at an Individual Issues Trial. They may also be subjected to a Claims Adjudication process that does not require them to be cross-examined by counsel for the Defendant (which was initially demanded by the Defendant and firmly refused by Class Counsel).

73 In recommending approval of the settlement, Paul D. Mack as Class Counsel deposed the following as to the merits of the settlement at paragraphs 65-68 of his affidavit:

65. Class Counsel strongly believes that the proposed settlement represents a fair resolution that achieves for all Class Members a consequential financial award obtained by way of a relatively simple and efficient claims process. It is the opinion of Class Counsel that the proposed settlement falls within the "zone of reasonableness". It provides financial recovery for those same Class Members who would have been required to participate in a lengthy and unpredictable series of individual issues trials. It removes the necessity of a formal and lengthy court process and replaces it with a paper-based claims process and a limited adjudication process where necessary.

66. The litigation has been hard-fought by a Defendant represented by respected and experienced counsel. The Defendant has been transparent that it intended to fight this matter if Class Counsel proceeded to a summary judgment motion, common issues trial and individual issues trials. It has maintained that it can successfully defend against any Class Member

who comes forward and attempts to prove that they subjectively relied on the Defendant's marketing materials. The Defendant has fought this litigation on that basis and has fought other litigation brought by other Hotel Unit purchasers.

67. There were serious risks for the Plaintiffs if this matter did not resolve. Having said this, we believe strongly that we would be successful on the common issues if the dispute proceeds by way of a summary judgment motion or a common issues trial. Having said this, there was no certainty that the Plaintiffs and Class Counsel would be successful, and certainly not with respect to all causes of action and in relation to all Class Members.

68. Bearing in mind the significant risks of proceeding through litigation and considering that the recovery could likely be restricted to only some of the affected Class Members who came forward and participated in a trial, Class Counsel, who have significant experience in this challenging area, view this settlement as extremely favourable.

**D. Settlement Approval**

***1. Settlement Approval: General Principles***

74 Section 27.1 (1) of the Class Proceedings Act, 1992, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.[23] For present purposes, the relevant provisions of s. 27 are as follows:

**Settlement**

27.1 (1) A proceeding under this Act may be settled only with the approval of the court.

[...]

(3) A settlement under this section is not binding unless approved by the court.

**Effect of settlement**

(4) If a proceeding is certified as a class proceeding, as ettlement under this section that is approved by the court binds every member of the class or subclass, as the case may be, who has not opted out of the class proceeding, unless the court orders otherwise.

**Settlement must be fair and reasonable**

(5) The court shall not approve a settlement unless it determines that the settlement is fair, reasonable and in the best interests of the class or subclass members, as the case may be.

**Differences not a bar**

(6) The court may approve a settlement even if individual class or subclass members, including a representative party, are subject to different settlement terms.

**Evidentiary requirements**

(7) On a motion for approval of a settlement, the moving party shall make full and frank disclosure of all materials facts, including, in one or more affidavits filed for use on the motion, the party's best information respecting the following matters, which the court shall consider in determining whether to approve the settlement:

1. Evidence as to how the settlement meets the requirements of subsection (5).

2. Any risks associated with continued litigation.

3. The range of possible recoveries in the litigation.

4. The method used for valuation of the settlement.

5. The total number of class or subclass members, as the case may be.

6. A plan for allocating and distributing the settlement funds, including any proposal respecting the appointment of an administrator under subsection (14), and the anticipated costs associated with the distribution.

7. The number of class or subclass members expected to make a claim under the settlement and, of them, the numbers of class or subclass members who are and who are not expected to receive settlement funds.

8. The number of class or subclass members who have objected or are expected to object to the settlement, and the nature or anticipated nature of the objections.

9. A plan for giving notice of the settlement to class or subclass members in the event of an order under section 19, and the number of class or subclass members who are expected to obtain the notice.

10. Any other prescribed information.

[...]

**Supervisory role of the court**

(13) The court shall supervise the administration and implementation of the settlement.

**Court-appointed administrator**

(14) The court may appoint a person or entity to act as an administrator to administer the distribution of settlement funds.

**Duty of administrator, other person or entity**

(15) An administrator appointed by the court or, if no administrator is appointed, the person or entity who administers the distribution of the settlement funds, shall administer the distribution in a competent and diligent manner.

75 In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation. [24]

76 In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement. [25] An objective and rational assessment of the pros and cons of the settlement is required. [26]

77 The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation. [27] A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally. [28]

78 Generally speaking, the exercise of determining the fairness and reasonableness of a proposed settlement involves two analytical exercises. The first exercise is to use the factors and compare and contrast the settlement with what would likely be achieved at trial. The court obviously cannot make findings about the actual merits of the Class Members' claims. Rather, the court makes an analysis of the desirability of the certainty and immediate availability of a settlement over the probabilities of failure or of a whole or partial success later at a trial. The court undertakes a risk analysis of the advantages and disadvantages of the settlement over a determination of the merits. The second exercise, which depends on the structure of the settlement, is to use the various factors to examine the fairness and reasonableness of the scheme of distribution under the proposed settlement.

***2. Settlement Approval: Analysis and Discussion***

79 By far the hardest task of a judge managing a class action pursuant to the *Class Proceedings Act, 1992*[29] is settlement approval and fee approval. Why? There are at least four reasons.

80 First, the adversary system, upon which judges rely, disappears in the procedure for settlement and fee approval. Typically, there is no opposition to the settlement or the contingency fee. The adversarial system, the usual habitat of a judge, and the inquisitorial system, in which a judge may from time to time foray, both break down in the procedure for settlement approval and fee approval. There is no crucible of debate or inquisition from which the truth may emerge. The judge must rely on surrogate factors, such as the views of the Representative Plaintiff, who is behooved to have no conflicts of interest with the class members and who acts on their behalf. The surrogate factors, however, are suspect. The parties proffer evidence that is all of predictably self-serving and often less than candid. The *pro forma* evidence is untested by discovery or by cross-examination. The few occasions when a settlement is rejected can be explained by the concerted objections of a class member, but this rarely occurs. It is not difficult to prove that a settlement in the hand is better than a judgment waiting in the thorny thickets of litigation, and with the absence of opposition, how can a judge, even a cynical one, refuse settlement even in appropriate cases?

81 Second, a judge is discomfited by being required to be a doctor for the litigation to make sure that the inherent conflicts of interest of an entrepreneurial model of class proceedings have not metastasized. Under the entrepreneurial model of contingency fees measured against the value of the settlement for the entire class, Class Counsel has far more to gain than any Class Member from a settlement. This inherent conflict of interest emerges in full bloom on the occasion of settlement and fee approval.

82 Third, in this last regard, instead of being just an impartial adjudicator, the judge is discomfited by being required to take sides in a litigation because the settlement approval procedure requires the doctor/judge to investigate and to diagnose whether the settlement is fair and in the best interests of the Class Members. This means that the doctor/judge is required to side with a litigant, the Class Members, and to protect their interests - from their own lawyer, who typically has far more to gain from the settlement than do individual Class Members.

83 Fourth, in this last regard, instead of being just an impartial adjudicator under the adversary system, the judge is discomfited because the fee approval procedure requires the doctor/judge to investigate to determine whether Class Counsel's fee is reasonable and fair and genuinely earned and deserved. Again, this means that the doctor/judge is required to side with a litigant, the Class Members, and to protect their interests - from their own lawyer.

84 Of course, it is not every case where settlement and fee approval is challenging. The challenge is always there in theory, but the challenge does not always appear in reality, and most of the time there is no difficulty and no troublesome features and even the cynical judge can rest easy when approving the settlement and the fee. The case at bar is not one of those untroublesome cases.

85 The first trouble in the immediate case is that based on Mr. Wine's evidence, it appears that Ms. Persaud abandoned her responsibility as Representative Plaintiff by allowing her husband to assume command and encourage the disqualified Mr. Wine to continue to act in the class action. This is most unfortunate because it appears that Mr. Boccinfuso either did not understand or intentionally ignored my ruling that Former Class Counsel were disqualified. With that disqualification, Former Class Counsel was not in a position to give advice or take instructions. Ms. Persaud was no longer a client. When Mr. Boccinfuso asked Mr.

Wine to stay involved, Mr. Wine should have told him that it would be improper and impossible for him to do so. Mr. Wine was bound by the conditional certification order that Ms. Persaud had been unsuccessful in appealing. There was no basis for Mr. Wine to act like he had a say in who should be replacement class counsel. There was no basis for Mr. Wine to give advice about whether Mr. Mack had the competence to be replacement Class Counsel; that was a matter for the court to determine. It was wrong for Mr. Boccinfuso to allow Mr. Wine to act as if he had an ownership interest in the class action because of his creativity and success in Singh v. Trump A class action is not the property of entrepreneurial Class Counsel; the class action belongs to the litigants not their lawyer. In short, the recommendation of Ms. Persaud in favour of the settlement has been compromised by her abandonment of her post as representative plaintiff. A representative plaintiff is obliged to act in the best interests of the class members and not in the best interests of Former Class Counsel or Current Class Counsel for that matter.

86 The second trouble in the immediate case is that the recommendation of Current Class Counsel is also compromised by the litigation between Current Class Counsel and Former Class Counsel. Mr. Mack denies that there was any fee sharing agreement, but the issue is before the court in an action external to the class action, and Current Class Counsel should have brought the matter to my attention. I should not have had to learn about this feud by an intervenor motion. The Counsel Fee is part of the settlement fund, and the settlement fund belongs to the Class Members. The feud is about the Class Members' settlement funds and the court should have been told about the claim being advanced by Former Class Counsel.

87 A third trouble is that I have had opaque disclosure of the information provided by Talon that led to the creation of a gross settlement fund of $5.75 million. I have not been provided with the details of what was achieved by the production motion that I described above, and I have had to piece together what is the likely number of claimants to a share of the net settlement fund. However, despite the paucity of information, I am satisfied that the settlement fund is the best that could have been achieved. I am satisfied that the settlement fund was the product of hard bargaining and that Class Counsel had the requisite information to arrive at this sum.

88 In any event, once I consider the other factors, these troubles, large and small, are not enough by themselves to justify rejecting the settlement. Turning to the other factors, given my eight-year involvement with the trials and tribulations of Trump Tower purchasers, I have excellent insight into the litigation risk of the class action. I am satisfied that the proposed settlement is much better than proceeding with the litigation to have a trial of the three common issues and possible individual issues trials on the issue of reliance. The settlement agreement avoids any adjudication about whether the Estimate was a misrepresentation and about whether there was any fraud. The settlement makes reliance the issue to be adjudicated by the Claims Administrator and reliance may be proven on a paper record. That is a better outcome than contested individual issues trials about reliance. The caps on the refunds of 75% or 25% are reasonable compromises. Although the claims program allows Talon to challenge the Class Members' claims, it will be difficult, although not impossibly difficult, for Talon to rebuff the paper proof. So overall the approach of the settlement agreement is far better and far less risky and far less expensive than the alternative of a common issues trial possibly with individual issues to follow.

89 The Class Members benefit from the narrowing of the issue to be determined to whether the Class Member reasonably relied on Talon's documents that are alleged to have been misrepresentations inducing them to purchase the Hotel Units. The Class Members benefit from not having to go through the delay of a common issues trial before addressing the reliance question that would have to be determined at an individual issues trial. The settlement is better than the alternative of prolonged litigation ending in individual issues trials.

90 The settlement brings certainty to what has been throughout a proceeding with high litigation risk.

91 The right of appeal to a Claims Adjudicator may help improve the success rate of Class Members. While little turns on it, the further right of appeal to this court is, practically speaking, of little utility. The major issue to be determined by the Claims Administrator and the Claims Adjudicator is the factual matter of reliance and the appeal right is limited to issues of law. The right of appeal is more apparent than real, but this circumstance is not a reason to reject the settlement.

92 The net settlement fund appears to be sufficient and there might be no *pro rata* reductions depending on the take-up. I was advised that the likely take-up was to a maximum of around 40 claimants, the majority of whom would be indirect purchasers.

By my reckoning, assuming that there were 30 indirect purchasers and 10 direct purchasers each with a deposit of $225,000, then the take-up would be $3.4 million, which is the net settlement fund, without any *pro rata* distribution.

93 In my opinion, it is in the best interests of the Class Members to approve this settlement.

94 While I shall approve the settlement, I do not agree with Class Counsel that the settlement is "extremely favourable." I rather agree with Ms. Persaud that the settlement is imperfect. The settlement is a mediocre success, and it remains to be determined how much of the Settlement Fund will be taken up by Class Members and how much will revert to the Defendant.

**E. Fee Approval**

***1. Fee Approval: General Principles***

95 Section 32 (2) of the Class Proceedings Act, 1992 stipulates that an agreement respecting fees and disbursements between class counsel and a representative plaintiff is not enforceable unless approved by the court. For present purposes, the pertinent provisions of the Act are sections 32 and 33 as set out below:

> **Fees and disbursements**
>
> 32 (1) 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;
>
> (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.
>
> **Court to approve agreements**
>
> (2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.
>
> **Fees must be fair and reasonable**
>
> (2.1) The court shall not approve an agreement unless it determines that the fees and disbursements required to be paid under the agreement are fair and reasonable, taking into account,
>
> (a) the results achieved for the class members, including the number of class or subclass members expected to make a claim for monetary relief or settlement funds and, of them, the number of class or subclass members who are and who are not expected to receive monetary relief or settlement funds;
>
> (b) the degree of risk assumed by the solicitor in providing representation;
>
> (c) the proportionality of the fees and disbursements in relation to the amount of any monetary award or settlement funds;
>
> (d) any prescribed matter; and
>
> (e) any other matter the court considers relevant.
>
> **Same**
>
> (2.2) In considering the degree of risk assumed by the solicitor, the court shall consider,

(a) the likelihood that the court would refuse to certify the proceeding as a class proceeding;

(b) the likelihood that the class proceeding would not be successful;

(c) the existence of any other factor, including any report, investigation, litigation, initiative or funding arrangement, that affected the degree of risk assumed by the solicitor in providing representation; and

(d) any other prescribed matter.

**Same**

(2.3) In determining whether the fees and disbursements are fair and reasonable, the court may, by way of comparison, consider different methods by which the fees and disbursements could have been structured or determined.

**Priority of amounts owed under approved agreement**

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

[...]

**Holdback**

(6) The court may determine and specify an amount or portion of the fees and disbursements owing to the solicitor under this section that shall be held back from payment until,

(a) the report required under subsection 26 (12) or 27.1 (16), as the case may be, has been filed with the court and the court is satisfied that it meets the requirements of that subsection; and

(b) the court is satisfied with the distribution of the monetary award or settlement funds in the circumstances, including the number of class or subclass members who made a claim for monetary relief or settlement funds and, of them, the number of class or subclass members who did and who did not receive monetary relief or settlement funds.

**Agreements for payment only in the event of success**

33 (1) A solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.

[...]

96 The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved. [30] The actual take-up rate as a measure of the success of the settlement is a relevant factor in determining an appropriate counsel fee. [31]

97 Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement. [32]

98 The risks of a class proceeding include all of liability risk, recovery risk, and the risk that the action will not be certified as a class proceeding. [33]

99 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. [34]

100 Accepting that Class Counsel should be rewarded for taking on the risk of achieving access to justice for the Class Members, they are not to be rewarded simply for taking on risk divorced of what they actually achieved. [35] Placing importance on providing fair and reasonable compensation to Class Counsel and providing incentives to lawyers to undertake class actions does not mean that the court should ignore the other factors that are relevant to the determination of a reasonable fee. [36] 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. [37]

***2. Fee Approval: Analysis and Discussion***

101 In the immediate case, the matter of fee approval is complicated by Former Class Counsel's claim for a share of the class counsel fee being sought by Current Class Counsel. That complication, however, can be dealt with separately, and I will deal with the fee sharing agreement in the next section of these Reasons for Decision. In this section of my reasons, I shall decide whether Current Class Counsel's fee request should be approved.

102 As noted in the introduction section in these Reasons for Decision, a troublesome feature complicating the determination of the appropriate counsel fee is that a portion of the settlement may remit to Talon, and it remains to be determined how much of the net settlement fund will be taken up by Class Members.

103 If the whole net settlement fund were to be taken up, then in my opinion, Current Class Counsel would truly have earned a counsel fee of $2.2 million. Current Class Counsel took on the high-risk litigation and they achieved a settlement that I have found to be fair and reasonable and in the best interests of the Class Members. I have described the settlement as a mediocre success, but it was a success, and it was the product of a hard-fought litigation and hard-fought negotiations.

104 Further, regardless of what the take-up may eventually turn out to be, Current Class Counsel has truly earned an immediately payable counsel fee of $1.25 million, and they deserve some considerable credit for taking on the case after I disqualified Former Class Counsel.

105 In the circumstances of the immediate case, because the amount of the take-up is uncertain, in my opinion, the appropriate approach is to approve a counsel fee of $2.2 million, all inclusive, and make $1.25 million, inclusive of fee, taxes, and disbursements, payable forthwith, and to holdback $950,000. The holdback shall be payable, if at all, subject to court approval, after the distribution of the settlement is completed and the actual take-up by the Class Members is determined.

106 In my opinion, Current Class Counsel has underestimated the work that they will have to do to implement the settlement and to assist Class Members in making claims to the Claims Administrator and the Claims Adjudicator. The holdback of approximately $1 million will incentivize Current Class Counsel to take on these tasks. If take-up and success is improved, the holdback will provide Current Class Counsel with the source for remuneration for the services rendered.

107 Residual settlements are not as common as they once were, but when there is a residual settlement, it has been common to use the approach of holdbacks to better determine the worth of the contingency fee and to encourage Class Counsel to increase the take-up, which, in turn, increases the access to justice, which is the primary purpose of a class proceeding.

108 I, therefore, approve a counsel fee of $2.2 million with a holdback of $0.95 million. Current Class Counsel may apply for court approval for a further payment of the counsel fee after the Claims Administrator reports to the court about the implementation of the settlement.

**F. The Fee Approval Claims of Former Class Counsel**

109 I turn now to Former Class Counsel's request in its notice of motion that, if necessary, the court make an Order approving the fee sharing agreement for the purposes of the *Class Proceedings Act, 1992* subject to the determination of the *Wine v. Mack* Action.

110 The discussion and the analysis of a fee approval for Former Class Counsel may begin by confirming, as was conceded by both Former Class Counsel and Current Class Counsel that it is necessary for Former Class Counsel to have its Fee Sharing Agreement approved pursuant to the *Class Proceedings Act, 1992*. I also agree with Former Class Counsel that it was necessary that the fee sharing agreement be disclosed to the court as a part of the fee approval motion. Thus, it is this court's responsibility to scrutinize and approve or reject Class Counsel's contingency fee agreement and Class Counsel's fee. And it is this court's responsibility to scrutinize and approve or reject any fee sharing agreement associated with Class Counsel's fee.

111 Although I agree with Former Class Counsel that the existence of the fee sharing agreement and its legality is not before me to decide on this motion, rather those matters are the subject matter of the Wine-Mack Action; nevertheless, it remains this court's responsibility to scrutinize and approve or reject the alleged fee sharing agreement. This I can do by assuming that the agreement exists as Mr. Wine outlined it to be in his affidavit. Assuming I approved that fee sharing agreement, the court in the *Wine v. Mack* Action would have to determine whether the agreement actually exists and whether it is a lawful agreement.

112 Should I then approve the alleged fee sharing agreement between Former and Current Class Counsel?

113 In answering that question, I shall assume that the fee sharing agreement exists and that it is a legal agreement. [38] Then, the questions become:

> (1) Is Former Class Counsel entitled pursuant to the *Class Proceedings Act, 1992* to share the counsel fee that I have awarded Current Class Counsel? and,
>
> (2) If so, how should the court assess the value of Mr. Wine's contribution to the class action be it: (a) as a contracting party fee to the sharing agreement; or (b) based on a *quantum meruit* and unjust enrichment share of the contingency fee, which Former Class Counsel describes in its Statement of Claim as the "entrepreneurial portion of the class action legal fee to be earned"?

114 My answer to those questions is that there is no basis for Former Class Counsel to lawfully share in the class counsel fee that I have awarded to Current Class Counsel.

115 I would have thought that it is obvious that Former Class Counsel is no longer a Class Counsel for this action. I would have thought that it is obvious that while a former lawyer of record is entitled to be paid for the legal services that he or she did while he or she was lawyer of record, he or she is not entitled to share in the payment for the legal services performed by his or her successor. A discharged lawyer may have a solicitor's lien for services rendered, but a lien is a debt security instrument, it is not an equity instrument in the future outcome of the action in which the former lawyer is no longer lawyer of record.

116 With its disqualification, Former Class Counsel was disqualified from acting for Ms. Persaud and the Class Members in the future. Mr. Wine's behind-the-scenes activities after I disqualified Former Class Counsel that I was unaware of until the fee approval motion are proof positive that I was correct in disqualifying Former Class Counsel. Mr. Wine purported to continue to be involved in a class action in which he had no retainer while at the same time acting for 16 putative Class Members who must have opted out of the class action in order for Mr. Wine to act for them. I explained to Mr. Wine that there is a conflict of interest to purport to act for clients both inside and outside a class proceeding against the same defendant seeking the same relief. He was unsuccessful in having my decision reversed, and he ought to have downed tools and any involvement with the class action. Subsequent case law confirms that a lawyer cannot simultaneously represent a representative plaintiff or class members and putative class members who opt out of the class action; one or the other retainer, not both. [39]

117 Given his ongoing legal work for his portfolio of 16 or more actions against Talon, had Mr. Wine actually contributed to Ms. Persaud's ongoing class action, I query how he and his clients would avoid breaching the deemed undertaking of rule 30.1 of the Rules of Civil Procedure. [40]

118 With the disqualification of Former Class Counsel, Ms. Persaud entered into a new contingency fee agreement with Current Class Counsel. Former Class Counsel is not a party to the contingency fee agreement pursuant to which a counsel fee has just been approved in the immediate case. Former Class Counsel provided no services and was exposed to no litigation risk under the retainer for which a counsel fee was just rewarded. I would have thought it was trite that no sweat, no sweet.

119 Former Class Counsel is not entitled to a *quantum meruit* on the basis of some sort of intellectual property conceit based on Mr. Wine's success in another action that Mr. Boccinfuso believes was Mr. Wine's "idea in the first place." Former Class Counsel is not entitled to a *quantum meruit* on the basis of Mr. Boccinfuso's belief that "if the within proceeding succeeds, then that success was based upon an earlier decision [Mr Wine] obtained in the Court of Appeal for Ontario, which decision is reported as Singh v. Trump, 2016 ONCA 747."

120 Mr. Wine's admirable success in Singh v. Trump, 2016 ONCA 747, for which his clients received costs of $215,000 is not the basis for a *quantum meruit* or an unjust enrichment. His admirable success was based on good advocacy and hard work in a conventional negligent misrepresentation and fraudulent misrepresentation claim. The "ideas in the first place" of violations under the *Securities Act* and the *Condominium Act, 1998* and the availability of statutory causes of action where reliance would not have to be proved were not resuscitated by the Court of Appeal.

121 With Former Class Counsel's disqualification, Mr. Wine left Current Class Counsel with a challenging case where there were no statutory causes of action. It was a challenging case because Current Class Counsel had to establish fraud, not an easy task, or the Class Members at individual issues trials would have to establish reliance, not an easy task. Former Class Counsel left the heavy lifting for Current Class Counsel. In any event, Former Class Counsel cannot be regarded as some sort of ghost writer or muse for whom Current Class Counsel should pay a royalty for their "ideas in the first place."

122 Moreover, in any event, there is no basis for a claim to a share of Current Class Counsel's counsel fee based on unjust enrichment. That idea is a *non sequitur*. The counsel fee in the case at bar is a deduction from the Class Members' partial recovery of their deposits. The elements of a cause of action for unjust enrichment are: (1) the defendant has been enriched; (2) the plaintiff has suffered a deprivation that corresponds to the defendant's enrichment; and (3) the absence of any juristic reason justifying the defendant's retention of that transfer of value. [41]

123 Analyzing Mr. Wine's unjust enrichment claim, presumably Mr. Wine is the plaintiff, and Current Class Counsel or the Class Members are the defendants who have been unjustly enriched. This leads to absurdity. It is impossible to conceive that Mr. Wine has been deprived because he was not paid for his "ideas in the first place." It is impossible to conceive that Current Class Counsel or the Class Members enjoyed a corresponding enrichment. Nobody in this class action is being enriched save perhaps Talon to the extent that it is keeping deposits or the balance of the deposits from the abortive sale of hotel units. Talon, however, has never admitted liability, and save for a few lawsuits where purchasers have been successful in obtaining a refund, it has not been determined that Talon was not entitled to forfeit and keep the deposits.

124 Assuming the fee sharing agreement exists and that it is a legally enforceable agreement, there is no legal basis to approve the agreement under the *Class Proceedings Act, 1992* and if there was a basis to approve it, I would not approve it for the above reasons.

125 Former Class Counsel relied on the Court of Appeal's variation of my decision in *Bancroft-Snell v. Visa Canada Corp.*, [42] in support of their argument that I could approve counsel fee and the fee sharing agreement and leave the matter of its existence and enforcement to the court deciding the *Wine v. Mack* Action.

126 The *Bancroft-Snell v. Visa Canada Corp.* decision is the opposite of helpful to Former Class Counsel. Rather, it confirms that I should not approve the fee sharing agreement in the immediate case.

127 In that case, class counsel commenced a multimillion-dollar national class action against Visa, Mastercard, and ten banks and major financial institutions. The national class action was very well advanced when the Merchant Law Group commenced a competing national class action in Alberta. To avoid a carriage fight, class counsel entered into a fee sharing agreement with the Merchant Law Group. Under the fee sharing agreement, the Merchant Law Group agreed to abandon its fight for carriage of what was destined to be a very remunerative class action in exchange for $800,000 payable from the judgements or settlements reached in the class action. There were a several settlements with some of the defendants. Those settlements generated settlement funds of $13.6 million, and class counsel brought a motion for approval of a $3.4 million fee payable from the settlement fund.

128 At the fee approval motion, I was surprised to learn about the fee sharing agreement between class counsel and the Merchant Law Group. Once apprised of it, I did the following to determine the fee approval motion: (a) I approved class counsel's fee, but I reduced it by 10% to $3.06 million; (b) I ordered that class counsel could not use any of the settlement funds from which the class counsel's contingency fee was being paid to pay the Merchant Law Group $800,000; and (c) I ordered that the fee sharing agreement was unenforceable and that Class Counsel could not pay the $800,000 from other sources.

129 In a judgment written by Justice Blair, the Ontario Court of Appeal varied my judgment only in so far as my ruling that $800,000 could not be paid by Class Counsel to the Merchant Law Group from other sources. The Court concluded that this prohibition could not be justified on due process procedural grounds. Justice Blair stated at paragraph 4 of his judgment for the Court:

> 4. [...] I would uphold the motion judge's decision to reduce Class Counsel's fees by 10% and that part of the order enjoining Class Counsel from paying any sums to the Merchant Law Group from the settlement funds or the fees approved in relation to the settlements. I would also uphold the motion judge's order that the Fee Sharing Agreement is unenforceable to the extent it renders paragraph 6 of that Agreement unenforceable. On procedural fairness grounds, however, I would set aside that part of his order declaring the Fee Sharing Agreement otherwise unenforceable and enjoining Class Counsel from making payment on account of the Fee Sharing Agreement from "any other source".

130 In *Bancroft-Snell v. Visa Canada Corp.*, Justice Blair confirmed that fee sharing agreements in the context of a class proceeding can and must be scrutinized. He confirmed that fee sharing agreements require court approval pursuant to the *Class Proceedings Act, 1992*. The fee sharing agreement in *Bancroft-Snell v. Visa Canada Corp.* arose in the context of a settlement of a carriage dispute, but Justice Blair made it clear that the Superior Court's jurisdiction to scrutinize and review fee sharing agreements arose in every context, including carriage contests but also in the context of fee sharing agreements with respect to co-class counsel or with respect to fee sharing agreements between class counsel and outside counsel who may have contributed to the prosecution of the class action and in the context where fees are being paid by the defendant directly to class counsel. At paragraphs 40-44, and 54 of his decision, Justice Blair stated:

> 40 It is well-accepted that courts are charged with a broad supervisory role over the conduct of class proceedings, including the approval of settlements and the approval of fees and disbursements to be paid to class counsel. [...] underpinning the court's broad supervisory mandate is the need to ensure that the members of the class are protected and that outcomes are fair and reasonable and in their best interests in circumstances where the interests of class counsel and defendants may conflict with those of the class and there is no one to speak for the interests of the class. As this Court noted in *Fantl v. Transamerica Life Canada*, 2009 ONCA 377, 95 O.R. (3d) 767, at paras. 39-40 ("*Fantl* ONCA"):
>
> > The existence of the absent class members, among other factors, is the reason that the court's supervisory jurisdiction is engaged from the inception of an intended class proceeding. It continues throughout the "stages" of the proceeding until a final disposition, including the implementation of the administration of a settlement or, where applicable, a resolution of all individual issues... The parties acknowledge that the court has supervisory jurisdiction throughout the proceeding.

41. Viewed through the lens of those governing principles, I interpret s. 32 to grant the motion judge authority to review fee arrangements like the Fee Sharing Agreement, and their effect, and to determine what terms and conditions, if any, should be imposed in relation to them in the fee approval process. In any event, if I am wrong in that interpretation, s. 12, alone or in combination with s. 32, provides the motion judge with that authority.

42 Jurisprudentially, the broad approach courts have taken to the importance of their supervisory role in class proceedings — as reflected in this Court's decision in *Fantl* ONCA — supports a wide and liberal interpretation of s. 32.

43 For example, fee arrangements between class counsel and outside counsel are routinely considered on fee approval motions, often in the context of determining whether they are to be treated as a disbursement or a component of class counsel's fees and, if the latter, as a factor in the overall "fair and reasonable" analysis: [...]

44 In other circumstances, courts have reviewed the fee payment portion of class action settlement agreements in which defendants have agreed to pay the fee of class counsel, albeit that such agreements are not, strictly speaking, agreements between class counsel and a representative party. [...]

54. Nor do I accept the view that the court ought not to look behind Class Counsel's decision to enter into the Fee Sharing Agreement in order to resolve the carriage dispute. The court is not entitled to delegate its responsibility to ensure that the best interests of the class are protected to what class counsel — even experienced class counsel — believe to be in the best interests of the class. To put it another way, the fact that class counsel genuinely believe they are acting in the best interests of the class does not transform a fee sharing agreement that is in reality one that is not in those best interests into one that is. That class counsel are in an inherently conflicting position in such circumstances cannot be ignored.

131 Justice Blair also noted at paragraph 62 of his decision that because class counsel's fee is ultimately borne by the class members, the court has an interest in knowing how the work and fees are divided and accounted for. [43]

132 Applying *Bancroft-Snell v. Visa Canada Corp.* to the circumstances of the fee sharing agreement in the immediate case, I have the jurisdiction to scrutinize it and approve or reject it. To quote Justice Blair, I am obliged to scrutinize the fee sharing agreement "to ensure that the members of the class are protected and that outcomes are fair and reasonable and in their best interests in circumstances where the interests of class counsel [...] may conflict with those of the class and there is no one to speak for the interests of the class."

133 Speaking for the class members in the immediate case, there is no reason that their settlement fund, from which the counsel fee is coming, should pay for services to a disqualified Class Counsel who no longer had carriage or responsibility or risk in prosecuting the class action and who did not negotiate the settlement and who had been paid for the services it had rendered prior to being disqualified. Just as I did in the Bancroft-Snell v. Visa Canada Corp., I do not approve the fee sharing agreement.

**G. Conclusion**

134 For the above reasons, I approve the settlement and I approve a class counsel fee to a maximum of $2.2 million, all inclusive, of which $1.25 million, inclusive of fee, taxes, and disbursements, is payable forthwith from the settlement fund, with the balance payable, if at all, subject to court approval, after the distribution of the settlement is completed and the actual take-up by the Class Members is determined. This counsel fee and any future counsel fee is exclusively for Current Class Counsel.

135 If the parties cannot agree about the costs to be awarded, if any, for the motion to intervene, and the approval motions, they may make submissions in writing beginning with the Plaintiffs' submissions within twenty days of the release of these Reasons for Decision followed by Former Class Counsel's submissions within a further twenty days.

Footnotes

1 Persaud v. Talon International Inc.2018 ONSC 5377 and 2020 ONSC 2362.

2 S.O. 1992, c. 6.

3 *MSTW Professional Corporation, Mitchell Wine and Levine Sherkin Boussidan P.C. v. Paul Mack and Mack Lawyers* Court File No. CV-21-672206.

4 There are concerns about compliance with the Ontario Law Society's Rules of Professional Conduct about referral fees and about champerty and maintenance and trading in litigation.

5 Singh v. Trump, 2015 ONSC 4461 rev'd in part 2016 ONCA 747, leave to appeal to the S.C.C. ref'd [2016] S.C.C.A. No. 548.

6 R.S.O. 1990, c. S.5.

7 S.O. 1998, c. 19

8 S.O. 1998, c. 19.

9 Singh v. Trump, 2015 ONSC 4461, rev'd in part 2016 ONCA 747, leave to appeal to the S.C.C. ref'd [2016] S.C.C.A. No. 548.

10 Singh v. Trump, 2016 ONCA 747, leave to appeal to the S.C.C. ref'd [2016] S.C.C.A. No. 548.

11 Singh v Trump, 2017 ONCA 34.

12 Persaud v. Talon International Inc., 2018 ONSC 5377.

13 *Vaeth v. North American Palladium*, 2016 ONSC 5015; *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (S.C.J.); *Logan v. Canada (Minister of Health)*, [2002] O.J. No. 522 (S.C.J.).

14 P. Perell, "Class Proceedings and Lawyers' Conflict of Interest" (2009), 35 *Advocates' Quarterly* 202.

15 A class counsel's contingency fee for a successful recovery of between $24.8 million to $32.25 million would be between $8.3 million and $10.8 million.

16 *Persaud. v.* Talon International Inc., 2019 ONSC 2488.

17 *Persaud. v.* Talon International Inc., 2020 ONSC 2362.

18 Persaud v. Talon International Inc., 2020 ONSC 3858.

19 Persaud v. Talon International Inc., 2020 ONSC 4432.

20 The Wine-Mack Action is Court File No. CV21-672206.

21 Persaud v. Talon International Inc., 2022 ONSC 4250. Defence in the *Wine v. Mack* Action, of which I continued to be unaware.

22 The Wine-Mack Action was commenced by Notice of Action issued November 17, 2021.

23 Kidd v. Canada Life Assurance Company, 2013 ONSC 1868; Farkas v. Sunnybrook and Women's Health Sciences Centre, [2009] O.J. No. 3533 at para. 43 (S.C.J.); Fantl v. Transamerica Life Canada, [2009] O.J. No. 3366 at para. 57 (S.C.J.).

24 Kidd v. Canada Life Assurance Company, 2013 ONSC 1868; Farkas v. Sunnybrook and Women's Health Sciences Centre, [2009] O.J. No. 3533 at para. 45 (S.C.J.); Fantl v. Transamerica Life Canada, [2009] O.J. No. 3366 at para. 59 (S.C.J.); Corless v. KPMG LLP, [2008] O.J. No. 3092 at para. 38 (S.C.J.).

25 Baxter v. Canada (Attorney General)(2006), 83 O.R. (3d) 481 at para. 10 (S.C.J.).

26 Al-Harazi v. Quizno's Canada Restaurant Corp. (2007), 49 C.P.C. (6th) 191 at para. 23 (Ont. S.C.J.).

27 Dabbs v. Sun Life Assurance Company of Canada(1998), 40 O.R. (3d) 429 (Gen. Div.); Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572 at para. 70 (S.C.J.).

28 McCarthy v. Canadian Red Cross Society(2007), 158 ACWS (3d) 12 at para. 17 (Ont. S.C.J.); Fraser v. Falconbridge Ltd., [2002] O.J. No. 2383 at para. 13 (S.C.J.).

29 S.O. 1992, c. 6.

30 Smith v. National Money Mart,2010 ONSC 1334 at paras. 19-20, var'd 2011 ONCA 233; Fischer v. I.G. Investment Management Ltd., [2010] O.J. No. 5649 at para. 25 (S.C.J.); Parsons v. Canadian Red Cross Society, [2000] O.J. No. 2374 at para. 13 (S.C.J.).

31 Lavier v. MyTravel Canada Holidays Inc., 2013 ONCA 92.

32 Smith v. National Money Mart,2010 ONSC 1334, var'd 2011 ONCA 233; Fischer v. I.G. Investment Management Ltd., [2010] O.J. No. 5649 at para. 28 (S.C.J.).

33 Endean v. Canadian Red Cross Society, 2000 BCSC 971 at paras. 28 and 35; Gagne v. Silcorp Ltd., [1998] O.J. No. 4182 t para. 17 (C.A.).

34 Sayers v. Shaw Cablesystems Ltd., 2011 ONSC 962 at para. 37; Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2005] O.J. No. 1117 at paras. 59-61(S.C.J.); Parsons v. Canadian Red Cross Society(2000), 49 O.R. (3d) 281 (S.C.J.); Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417 (C.A.).

35 Welsh v. Ontario, 2018 ONSC 3217 at para. 103.

36 Smith Estate v. National Money Mart Co., 2011 ONCA 233 at para. 92.

37 Commonwealth Investors Syndicate Ltd. v. Laxton, [1994] B.C.J. No. 1690 at para. 47 (C.A.).

38 I have serious reservations and concerns that the fee sharing agreement is actually illegal as champerty and maintenance, but I shall assume not.

39 Singh v. RBC Insurance Agency Ltd.2020 ONSC 3796; Whitehouse v. BDO Canada LLP,2020 ONSC 144.

40 R.R.O. 1990, Reg. 194.

41 Moore v. Sweet,2018 SCC 52; Kerr v. Baranow, 2011 SCC 10; Garland v. Consumers' Gas Co., 2004 SCC 25; Peel (Regional Municipality) v. Canada, [1992] 3 S.C.R. 762; Pettkus v. Becker, [1980] 2 S.C.R. 834.

42 2015 ONSC 7275 and 2015 ONSC 7411, var'd 2016 ONCA 896.

43 See also Mancinelli v. Barrick Gold Corporation, 2016 ONCA 571 at para. 71.

2021 ABQB 316
Alberta Court of Queen's Bench

Singh v. Glaxosmithkline Inc.

2021 CarswellAlta 984, 2021 ABQB 316, [2021] A.W.L.D. 1910, 28 Alta. L.R. (7th) 342, 331 A.C.W.S. (3d) 28

# Fiona Singh and Muzaffar Hussain by His Litigation Representative Fiona Singh (Plaintiffs) and Glaxosmithkline Inc., Glaxosmithkline Llc and Glaxosmithkline Plc (Defendants)

J.D. Rooke A.C.J.Q.B.

Heard: February 23, 2021
Judgment: April 21, 2021
Docket: Calgary 1201-12838

Counsel: C. Docken, M. Farrell, C Churko, for Fiona Singh
E.F. Merchant, Q.C., A.A. Tibbs, for Mary Auch
K. Findlay, M. MacIsaac, for Defendants [*]

***J.D. Rooke A.C.J.Q.B.*:**

**Introduction**

1 At the proverbial "end of the day", this Memorandum of Reasons for Decision (Reasons) are about the right of a proposed representative plaintiff (prp — generic herein, or when not in reference to the specific PRP, who is the Plaintiff herein) in a class proceeding to change counsel. However, in this strange case (see Background *infra*), there are, to continue the metaphor, a lot of days leading up to these Reasons, and some to follow.

2 In the end, for the reasons that follow, I acknowledge, and, in face of challenge by Merchant Law, approve, the Proposed Representative Plaintiff, Ms. Singh's (Singh or PRP), right to change counsel and to file a Notice of Change of Representation to Counsel associated with a consortium of Guardian Law and KoT Law (the Consortium) so as to continue the carriage of this action.

3 Additionally, I deny the application of her former Counsel, Merchant Law, and New Proposed Representative Plaintiff, Ms. Auch (Auch or NPRP), to substitute the NPRP for the current PRP (Substitution Application), filed May 15, 2019.

4 Mr. Merchant, on January 18, 2021, also filed, in the alternative to his Substitution Application, an Application for a Charging Order (Charging Application) against the PRP in respect of fees and disbursements incurred to date, in the event that he was not successful, as is now the case, on the Substitution Application. I will make no decision on the Charging Application at this time, so as to see if the PRP and Merchant Law can resolve same now that it is known who has continued carriage of the action, although the Order to grant the PRP continued carriage of the action with New Counsel will be conditional on and subject to an agreement between the PRP and Merchant Law, or a future decision as to the substance of the Charging Application.

5 These Reasons are brief and not robust, but I issue them now in their current state, so that New Counsel (NC) for the PRP, and Counsel for the Defendants, can determine if they wish to file any supplementary material on certification, and, if so, for me to set a schedule for that before I determine the application for certification. In the result, I reserve the right to issue supplementary reasons for this Decision, if I find it necessary or advisable to do so, up to and including the time that I decide the certification application that is currently before me - and has been for over two years held in abeyance by me, pending the resolution of the dispute herein between the PRP, the NPRP, and old and new counsel for the PRP.

6 The simple reasons for these decisions are those set out in the case that is substantially on all fours, with the case at Bar, namely *Fantl v. Transamerica Life Canada* 2009 ONCA 377 (*Fantl CA*). Many of the passages of that decision, in addition to references therein to the motions judge's decision ([2008] OJ No. 1536 - *Fantl ONSC*), and the Divisional Court's decisions ([2008] OJ No. 4928 - *Fantl ONDC*) leading to the Court of Appeal's decision, are worthy of repetition herein, but I will try to limit same, as, indeed, the whole of the Court of Appeal's decision is relevant, *mutatis mutandis*.

7 To be clear, none of the *Fantl* decisions are binding on me. However, as to *Fantl CA*, I find the conclusion therein, and the reasoning getting there, very persuasive. The decision is written by the highly respected former Chief Justice of Ontario, Winkler CJO, who had to that point much experience and wisdom in relation to civil procedure in general, and class actions in particular. In the result, I find it a proper basis on which to anchor my decision herein.

**Background**

8 This action started in 2012, and already had a long history when I became case management justice (CMJ) in January 2019, when the existing CMJ recused due to a then recently discovered potential conflict.

9 Starting at about the time the subject issue herein arose (i.e., when the representation of the PRP by then Counsel, Merchant Law, had begun to unravel), aside from some other substantive certification issues then existent between Counsel for both sides (following from the certification hearings, not now relevant hereto), I had received all of the written and oral submissions necessary for the certification decision in this case by January 8 and 9, 2019, and had my decision as to the certification merits on reserve.

10 It appears from the subsequent record that Mr. Churko, who appeared with Merchant Law at the certification hearing in January 2019, and who was trusted by Merchant Law with a major part in the work on behalf of the PRP leading to that hearing, in mid January 2019, got into a dispute with Merchant Law and left that firm. It further appears that the PRP wished Mr. Churko to carry on the action, and in the result, on April 19, 2019, the PRP served (but I don't believe filed with the Clerk — it doesn't appear on the Clerk's Record) a Notice of Change of Representation appointing Mr. Churko and his firm, KoT Law, as new counsel of record.

11 On May 3, 2019, the PRP further filed a formal Notice of Change of Representation to name the Consortium as counsel of record.

12 There were apparently some initial issues between the PRP and KoT Law in the latter carrying on the action as Counsel for the PRP, relating to the retainer between them, and the ability of KoT Law to carry the action with the need of the PRP to pay (or secure for payment) Merchant Law for fees and disbursements ("work in progress") and costs thrown away claimed by the Defendants against the PRP, such that the PRP had concerns as whether she could carry on the action. Thus, on October 16, 2019, the PRP filed an application seeking to withdraw as PRP.

13 From November 29, 2019 to March 13, 2020, there are filings, unrelated to the specifics of the applications before me at this time, relating to the Defendant's application for costs against the PRP, in face of her purporting to seek to withdraw.

14 At this time the Covid-19 pandemic intervened and all applications in the action were suspended as not being emergency applications.

15 The concerns of the PRP about the ability to carry on with the action seem to have been resolved by February 7, 2020 when the PRP filed and served an affidavit explaining her position over the last year, and appearing to abandon her application to withdraw as PRP, but rather to continue on with the Consortium representing her.

16 In the interval, on or about May 15, 2019, Merchant Law filed, on behalf of the NPRP, the Substitution Application, supported by the affidavit of the NPRP (sworn April 23, 2019).

17 These steps led to a conflict between both proposed new Counsel and previous Counsel to the PRP, as well as conflict between the right of the PRP or NPRP to carry on the action. [1]

18 In the result of this dispute between the competing PRP and the NPRP, and competing law firms, Consortium and Merchant Law, at some point in time I advised all Counsel and parties that I would "set down my pen" on my reserved certification decision until the parties resolved the dispute or brought it before the Court for resolution, which was delayed by the parties not consenting and not taking timely appropriate steps, and the intervening Covid-19 pandemic.

19 Ultimately, after receiving briefs and related material, and with Court procedures allowing virtual hearings notwithstanding Covid-19, I heard the conflicting position and the Merchant Law applications on February 23, 2021. These Reasons result from that hearing.

**Positions of the Parties**

20 I will state the resulting positions of the Parties in simple terms, the details of which are in their briefs and supporting materials, and the transcript of the hearing, but do not need elaboration herein.

21 The Consortium, in its brief, contrary to the argument of Merchant Law, states that there is no extant application filed by the PRP, but rather that she continues in the position as PRP, and, relying on *Fantl CA* at paras 43-4, took the position that she is entitled to change counsel without leave, and thus, there is no status in the NPRP to seek substitution, especially with the Consortium offering to protect all fair and reasonable fees and disbursements of Merchant Law.

22 The position of Merchant Law and the NPRP, on the other hand is that the PRP needs leave of the Court to withdraw, and that she does not meet the tests set out in *Fantl CA*.

23 *Fantl CA*, at para 47 supports the position of the PRP as to the lack of need of the PRP to seek Court approval to change counsel, except that, in face of challenge of her decision to change counsel, the Court has jurisdiction to review the PRP's decision, in light of the substantive tests set out in *Fantl CA*, para 49, and should do so, as I will herein.

**Analysis and Conclusion**

24 Before I get to the substance of the issue before me, I must make one observation. The Court has jurisdiction under s. 13(2) of the *CPA* to substitute a representative plaintiff with another class member if "a representative plaintiff is not fairly or adequately representing the interests of the class". However, this is not such a case. Indeed, Merchant Law put the PRP forward as a proper and appropriate PRP as recently as January 9, 2019. Her wish thereafter, to change counsel, does not change that.

25 The tests in *Fantl CA* for changing counsel is this situation, and my analysis and conclusions, based on the facts on the record are set out below.

***A. Criteria for Choice of Counsel***

26 The test to be applied when a prp's decision to change counsel is contested and the court reviews the prp's choice of counsel is set out in para 49 of Fantl CA:

> Once the court's jurisdiction is engaged, any review by the court of a decision as to choice of counsel must be directed to three factors: (1) Has the plaintiff chosen *competent counsel*? (2) Were there any *improper considerations* underlying the choice made by the plaintiff? (3) Is there *prejudice to the class* as a result of the choice? [Emphasis added.]

*1. Competent Counsel — Has the plaintiff chosen competent counsel?*

27 The PRP has changed law firms, but, effectively, not her active counsel. On the basis of her affidavit of February 7, 2021, the PRP asserts under oath that Mr. Churko was, effectively her counsel when he was at Merchant Law, and she wants him to continue.

28 *Fantl CA*, at para 60, sets out the tests for competence, which includes: (1) the nature of the lawsuit; (2) the complexity; (3) that it is a class proceeding; (4) the experience of counsel as to the subject matter and class actions; (5) the resources of counsel; (6) the stage of the proceeding; and (7) the basket clause of "any other considerations".

29 The answers to points (1), (2), (3) and (6) are clearly on the record from the briefs leading to, and the oral submissions at the certification hearings concluded on January 9, 2019, and thus need not be further elaborated herein.

30 Thus, it is only (4), (5) and (7) that are specifically germane at this time. As to (7), I know of no other considerations.

31 As to (4) and (5) and the test of competency, in general, I have no evidence that the Consortium is not competent. KoT Law has added Guardian Law to the Consortium team, a firm also active in class proceedings law in Alberta, to provide professional and (I would presume) financial back up to carry the action to conclude certification, and, if granted, to a common issues trial. Thus, in addition to Mr. Churko's experience and worth in the proceedings to January 9, 2019, mentioned *supra*, Guardian Law adds experience and resources to his firm, as part of the Consortium.

32 More specifically, as to (4), although there were submissions as to the professional experience and strength of the Consortium and Merchant Law, as I noted, Counsel argued that this was not a carriage motion where, in a general sense, in addition to timeliness, the most competent and resourceful are successful in carriage. Indeed, *Fantl CA* signaled that such a competition is not appropriate in such a case — see para 53.

33 Moreover, while competence is the test, being the "best" is not part of the *Fantl* test (see paras 6 and 110 of the original motion judge's decision — (*Fantl ONSC*) and para 31 of *Fantl CA*.

34 In further elaboration as to factors (4) and (5), I find, on the record, that the Consortium, from both a professional and resource standard, is competent to meet the first test for choice of counsel, as set out in *Fantl CA*. In essence, while avoiding the need for a contest that necessarily arises in carriage applications (paras 53-4), and while acknowledging the record may show some pluses and minuses as to the strength and experience of the competing law firms, I am satisfied that the Consortium is as relevantly competent, as to experience, strength and resources, as Merchant Law, to continue this action. Again, even there, the test is not the best, but the competent. Indeed, I find that Merchant Law relied on Mr. Churko for much of its effort on behalf of the PRP.

*2. Improper Considerations — Are there any improper considerations underlying the choice of counsel?*

35 On the record before me, I find no such improper considerations — see paras 63-4 of *Fantl CA*.

*3. Prejudice to the Class — As a result of the choice of counsel?*

36 In spite of the arguments of Mr. Merchant on behalf of the NPRP, I find that there is no serious basis for finding that there is any prejudice to the class.

37 Rather this case is very much like *Fantl CA*, at paras 65-8, where the applications brought by Merchant Law are more about "economic prejudice" to Merchant Law than the class, and are thus not relevant. Specifically (para 67):

> The CPA does not, nor was it ever intended to, provide lawyers with a vested interest in the subject matter of the lawsuit entitling them to override the choices of a representative plaintiff in the litigation, including the choice of counsel.

38 Moreover, in reference to para 68 of *Fantl CA*, there will be no prejudice to Merchant Law's "investment of time and effort" in the action to date as past counsel, because there is an undertaking from the Consortium to pay fair and reasonable

fees and disbursements under the contingency agreement between Merchant Law, and the PRP, at the end of the action, if the PRP is successful. Alternatively, absent consent between the PRP and Merchant Law, I will entertain the Charging Application on its merits if necessary.

***B. Other Considerations***

39 I am heartened by the decision to a similar result on a similar issue, in a unique factual situation, by my colleague, Grasser J., in *LC v. Alberta* 2021 ABQB 24.

40 There, Mr. Tinkler (a lawyer with much class proceedings experience), was acting as the litigation representative for a minor prp, EMP [2], and thus, Mr. Tinkler, was, in that capacity, effectively the prp. Mr. Lee was Counsel for the prp, Mr Tinkler (standing in the prp's, EMP's, shoes). In that capacity Mr. Tinkler dismissed Mr. Lee.

41 In face of this Graesser J held (paras 32 - 43, much of which is, *mutatis mutandis*, relevant here, which is the reason I quote it, (the highlighting being mine and for emphasis as relevant to the case at Bar):

> [32] . . . *an application to remove* Mr. Lee as *class counsel was not necessary*. EMP is the only representative plaintiff. Class counsel needs to take instructions from the representative plaintiff. EMP lacked (and still lacks) the capacity to instruct counsel. Even if Mr. Lee technically remains class counsel because he has not been formally discharged by the Court, there is no one to give him instructions in that role. The only person who can give instructions is Mr. Tinkler. *Mr. Tinkler fired Mr. Lee as EMP's* counsel. To the extent that Mr. Tinkler could not fire Mr. Lee as class counsel without a court order, that is really a distinction without a difference. Mr. Lee has no client.
>
> [33] . . . *Lawyers do not have independent status in the lawsuit in which they have been retained to represent a client. A dismissed lawyer cannot protest and insist that they remain counsel for the client despite the client's clear decision to fire the lawyer*. Mr. Lee had been explicitly instructed by Mr. Tinker to do nothing more for EMP or the class.
>
> [34] *The [CPA] is silent on court approval of class counsel. Case law on the subject seems clear that class counsel is retained and instructed by the class representative or representatives. The class representative's choice may be impacted by conflicts within the class or conflicts with other parties in the litigation, but I have found no case law suggesting anyone has standing to oppose a decision by the class representative to fire their lawyer*.
>
> [35] The basic law in this area is found in ***Fantl*** . . . Those cases [ONSC, ONDC and ONCA] spell out the rights of the representative plaintiff to select and instruct counsel, direct the litigation and authorize settlement. Other class members may apply for the right to participate in the decision-making process, a right that is given by s 16 of the [*CPA*]. [3]
>
> [36] *The* ***Fantl*** *decision[s] arose in the context of the dissolution of the law firm that had been retained by the representative plaintiff*. Two new law firms resulted. The lawyer with the closest personal relationship to the plaintiff was at one; the lawyer with the greatest involvement in the litigation was at the other. The plaintiff chose his friend's firm. [4] The most involved lawyer's new firm applied to set aside the notice of change of solicitors on the basis that it was in the best interests of the class that this new firm continue with the litigation. The application was dismissed by the case management judge and the appeal was dismissed.
>
> [37] Most important for the purposes of this decision is the Ontario Court of Appeal finding at paras 43-44:
>
> > [43] *The motion* under appeal *was brought pursuant to s. 12 of the [Ont] CPA. The appellant argues that a notice of change of solicitors should not have been delivered without first obtaining an order of the court on motion brought by the representative plaintiff, so as to have the court approve the new class counsel*. Further, the appellant contends that this determination should only be made on the basis of the "best interests of the class".
> >
> > [44] *I disagree*. The position advanced by the appellant appears to be an attempt to combine certain developed principles of class action jurisprudence so as to elevate the court's supervisory role over the proceeding to one of

mandatory intervention. While it is true that the court has a responsibility to the absent class members, the prosecution of the action rests squarely with the representative plaintiff. *The representative plaintiff in a class action lawsuit is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report*.

[38] In practical terms, nothing has been happening to move the action itself, other than the dispute between Mr. Tinkler and Mr. Lee. The [Defendant] . . . has been sitting back, watching and waiting the outcome of these applications. [5]

. . .

[41] . . . the absence of a formal application by Mr. Tinkler to have Mr. Lee removed as class counsel for the child class is moot. *A lawyer without a client has no independent interest in the lawsuit.*

[42] That is illustrated in ***Fantl***, where the Court of Appeal stated at para 66:

[66] There is no question that class proceedings are entrepreneurial in nature. However, the proposition advanced by the appellant (that counsel have an independent interest in the class proceeding) would only be supportable if the creation of an entrepreneurial class-action bar was a policy goal underpinning the [Ont] CPA [6] . This argument fails because as far as the [Ont] CPA is concerned, the entrepreneurial lawyer is a means to an end, not an end in and of itself. Were it otherwise, one of the criticisms of the [Ont] CPA, that it promulgates plaintiffless [sic] litigation benefiting only the lawyers involved, would be well- founded. Such is not the case.

[43] Mr. Lee had been removed as EMP's lawyer; EMP was the child class sole representative. Mr. Lee may have remained "solicitor of record for the child class", but that would be analogous to being the solicitor for an out of province corporation: an address for service, but with no capacity to act absent instructions from the client. *Class proceedings belong to the class members, not the lawyers representing them.*

42 In essence, in quite similar, but not identical circumstances, these views represent my views, *mutatis mutandis*, as compared to the case at Bar. Thus, this gives me confidence to now issue this Memorandum, for the reasons above, without fully reviewing all the submissions of the parties and an analysis of the issues, while reserving the right to issue supplementary reasons, if I deem it necessary or advisable in the future.

**Application for Certification**

43 The briefs and oral hearings on certification concluded on January 9, 2019, over two years ago. Moreover, the PRP now has new Counsel — the Consortium. Thus, the Court needs to know, within the next 30 days, whether either party is content with the current certification record, or wants to add to it, subtract from it, or change it, for any good reason. If they are content, I will "pick up my pen" and issue a certification decision in due course. If they are not content, and wish to make further submissions, they are directed, within that 30 day period (unless extended by the Court on application within the 30 days) to provide a draft consent procedural order for the Courts approval, or, absent consent, to set up a further case management hearing.

**Ancillary Applications**

44 I am sure that I don't have to invite the parties to make (or renew) any ancillary applications that arise from events since January 9, 2019, but if they do, they may bring them or renew them within 30 days (unless extended by the Court on application within the 30 days).

**Costs**

45 As a result of my decision herein, Merchant Law is not entitled to costs against the class for taking steps to deny the change of counsel or for being unsuccessful in its Substitution Application. Indeed, the Consortium and or the PRP are, *prima*

*facie*, entitled, as against Merchant Law, for the latter. This may require further applications before the Court, absent settlement of such costs or potential costs.

46 Thus, the PRP is, *prima facie*, entitled to costs of this application as against Merchant Law. If that result is accepted, then the parties have 30 days to settle the amount of those costs as between themselves, or for a consent order of the Court. If not accepted and/or settled, the parties, or either of them, may apply to the Court or the Assessment Officer (depending on their respective jurisdictions) within 30 days (unless extended by the Court on application within the 30 days).

47 If the Defendants have any claim for any "costs thrown away" while being on the sidelines during this dispute, absent settlement thereof, they may also apply to the Court for such a result within 30 days (unless extended by the Court on application within the 30 days).

**Conclusion**

48 For the reasons above, PRP's Notice of Change of Representation is acknowledged and the Consortium is her Counsel for the continuation of the certification application herein.

49 The Substitution Application is dismissed.

50 Existing or new ancillary applications and costs have been directed above.

*Order accordingly; application dismissed.*

Footnotes

* The Defendants took no part in these applications but filed submissions in relation to ancillary issues against the PRP relating to costs thrown away which issues have been held in abeyance pending on these Reasons, and for which I have dealt with (*supra*).

1 However, at the hearing of these conflicting applications Mr. Merchant argued that this was not a "carriage motion", and in correspondence as recently as February 24, 2021 submitted that "The Court is reminded that both sides clearly indicated in oral argument that this is not a carriage fight". The reasons for this position are addressed in para 54 of *Fantl CA*.

2 The record is clear that EMP who was then soon to reach his majority was intending to continue to act as prp on his own, without a need for Mr. Tinkler as his litigation representative.

3 However, this section of the *CPA* only allows the court to "substitute another class member ... as the representative plaintiff", "[f]or the purposes of ensuring the fair and adequate representation of the interests of the class": see ***Fantl ONSC***, para 7. That is not the situation in this case. Moreover, there is no issue here of new Class Counsel having a conflict of interest — see ***Singh v. RBC Insurance Agency***, 2020 ONSC 5368.

4 In essence the same situation, with some differences, arises in the case at Bar. As a result of the dispute between Mr. Churko and Merchant Law, two separate firms resulted, Merchant Law remained and KoT Law was formed. The lawyer with the closest professional relationship to the PRP, Mr. Churko, was at KoT Law; and the lawyer who was the head of the Merchant Law, Mr. Merchant, was at the other. The plaintiff chose Mr. Churko.

5 Again, that is the case here, due to the dispute (and Covid-19) the action has been dormant for over two years, from January 9, 2019 to February 23, 2021.

6 I find the *CPA* to be to the same effect as the *Ont CPA*.

2011 ONCA 233
Ontario Court of Appeal

Smith Estate v. National Money Mart Co.

2011 CarswellOnt 1920, 2011 ONCA 233, [2011] O.J. No. 1321, 106 O.R. (3d) 37,
199 A.C.W.S. (3d) 1077, 276 O.A.C. 237, 331 D.L.R. (4th) 208, 3 C.P.C. (7th) 223

# Kenneth Smith, as Estate Trustee of the Last Will and Testament of Margaret Smith, deceased, and Ronald Oriet, Plaintiffs (Appellants) and Sutts, Strosberg LLP, Heenan Blaikie LLP, Paliare Roland Rothstein Rosenberg LLP and Koskie Minsky LLP, Appellants and National Money Mart Company and Dollar Financial Group, Inc., Defendants (Respondents)

M.J. Moldaver, R.P. Armstrong, R.G. Juriansz JJ.A.

Heard: October 25, 2010
Judgment: March 28, 2011 *
Docket: CA C51893

Proceedings: reversing in part *Smith Estate v. National Money Mart Co.* (2010), 2010 ONSC 1334, 2010 CarswellOnt 1238, 94 C.P.C. (6th) 126 (Ont. S.C.J.)

Counsel: Terrence J. O'Sullivan, James Renihan, for Appellants
Chris Hubbard, for Money Mart (not participating in appeal)
Mahmud Jamal, Jason MacLean, for Dollar Financial Group, Inc. (not participating in appeal)

***R.G. Juriansz J.A.*:**

1 This is an appeal from the order of Perell J. fixing the appellants' counsel fees in this class proceeding. The appellants are four law firms that acted as class counsel in this class proceeding.

2 By order dated March 3, 2010, Perell J. varied the certification order by expanding the class definition, approved the settlement of the class action, allowed the representative plaintiff compensation of $3,000 to be paid out of class counsel fees, and fixed class counsel fees in the amount of $14.5 million, being $12,806,074.94 for fees, $640,303.75 for GST and $1,053,621.31 for disbursements including GST. The disbursements included the fees of certain consultants and other counsel retained by class counsel that the appellants had requested be treated as contingency fees.

3 The class definition was expanded to add a group of payday loan borrowers who entered into transactions between the publication of the original certification order and December 15, 2009. The date December 15, 2009, is significant. As of that date, because of legislative changes, it could no longer be alleged that the transactions contravened the *Criminal Code*'s provisions prohibiting criminal rates of interest.

4 Before Perell J., class counsel sought approval of a counsel fee of $27.5 million. On appeal, they seek a fee of $20 million. They also seek, as they did before Perell J., to have fees, disbursements and taxes of other counsel — who had provided their services on a contingency basis — treated as a component of the class counsel base fee rather than as disbursements, to have the fees of consultants — who had also provided their services on a contingency basis — increased by the multiplier the court awarded to class counsel, and to have the compensation paid to the representative plaintiff paid out of the class fund rather than out of class counsel fees.

5 For the reasons that follow, I would allow the appeal in part. I would vary the motion judge's order so that the fees of the representative plaintiff are paid out of the class fund. I would dismiss the remainder of the appeal.

6 I add the observation that in a case such as this, the motion judge should give serious consideration to the appointment of *amicus curiae* or a guardian of the settlement fund on the hearing of counsel's application for approval of their fees.

**Background**

7 In this class proceeding, the plaintiffs alleged that they were charged a criminal rate of interest by the defendants for small loans with a due date for repayment connected to their payday. The issue in the action was whether the various charges, i.e. a finance charge, a cash checking fee and an item fee, should be characterized as interest under the *Criminal Code*'s provisions prohibiting criminal rates of interest.

8 The class action was strenuously resisted. There were many interlocutory proceedings. According to the motion judge's count, there were 39 orders, 12 endorsements, and four judgments. There was one leave application to the Divisional Court, four appeals to the Court of Appeal, and three leave applications to the Supreme Court of Canada. The issues litigated included whether the order for service of the claim, *ex juris*, on the defendant Dollar Financial Group, Inc. was valid, whether the loan agreements required the plaintiffs to mediate or arbitrate their disputes, whether the defendants' franchisees should be added as defendants, and whether the plaintiffs were entitled to partial summary judgment.

9 The trial began on April 27, 2009, and proceeded for 17 days. It was established that during the class period, class members had paid cheque cashing fees and interest totalling $224,791,507. Money Mart counterclaimed for the class members' indebtedness from payday loans that were in default. The amount of that indebtedness was ultimately calculated to be $56,388,071 at the time of the motion.

10 Following a mid-trial mediation, the parties agreed to a settlement on the following terms:

i. The defendants would pay $27.5 million to the settlement class;

ii. the defendants would forgive the class members' indebtedness to them, in the amount of $56,388,071;

iii. the defendants would make available fully transferable transaction credits in the amount of $30 million to reduce the cost of using the defendants' services in the future, to be allocated among those class members who were not indebted to Money Mart;

iv. the defendants would pay to the Class Proceedings Fund the sum of $3 million, in annual instalments of 10% of the transaction credits as they are used, and 10% of the unused transaction credits after the expiration date; and

v. the defendants would pay the costs of administering the settlement, in the amount of $2 million.

11 At the motion, class counsel asserted the value of the settlement was in the range of $120 million. The time value of the hours docketed by class counsel was $9,750,024.

**Issues**

12 The appellants resist the characterization of the appeal as primarily involving a claim for higher fees. Rather, they say that the appeal raises important issues about access to justice, since it concerns the legal principles that govern the determination of fair fees for class counsel. The fees awarded must not only provide adequate compensation to class counsel but must also provide a suitable incentive to skilled lawyers to take on complex and expensive class proceedings, all without unreasonably diminishing the fund available for distribution to the class. The appellants say that contingency fees should be available to firms who provide essential but non-legal services to the class and that it is important that class counsel be able to retain, on

a contingency basis, the expert services necessary to effectively assert the class' claim. Finally, they say that as a matter of principle, a representative plaintiff's compensation should be paid out of the fund and not out of class counsel fees.

13 I summarize the appellants' arguments as follows:

i. The motion judge erred by failing to apply the base fee/multiplier approach provided for in s. 33(7);

ii. the motion judge erred by failing to allow class counsel fees in an amount that was fair and reasonable;

iii. the motion judge erred by refusing to treat the fees payable to the consultants, Price Waterhouse Cooper ("PWC") and Mr. Anand, in accordance with the contingency basis on which class counsel had retained them;

iv. the motion judge erred by refusing to consider the fees of Fraser, Milner, Casgrain LLP ("FMC") and Prof. Krishna as class counsel fees because the court had not appointed them as part of the class counsel group; and

v. the motion judge erred by ordering that the representative plaintiff's compensation be paid from class counsel fees.

14 There is another matter worth discussing though, strictly speaking, it is not a legal issue raised by the appeal. During oral argument, the court raised with counsel the difficulties that stem from the fact that class counsel fees are determined in a non-adversarial forum. Counsel for the appellants frankly acknowledged the difficulties and suggested that it would be useful to the profession for this court to discuss the issue. I begin with that discussion.

**The non-adversarial forum**

15 Our system of justice is based on the basic tenet that the court will be able to reach the most informed, considered, impartial and wise decision after presiding over the confrontation between opposing parties, in which each side can identify issues, lead evidence, cite law, discuss policy considerations, and seek to undermine the position of the other. Motions for the approval of settlements and class counsel fees in class proceeding depart from this basic tenet as a matter of routine. They usually proceed unopposed in large part because individual class members often have too small a stake to be compelled to participate.

16 The motion judge was troubled by what he described at one point as the "*ex parte*" nature of the hearing before him and included a lengthy comment about it in his reasons, a comment that is worth reading. The comment emphatically observes that it is "well known" that the court is placed in a difficult position in determining whether a settlement and class counsel fees should be approved without "the dynamics of the adversary system where opposing views are heard".

17 Winkler J. in *McCarthy v. Canadian Red Cross Society* (2001), 8 C.P.C. (5th) 350 (Ont. S.C.J.) also compared unopposed motions in class action to *ex parte* proceedings. After referring to authorities that highlighted that "there is no situation more fraught with potential injustice and abuse of the Court's powers than application[s] for an ex parte injunction", he stated that counsel in unopposed motions in class proceedings are under a special duty to make full and frank disclosure, just as in *ex parte* proceedings. He stated,

> By comparison, a class proceeding by its very nature involves the issuance of orders or judgments that affect persons who are not before the Court. These absent class members are dependent on the Court to protect their interests. In order to do so, the Court must have all of the available information that has some bearing on the issues, whether favourable or unfavourable to the moving party. It is the obligation of counsel to provide that information in a manner that is consonant with the duty to make full and frank disclosure. Moreover, that information must be provided in a manner that is not misleading or even potentially misleading. In most class proceedings, voluminous records develop as a consequence of the complexity of the litigation. The Court is not equipped, nor should it be required, to engage in a forensic investigation into the material or to mine the record to inform itself. Counsel must direct the Court to all relevant information that would impact on the Court's determination. This is especially important where the motion is for the approval of settlement agreements, class counsel fees or consent certifications for the purpose of settlement.

18 In one respect, counsel's duty to make full and frank disclosure is more significant in unopposed class action motions than in *ex parte* motions. An order obtained *ex parte* is very often brought back before the court by an interested party not present at the *ex parte* hearing. This does not happen with orders approving counsel fees in class proceedings. This court recently found that a class member lacks standing to appeal an order approving class counsel fees: *Charles Trust (Trustee of) v. Atlas Cold Storage Holdings Inc.* (2009), 311 D.L.R. (4th) 323 (Ont. C.A.).

19 On appeal, counsel for the appellants summed up the court's concern well. The process, he said, places the court in the position of adversary and adjudicator at the same time; the court must test the case being put to it, while impartially adjudicating it. He suggested this was "perhaps a flaw in the legislation".

20 Nothing in the legislation, however, discourages the court from exercising its inherent jurisdiction to ensure the proceedings before it are fair or resorting to its authority under rule 13.02 to appoint an *amicus*. In fact, counsel for the appellants advised that now some judges of the Superior Court appoint *amicus* to present an opposing view in such motions. As well, "monitors" have been appointed in several Ontario cases. In the United States, it is not uncommon for the courts to appoint a *guardian ad litem* for the settlement fund.

21 An uncontested motion for fees also places counsel in an awkward position. Lawyers are expected to be zealous but personally disinterested advocates of their clients' positions. On an uncontested motion for fees, the lawyer represents the class whose interest is in maintaining the maximum settlement amount possible for distribution among class members. The lawyer, on the other hand, seeks fees that will diminish the amount of the settlement available for distribution. The lawyer's interests appear to be pitted against those of the client. In appropriate cases, class counsel may, on their own initiative, seek to reduce the awkwardness of this position by arranging for independent counsel to advise the representative plaintiff in relation to class counsel's application for fees. Class counsel have taken this action in at least one reported Canadian case.

22 I discuss each of these strategies briefly.

***Amicus***

23 The court has jurisdiction to appoint an *amicus* to preserve the fairness of the proceedings before it. In Ontario, though, there is no judicial discussion of the appointment of *amicus* in the context of class action proceedings. Commentators, however, have pointed out the benefits of allowing *amicus* to assist the court in the approval of settlements and class counsel fees, which are often dealt with together. The motion judge cited Prof. Garry Watson, who, in his paper "Settlement Approval — The Most Difficult and Problematic Area of Class Action Practice" prepared for the NJI Conference on Class Actions in April 2008, argued that "judges should give serious thought to precipitating an adversarial hearing by appointing counsel to advise the court and oppose the settlement if appropriate".

24 Another significant paper is "Caught In a Trap — Ethical Considerations for the Plaintiff's Lawyer in Class Proceedings" authored by Winkler C.J.O. and Sharon D. Matthews, presented at the 5th Annual Symposium on Class Actions April 11, 2008 and available online at « http://www.ontariocourts.on.ca/coa/en/ps/speeches/caught.htm ». The authors note the effect of the absence of an adversary in these situations and suggest the use of *amicus*:

> Depending on the terms of the settlement, the defendant may not have standing on the fee approval and in such cases there will be no effective adversary to assist the court on either settlement or fee approvals. Class counsel may find themselves in a conflict in supporting settlement approvals. ... It may be appropriate to appoint *amicus curiae* to assist courts in understanding the merits of the settlement generally and as it relates to fees in particular.

25 The only Canadian case that actually discusses the appointment of an *amicus* in the context of approving a class settlement or class counsel fees seems to be *Killough v. Canadian Red Cross Society* (2001), 85 B.C.L.R. (3d) 233 (B.C. S.C.). K.J. Smith J. of the B.C. Supreme Court cautioned against too quickly resorting to the appointment of an *amicus* in motions to approve class counsel fees:

> In my opinion, there is merit in [the] submission that *amicus curiae* should not be appointed as a matter of course in these matters. It may be that, in a particular case, the class-action judge will consider that *amicus* would be helpful, but to make such an order in the absence of some special circumstances warranting it would be to add an unnecessary layer of complexity and expense to the fee-approval process.

26 He found the appointment of an *amicus* was premature because it appeared the court would have the benefit of an independent perspective. Class counsel had retained separate independent counsel to advise the representative plaintiff as to the fairness and reasonableness of the proposed fees and class counsel had undertaken to file independent counsel's opinion with the court. Moreover, the Public Guardian and Trustee had sought standing to take a position and that application had not yet been dealt with. When the matter eventually came on for hearing, see *Killough v. Canadian Red Cross Society* (2001), 91 B.C.L.R. (3d) 309 (B.C. S.C.) at para. 40, K.J. Smith J. declined to give the Public Guardian formal standing, but did allow the Public Guardian to participate in the hearing:

> Counsel have an inherent conflict of interest on applications for approval of their own fees and disbursements. While those of us who are trained in the workings of the legal system understand that counsel put aside their own self-interest in such matters, as they are ethically bound to do, decisions that take into account the objective, perhaps adversarial, submissions of other interested parties will generally better withstand scrutiny. Accordingly, if the Public Guardian and Trustee wishes to address the Court on behalf of legally incapable persons in the class, it is my view that the Court should hear those submissions.

***Monitors***

27 Monitors have been appointed in a number of Ontario class actions. The published reasons do not always make clear the role assigned to the monitor. For example, in *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (Ont. S.C.J.) and *Frohlinger v. Nortel Networks Corp.* (2007), 40 C.P.C. (6th) 62 (Ont. S.C.J.), court-appointed monitors are included in the list of those appearing before the court, but no mention of them is made in the reasons. Both of these cases involved a motion for the approval of class counsel fees as well as other issues.

28 Monitors can assist the court by analyzing the volumes of information that may be filed on approval motions. For example, on a fee approval motion, a monitor could be assigned to review in detail the dockets of counsel with a view to understanding the fees charged in respect of each step in the litigation, identifying duplicated effort and instances in which a greater number of hours than reasonably necessary has been expended.

***Guardian ad litem***

29 American jurisprudence, as one would expect, is more mature given the much longer experience with class proceedings in the United States. American courts do appoint *amicus*: see e.g. *Zucker v. Westinghouse Elec.*, 374 F.3d 221 (U.S. C.A. 3rd Cir. 2004); *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518 (U.S. C.A. 1st Cir. 1991). However, the predominant American approach appears to be the appointment of a *guardian ad litem* for the settlement fund.

30 The landmark case seems to be the 1976 decision *Miller v. Mackey Intern., Inc.*, 70 F.R.D. 533 (U.S. Dist. Ct. S.D. Fla. 1976). The court considered a class counsel fee application to be analogous to litigation between a guardian and a ward. The substantive interests of the members of the class are at stake because the benefits they receive are reduced by the compensation sought by counsel representing the class. Therefore, over the strenuous objections of class counsel, the court appointed a *guardian ad litem* for the members of the class saying, "The appointment of a *guardian ad litem* is appropriate where there is litigation between a Guardian and Ward — herein, the attorneys for the class and the class." Since the guardian is charged with the protection of the fund for the class, his fee was to be charged against the fund. The court observed:

> [T]his procedure both achieves protection for the members of the class and enables the trial judge to remain in an impartial position. Counsel for the class strenuously objected to the appointment of a guardian ad litem and asserted that the court

should conduct cross examination of the witnesses testifying for plaintiff's counsel. However, that contravenes the court's traditional role, tending to cast the court into an advocate's role.

31 The legislation in the United States is more mature as well. The Class Action Fairness Act of 2005, 28 U.S.C. (2005), which brings most large class actions within the jurisdiction of the federal courts, specifically authorizes judges to have the value of "coupon settlements" assessed by an independent expert before approval: see §1712(d).

***Independent counsel***

32 Class counsel may consider going beyond their strict duty to make full and frank disclosure on an unopposed motion for fees and retain separate counsel to provide independent advice to the representative plaintiff regarding the fairness and reasonableness of the fees class counsel is seeking. Class counsel took this step in *Killough*.

33 It seems to me that counsel who bring and proceed with a motion without ensuring that an independent perspective is put forward have little cause for complaint if the court departs from the passive role it traditionally plays by raising new issues, dealing with arguments not advanced and actively challenging the uncontradicted evidence. A court, though, should not appear confrontational. The line between a sceptical and confrontational approach may be difficult to navigate for a court that bears the full responsibility for testing the merits of the position put forward by counsel in order to fulfill its responsibility to protect members of the class. Courts should not be reticent in resorting to one of the strategies discussed above when they consider that confrontation of counsel's unopposed position would be helpful and reasonably warranted in the circumstances. Such resort is, of course, discretionary. Appointment of *amicus* or a guardian is neither necessary nor desirable in every case.

**Application to this case**

34 A glance at the major features of the case placed before the motion judge might suggest it was appropriate for the court to consider exercising its discretion to appoint a guardian for the fund or an *amicus* or monitor. Nonmonetary items figured prominently in the settlement. Class counsel was seeking fees of $27.5 million. The fees class counsel sought would exhaust all the cash in the settlement fund, leaving only the nonmonetary benefits for distribution to the class members. While the record was huge, an accounting firm reviewed much of the voluminous documentation produced by the defendants. The hourly rates charged by counsel were substantial; they were described by the motion judge as "not bargain-basement". The total time value of class counsel's docketed hours was $9,750,024. Class counsel was comprised of four law firms, raising the possibility of duplication of effort in becoming familiar with this very large file and dealing with it. Class counsel had not placed before the court any independent evidence of the value of the various components of the settlement.

35 No doubt, the motion judge faced a difficult task.

36 In our adversarial system, in which the case is prepared by the parties, the court should not be expected to scrutinize in detail a massive set of counsel's dockets for duplicative or excessive hours. Winkler J.'s comments in *McCarthy* are worth repeating: "The Court is not equipped, nor should it be required, to engage in a forensic investigation into the material or to mine the record to inform itself". A court must also guard against appearing confrontational by embarking on a cross examination of counsel about the dockets or on matters such as whether they perform work at other than the "usual" rates indicated in the fee agreement, and if so, at what rate and for what type of client.

37 The motion judge, after underscoring that "the tasks are difficult and made more difficult by the adversarial void", considered that he was "up to the task" and proceeded. However, the adversarial void did affect his reasoning and the way he dealt with the case. The motion judge did not resolve the fundamental question whether a court under the CPA could allow a premium for service providers engaged by class counsel on a contingency basis. He declined to deal with that question on "what is essentially an *ex parte* motion where the voices against any change are not being heard". He added that the matter "should be attended to by the Legislature and not as an exercise of law reform on an uncontested fee approval motion."

38 The motion judge should not have felt inhibited from seeking the assistance he considered necessary to address the question. He could have appointed *amicus* and invited intervention from interested groups, such as the Law Society in regard to the interpretation of its Rules of Professional Conduct.

39 Before leaving this topic I add the observation that the adversarial void also affects the case on appeal. The appellant decides what issues will be raised on appeal and what material will be included in the Appeal Book. There is no respondent to raise additional issues or to focus the court's attention on different material in the exhibit books. In crafting the appeal, the appellant is able to attack some findings of the court below and leave others undisturbed. For example, here the applications for approval of the settlement and determination of counsel fees were brought before the court in one motion; the motion judge dealt with both matters at one hearing, and he rendered one set of intertwined reasons. In those intertwined reasons, he expressly stated, at paras. 95, 104 and 113, [1] that his approval of counsel fees in the amount of $14.5 million was one of the factors on which his approval of the settlement was based. Yet, this appeal seeks to modify the motion judge's order only in respect of fees divorced from his approval of the settlement.

40 This court, no less than the motion court, had the discretion to appoint an *amicus* or guardian to articulate opposition to the appeal. In hindsight, the appointment of *amicus* or guardian may have been of great assistance in this appeal. The analysis upon which this appeal turns was not raised in the appellants' material and did not come up at the appeal hearing. After the hearing, the court found it necessary to seek the appellants' written submissions on further issues.

41 With that preface, I turn to the issues raised by the appellants.

**Quantum of Fees**

42 The appellants advance two arguments regarding the quantum of fees assessed by the motion judge.

43 First, at the appeal they argued that the motion judge was bound to use the analytical framework of s. 33(7) of the CPA in assessing what would be an appropriate counsel fee and that he erred in law by failing to do so. In their supplementary factum filed after hearing, they argue that a motion judge determining fees under s. 32(4) must apply the analytical framework of s. 33(7) in a case in which counsel seek a premium by the application of a multiplier.

44 Second, in their supplementary factum they argue that any mode of analysis should result in the approval of fees that are fair and reasonable. Here, they submit, the counsel fee that the motion judge approved was not fair or reasonable.

***Sections 32 and 33 of the CPA***

45 In advancing their initial argument, the appellants presumed that the motion judge was bound to apply the two-step analysis of s. 33(7). Under s. 33(7), the court must first determine the number of hours worked and the hourly rate to be allowed in order to calculate a "base fee". Second, the court must determine the appropriate multiplier to be applied to the base fee in order to arrive at fair and reasonable compensation to class counsel for the risk they have assumed in representing the class on a contingency basis.

46 The appellants contend that the two steps of s. 33(7) are distinct and must be separately applied. In determining the base fee the court may consider a number of factors including the time expended by class counsel, the legal complexity of the action, the importance of the matter to the client, class counsel's skill, the results achieved and the ability of the client to pay. By contrast, they say, the court may consider only two factors — the degree of risk undertaken and the degree of success achieved — in determining the multiplier to be applied to the base fee.

47 The appellants argue that the motion judge conflated the first and second steps. Because he failed to distinguish between the two steps, they say, he considered factors relevant to the base fee in determining the multiplier to be applied to the base fee. They submit that he improperly weighed all the factors in one stage and, as a result, the class counsel fee he approved was lower than was warranted.

48 In setting out the analysis the motion judge should have carried out, the appellants begin by submitting that the motion judge found that their base fee was reasonable. Although he made no express finding on that point, they say it is clear he approved their hourly rates and all the hours they recorded in their dockets. Using a base of $10,327,525.20 for fees and GST, they calculate that the "premium" the motion judge allowed amounts to a multiplier of only 1.29. Fees in the amount of $20 million, which they request on appeal, would amount to a multiplier of 1.78. They say that 1.78 is a modest multiplier in the circumstances.

49 I note in passing that the appellants' calculations are not in accordance with the CPA. Section 33(3) defines the base fee as "the result of multiplying the total number of hours worked by an hourly rate". Under the statutory definition, the GST does not get multiplied. If the GST included the appellants' calculations is excluded, the premium granted by the motion judge would amount to 1.48, and fees of $20 million would represent a multiplier of 2.05.

50 As noted, the appellants presumed that s. 33(7) of the CPA governs the determination of counsel fees in this case. I set out s. 33(7) in the context of the section as a whole:

> 33. (1) Despite the Solicitors Act and An Act Respecting Champerty, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding. 1992, c. 6, s. 33 (1).
>
> **Interpretation: success in a proceeding**
>
> (2) For the purpose of subsection (1), success in a class proceeding includes,
>
> (a) a judgment on common issues in favour of some or all class members; and
>
> (b) a settlement that benefits one or more class members. 1992, c. 6, s. 33 (2).
>
> **Definitions**
>
> (3) For the purposes of subsections (4) to (7),
>
> "base fee" means the result of multiplying the total number of hours worked by an hourly rate; ("honoraries de base")
>
> "multiplier" means a multiple to be applied to a base fee. ("multiplicateur") 1992, c. 6, s. 33 (3).
>
> **Agreements to increase fees by a multiplier**
>
> (4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier. 1992, c. 6, s. 33 (4).
>
> **Motion to increase fee by a multiplier**
>
> (5) A motion under subsection (4) shall be heard by a judge who has,
>
> (a) given judgment on common issues in favour of some or all class members; or
>
> (b) approved a settlement that benefits any class member. 1992, c. 6, s. 33 (5).
>
> **Idem**
>
> (6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose. 1992, c. 6, s. 33 (6).
>
> **Idem**

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

(a) shall determine the amount of the solicitor's base fee;

(b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and

(c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement. 1992, c. 6, s. 33 (7).

**Idem**

(8) In making a determination under clause (7) (a), the court shall allow only a reasonable fee. 1992, c. 6, s. 33 (8).

**Idem**

(9) In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding. 1992, c. 6, s. 33 (9).

51 It is readily apparent that the motion judge did not proceed in the manner contemplated by s 33(7). He made no express finding of counsel's "base fee" under s. 33(7)(a). He made no determination of the "multiplier" to be applied to the base fee under s. 33(7)(b). Instead, the motion judge considered a number of factors, including counsel's rates and the hours they docketed. Instead of applying a multiplier, he indicated he was allowing counsel a "premium" and concluded that a counsel fee in the amount of $14.5 million was fair and reasonable.

52 While I agree that the motion judge did not apply the analysis contemplated by s. 33, I do not agree that he erred. The determination of counsel fees, on the facts of this case, is not governed by s. 33(7) of the CPA, but by s. 32(4). Section 32 provides:

**Fees and disbursements**

32. (1) 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;

(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. 1992, c. 6, s. 32 (1).

**Court to approve agreements**

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor. 1992, c. 6, s. 32 (2).

**Priority of amounts owed under approved agreement**

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award. 1992, c. 6, s. 32 (3).

**Determination of fees where agreement not approved**

(4) If an agreement is not approved by the court, the court may,

(a) determine the amount owing to the solicitor in respect of fees and disbursements;

(b) direct a reference under the rules of court to determine the amount owing; or

I direct that the amount owing be determined in any other manner. 1992, c. 6, s. 32 (4).

53 Section 32 is mandatory and generally applies to all fee agreements. Its own terms leave no doubt that it applies to contingency fee agreements as well. Section 32(1) requires that all fee agreements meet certain formal requirements. All fee agreements must be in writing and must state the terms under which fees and disbursements are to be paid, must provide an estimate of the expected fee, and must state the method of payment. Section 32(2) provides that fee agreements in class proceedings are *prima facie* unenforceable. They are only enforceable after being approved by the court. Section 32(3) provides that amounts owing under an enforceable agreement, i.e. one that is approved by the court, are a first charge on any settlement monies or monetary award. Finally, "if an agreement is not approved by the court", s. 32(4) gives the court the authority to determine class counsel fees or to direct the manner in which class counsel fees are to be determined or calculated.

54 The court's authority to determine class counsel fees under s. 32(4) is distinct from its authority to determine class counsel fees under s. 33(7). The court's authority to determine fees under s. 32(4) arises "if an agreement is not approved by the court". The court's authority to determine fees under s. 33(7) arises "on the motion of the solicitor who has entered into an agreement under [s. 33(4)]".

55 In their supplementary factum, the appellants contend that it should make no difference which one of these sections apply, as both should lead to the same result — the approval of fees that are fair and reasonable. What is clear is that the mode of analysis open to the court under the two sections is different. The court's authority under s. 32(4) is far more expansive than its authority under s. 33(7). Section 33(7) provides only for the base fee/multiplier approach, whereas s. 32(4) provides the court with broad discretion to set the fee, direct a reference or direct the fee be determined "in any other manner".

56 The relationship between ss. 32 and 33 has been the subject of previous judicial comment. Winkler J., in *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 (Ont. Gen. Div.), observed that "[T]he scheme of the CPA seems to envisage that sections 32 and 33 operate independently of one another. Hence the duplicate provisions for court approval." In *Crown Bay Hotel*, Winkler J. concluded that the court had authority under s. 32(4) to approve a contingent counsel fee based on a percentage of the recovery, rather than on a base fee/multiplier as contemplated by s. 33(7).

57 In an earlier case, *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1996), 28 O.R. (3d) 523 (Ont. Gen. Div.), Brockenshire J. commented that the arrangement of sections 32 and 33 was "somewhat confusing". He suggested that "it would have been clearer if s. 33(1) and (2) had come first, followed by s. 32 and then followed by s. 33(4) through (9)." That is because sections 33(1) and (2) apply generally to make it clear that a contingency fee agreement is permitted by the CPA, despite the provisions of the *Solicitors Act*, R.S.O. 1990, c. S.15 and *An Act Respecting Champerty*, R.S.O. 1897, C. 327. Section 32(3) also applies generally. Sections 33(3) through (9), in Brockenshire J.'s view, apply in cases in which there is "an arrangement under which hourly rates are quoted, with a provision for applying to the court after the fact, for an increase in such hourly rate, based on the risk incurred in undertaking the case under an agreement to be paid only if successful."

58 In *Crown Bay Hotel* Winkler J. quoted and approved of Brockenshire J.'s comments in, *Nantais*.

59 Cullity J. in *Garland v. Enbridge Gas Distribution Inc.* (2006), 56 C.P.C. (6th) 357 (Ont. S.C.J.) at para. 16 said:

> Section 32 is concerned with fee agreements — contingent or otherwise — in general. Section 33 is confined to a particular type of contingent fee agreement: one that contemplates, and permits, the solicitor to make a motion to the court to have his or her fees increased by a multiplier. The jurisdiction under this section appears to be premised and conditioned on the existence of such an agreement.

60 I agree with these earlier decisions. The court's jurisdiction to determine class counsel fees under s. 33(7) is premised and conditioned on the existence of a fee agreement providing for payment of fees and disbursements only in the event of success and which permits class counsel to make a motion to the court to have his or her fees increased by a multiplier. To spell this out, I observe that the court's jurisdiction under s. 33(7) is brought into play by a motion of a solicitor "who has entered into an agreement under subsection (4)". An agreement under s. 33(4) is one that permits counsel to make a motion to the court to have his or her fees increased by a multiplier.

61 Illustrative of a fee agreement to which s. 33(7) applies is the fee agreement that was before this court in *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (Ont. C.A.). *Gagne* is the main authority on which the appellants relied in this appeal. In *Gagne*, Goudge J.A. provided the following description of the fee agreement:

> As required by the Act, the appellant solicitors executed a written agreement with the representative plaintiff respecting their fees and disbursements. It provided that the payment of any legal fees was contingent on the class action being concluded successfully as defined by the Act. It also provided that the base fee would be the product of the hours worked by the solicitors and their usual hourly rates. In addition, it set out that the solicitors could seek court approval for a multiplier to be applied to that base fee. Finally, the agreement described two examples of how this might work....
>
> [Emphasis added.]

62 In the case on appeal, the agreement is quite different. Paragraph 9 of the agreement provides:

> In the event of Success in the Action, and in addition to any costs paid by the Defendants to the Solicitor, the Solicitor shall be paid and shall receive the aggregate of the following in accordance with paragraph 8:
>
> (a) an amount equal to any disbursements not paid by the Defendant(s) as costs, plus applicable taxes plus interest thereon in accordance with s. 33(7)(c) of the Act;
>
> plus
>
> (b) the greater of:
>
> (i) one-third of the Recovery; or
>
> (ii) the Base Fee increased by a multiplier of four;
>
> less
>
> (iii) the fee portion of any costs paid to the Solicitor in accordance with paragraph 8;
>
> plus
>
> (iv) applicable taxes.

63 This paragraph, which is the agreement regarding class counsel fees, does not provide that counsel may bring a motion to have the court increase the base fee by a multiplier. Rather, if paragraph 9 were given effect, counsel fees may not even be premised on the base fee/multiplier approach, but on one third of the recovery.

64 Nowhere else in the agreement is it stipulated that class counsel is permitted to bring a motion to have their fees increased by a multiplier. Recital D of the agreement merely states that "[t]he Act provides, among other things, that a Fee Agreement: ... (d) may permit a solicitor to be paid by having a Base Fee increased by a multiplier or as a percentage of the Recovery". While this is accurate as a general statement, it does not bring the fee agreement under s. 33(4) of the CPA. It does not, as a matter of contract, "permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier".

65 The distinction is not merely technical. Class members may understand the phrase "[t]he Act ... may permit a solicitor to be paid ... a base fee increased by a multiplier" to mean that such fees are payable if specified in the fee agreement. On the other hand, an agreement that precisely complies with s. 33(4) of the CPA can leave no doubt in the mind of class members that the size of the multiplier and the fees themselves rest completely within the discretion of the court. It is a matter of emphasis. A fee agreement that simply states that "the Act provides that a Fee Agreement may permit a solicitor to be paid by having a Base Fee increased by a multiplier" does not emphasize that the court must, in every case, approve both the base fee and the multiplier before the fee agreement is enforceable.

66 The agreement in this case does make clear the court must approve it. Paragraph 4 of the fee agreement states, "This agreement requires Court approval. If this agreement is approved by the Court, it shall bind the Solicitor, the Client, and all members of the Class who do not opt out of the Action". Paragraph 4 speaks to the fee agreement as a whole. No provision of the agreement, however, expressly indicates that the court must determine what fees will be allowed to counsel.

67 It is interesting to note the difference between paragraph 8, which deals with costs paid by the defendants, and paragraph 9 which deals with counsel fees. Paragraph 8 expressly provides that counsel's entitlement to costs payable to the client is specifically subject to the approval of the court. Paragraph 9 sets out precisely how counsel fees are to be calculated, but unlike paragraph 8, does not state that counsel fees are subject to the approval of the court.

68 I conclude that the fee agreement in this case does not satisfy the requirements of s. 33(4). It does not permit counsel to apply to the court for a multiplier but instead stipulates how counsel fees are to be calculated. The agreement for the fees stipulated would become enforceable only if it were approved by the court under s. 32(2). If the agreement was not approved then, under s. 32(4), the court could determine the amount owing to counsel.

69 In this case, the motion judge did not expressly state that he was disapproving the fee agreement. Section 32(4), however, does not require that a fee agreement be expressly disapproved before it applies. Section 32(4) applies whenever there is no approval of the fee agreement. This is made clear by the opening words of s. 32(4), which clearly state that the court's authority to determine the amount owing to class counsel in respect of fees and disbursements under that subsection arises "if an agreement is not approved by the court". Cullity J. put it well in *Martin v. Barrett*, [2008] O.J. No. 3813 (Ont. S.C.J.), at para. 35: "If the court withholds approval, it then has a discretion to determine the fee pursuant to section 32(4)(a)."

70 There can be no doubt the motion judge withheld approval of the fee agreement in this case. Had he approved it, it would be enforceable and the fees owing under paragraph 9 would be a first charge on the settlement fund by virtue of s. 32(3) of the CPA. By assessing fees in a different amount, the motion judge made evident he was not approving the fee agreement. Section 32(3) makes apparent that a substantive as well as a formal review of the fee agreement is necessary for court approval. The current practice of some trial courts to approve the fee agreement simply upon being satisfied that it contains the formal requirements of s. 32(1) ignores the effect of s. 32(3). The motion judge in this case followed the correct approach by withholding approval of the fee agreement.

71 Because the fee agreement in this case was not approved and because it does not meet the requirements of s. 33(4), I conclude that class counsel were not entitled to invoke the application of s. 33(7). Rather, counsel's fees in this case fell to be determined under s. 32(4).

72 I do not accept the contention advanced in the appellants' supplementary factum that, even if s. 32(4) applies, the court must apply the analytical framework of s. 33(7) when counsel who have taken the case on a contingency basis apply for a multiplier. The wording of s. 32(4) is clear. The court has broad authority to itself determine the "the amount owing to the solicitor in respect of fees", or even to direct that the amount owing be determined "in any other manner". *Gagne*, the only Court of Appeal authority on which the appellants rely for this argument, was a s. 33(7) case. The proper view is that the court acting under s. 32(4)(a) has the authority to determine the fees owing to the solicitor after considering and weighing all relevant factors. It is within the court's discretion to test the reasonableness of the quantum of a lump sum fee by looking at the result as

a multiplier, as Cumming J. suggested in *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (Ont. S.C.J.). It is, however, a matter of discretion.

73 I conclude that the motion judge was not bound to apply the base fee/multiplier analysis provided for in s. 33(7) of the CPA. He committed no error in exercising his authority under s. 32(4) of the CPA to determine class counsel fees without determining the amount of the appellants' base fee and applying a multiplier to it.

74 Before leaving this issue I add that it is not apparent to me that, before the motion judge, class counsel pressed the application of the base fee/multiplier analysis, which they now allege he erred in failing to apply. The notices to the class members and the notice of motion filed with the motion court are more consonant with the application of s. 32(4) than with s. 33(7) of the CPA.

75 The notice of certification, drafted and advertised by class counsel, advised the class members that the agreement "which must be approved by the court to be effective, provides for a contingency fee of at least one-third of the amount recovered in the class action." The notice of the approval hearing stated that "[c]lass counsel will ask the court to approve their fee agreement with the plaintiffs and award $27.5 million in cash in full payment of the plaintiffs' obligations to class counsel." Neither indicates that counsel would apply to the court for the application of a multiplier to their base fee.

76 Paragraph 1(d) of the notice of motion sought an order "approving the agreements as to fees, disbursements and taxes between [the representative plaintiffs] and Harvey T. Strosberg ('Agreements')". Paragraph 1(e) sought an order "fixing the amount of class counsel's fees at $27.5 million". The notice of motion refers generally to both ss. 32 and 33, but does not seek to have counsel's base fees increased by a multiplier, as contemplated by s. 33(7). Nowhere in the notice of motion is there a reference to either the base fee or a multiplier. The supporting affidavits filed on the motion do not refer to a multiplier.

77 Finally, the motion judge made no reference to any argument by the appellants that he was bound to apply the base fee/multiplier analysis, as would be expected had the argument been advanced. He only referred to the position in the appellants' notice of motion and notices to the plaintiff class that they were seeking a specific dollar amount — namely $27.5 million.

78 I would not give effect to this ground of appeal. Before moving on, I caution that these reasons should not be taken to indicate acceptance of the appellants' submissions on how s. 33(7) should be interpreted and applied.

***Reasonableness of class counsel fees***

79 I turn then to the second leg of the appellants' argument, that, irrespective of the mode of analysis used, the quantum of fees allowed by the motion judge was too low. The appellants submit that the amount of $14.5 million is inadequate to achieve the policy objective of providing incentives for lawyers to undertake complex and protracted class actions, and that the amount is not fair and reasonable compensation given the work they performed, the risk they undertook and the success they achieved.

80 At para. 24 of his reasons, the motion judge set out the general principles that apply to the assessment of class counsel fees:

> Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

81 There can be no quarrel that these factors are relevant in assessing the reasonableness of class counsel fees. These factors have been applied in a number of cases, including those cited by the motion judge.

82 The motion judge found that the class proceeding dealt with matters of high factual and legal complexity, had a substantial monetary value, was important to the class, and that class counsel performed with competence and admirable skill. The motion judge also considered that class counsel had assumed a high risk in taking on the class proceeding and he recognized that that

risk should be rewarded. He also attached weight to the fact that "Class Counsel's compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well".

83 The motion judge, however, refused to accept class counsel's contention that they deserved fees in the amount of $27.5 million for achieving a settlement worth $120 million because, in his view, the settlement was not worth $120 million. The motion judge seemed taken aback by class counsel's insistence that the settlement had a value of $120 million as he "would have thought it obvious that the settlement in the case at bar, which involves cash, coupons, and releases, is not worth $120 million". He repeated that the settlement was not worth $120 million "for the purposes of the contingency fee agreement". He described the result as "adequate or satisfactory" and said it was "to spin a silk purse from a sow's ear to suggest that the result was excellent." He added that an objecting class member "was right in expressing disappointment about the settlement".

84 The motion judge had a solid foundation for finding that the settlement did not have a value of $120 million. To begin with, the motion judge did not regard the transaction credits as having a benefit to the class members equal to their face value. He was sceptical that there would be much take-up and stated his view that the most likely beneficiaries would not be class members but future Money Mart customers. The implication that class counsel do not earn a premium in fees by obtaining benefits for persons outside the class is sound.

85 The motion judge also observed that the transaction credits could be viewed "as a business promotion scheme under which Money Mart discounts its price and makes less profit from a profitable transaction" but "obtains business it would otherwise not have obtained". He also drew attention to the fact that the settlement provided that a maximum of five dollars in transaction credits could be used per transaction. This meant that class members would have to enter into a number of further transactions with Money Mart repeatedly in order to exhaust their transaction credits.

86 The motion judge was not impressed with class counsel's argument that the transaction credits should be considered to have marketable value because Money Mart's competitors would likely honour the transaction credits. That competitors would find acceptance of the transaction credits attractive confirmed that credits were a business promotion scheme for more payday loans, in the motion judge's mind.

87 The motion judge, in making the point that the transaction credits were not equivalent to cash, surmised that class counsel would likely not accept an assignment of $27.5 million worth of transaction credits as payment of their fees. In my view, this was a fair inference based on class counsel's position that the entire cash remnant of $27.5 million should be devoted to paying their fees rather than them taking a share of the "marketable" transaction credits. The motion judge concluded that it was "hard to paint [the transaction credits] as a success for the mission of this class proceeding."

88 The motion judge also substantially discounted the value of the debt forgiveness component of the settlement. He considered that payday loans were uneconomical to recover given their small value and the expense of collecting them. The evidence indicated that much of the debt forgiveness component of the settlement released debts that were already written off or reserved in Money Mart's financial records.

89 The motion judge did recognize that the $30.5 million in cash that the settlement provided was solid value, though he observed it "should be present-valued because it is being paid in instalments over approximately two and a half years and there is no interest until the payments are due".

90 These matters provided an abundant basis for the motion judge's finding that the settlement was not worth $120 million. The appellants' arguments at the appeal hearing and in their written submissions were all premised on the settlement being worth $120 million. However, they did not establish that the motion judge made any error in arriving at the clear finding of fact that it was not. The appellants complain that the motion judge made no finding as to what the settlement was worth. The record before the motion judge, compiled by the appellants, provided a poor basis for doing so. There was no independent expert opinion on the value of the transaction credits or the debt reduction.

91 Besides finding that the settlement was worth less than the appellants contended, another important factor in the motion judge's approval of the settlement was the $13 million in cash that would become available for distribution to the class upon class counsel fees being fixed in the amount of $14.5 million instead of the $27.5 million that the appellants sought.

92 Placing importance on providing fair and reasonable compensation to counsel and providing incentives to lawyers to undertake class actions, as the motion judge noted, does not mean that the court should "ignore the other factors that are relevant to the determination of a reasonable fee." In this light, it was an important aspect of the motion judge's analysis that the settlement he approved provide some cash for distribution among the class members. The motion judge stressed that the settlement he was approving was one in which "Class Counsel's fee does not take up all the cash portion of the settlement".

93 The motion judge found that "[h]aving regard to all the factors, an all-inclusive award of $14.5 million is a reasonable fee in the circumstances of this case." He concluded that $14.5 million was "ample compensation and a reasonable fee" and there was "no necessity to award more having regard to the success achieved and the risk taken".

94 The appellants submit that the motion judge made errors in his analysis of specific issues. I agree he may have overstated one or two things, but this does not undermine his central reasoning and the conclusion that he reached.

95 For example, the appellants submit that the motion judge's comment that the settlement failed to achieve behaviour modification is unreasonable because the section of the *Criminal Code* prohibiting criminal rates of interest was amended in May 2007 to exempt from its application small short-term loans in provinces that enact legislation to regulate the payday loan industry. At the time of the hearing before the motion judge, British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, Saskatchewan and Ontario had introduced such legislation. The provisions of Ontario's *Payday Loans Act, 2008*, S.O. 2008, c. 9, which regulate the cost of payday loans borrowing, came into force on December 15, 2009. The appellants make the point that it was impossible for the settlement to achieve "behaviour modification" because the new legislation legalized the defendants' business practices. The motion judge erred, they say, by minimizing the success they achieved on the basis that the settlement did not accomplish "behaviour modification".

96 The motion judge could have explained more clearly why he commented that "there was not a peep about behaviour modification" during the settlement approval motion. As I understand his reasons, the point he was making is that the settlement, by providing coupons for the defendants' services, provided support for the payday loan industry and hence diminished the degree of success achieved. The settlement did not sever the business relationship between the defendants and the class members who receive transaction credits under the settlement but rather continued that business relationship. I gather this because, after observing there was no behaviour modification, the motion judge said,

> [B]ut for the members of the Transaction Credit group, if they are to obtain a benefit under this settlement it is by abandoning the original purposes of this class action, which was to enjoin, not encourage, payday loans pricing policies. Once again, it is hard to paint this as a success for the mission of this class proceeding.

97 I have no doubt that the motion judge did not expect that a settlement or judgment could have resulted in the modification of the defendants' business practices. The motion judge was aware of the new legislation. He set out the evolution of the legislative changes and noted the irony that the defendant's charge for the representative plaintiff's loan was now apparently legal in Ontario and that, indeed, Money Mart could even charge him an additional two dollars. The motion judge could have meant nothing more than that there was no "behaviour modification" as far as these members of the class were concerned because the scheme of the settlement destined them to continue to borrow payday loans from the defendants on essentially the same, albeit now unquestionably legal, terms.

98 In any event, I do not see the motion judge's comment about the lack of behaviour modification as the foundation for his conclusion that the value of the settlement was much less than the claimed $120 million.

99 The appellants also take strenuous and justified umbrage to the motion judge's description of the settlement as the self-serving design of class counsel. The motion judge said,

> With respect to the factor of the class' ability to pay, the settlement has been structured in a way that the class is able to pay Class Counsel's fee, but that is the self-serving design of Class Counsel, and as I have already explained, the class would not have been able to pay the contingency fee if Class Counsel had been able to enforce the contingency fee agreement based on its own self-serving evaluation of the value of the settlement.

100 I agree with the appellants that a court ought not to attribute self-interest to counsel in the absence of a proper evidentiary basis. There was, in this case, no evidentiary basis for the modifier "self-serving". Regrettably, the risk of such an overstatement is increased in a non-adversarial motion brought by class counsel that requires the court to depart from its traditional neutrality and take on an active role to protect the interests of the class. In fulfilling that active role, the motion judge could allude to the fact that the settlement was structured to provide for a cash payment of $27.5 million and that class counsel was seeking approval of fees in the amount of $27.5 million, and highlight that this would leave the class members only with transaction credits and debt forgiveness. His use of the modifier "self-serving" in making that observation was unfortunate.

101 None of the isolated comments that the appellants objected to provide any reason to interfere with the motion judge's exercise of discretion in setting class counsel fees.

102 The motion judge's determination was discretionary. The appellants have not established any basis for interfering with his determination that $14.5 million was a fair and reasonable fee for class counsel in this case.

**The fees of PWC and Mr. Anand**

103 Class counsel retained PWC and Mr. Anand to perform certain work on the basis that they would only be paid if and when the action was successful and then on the same basis as class counsel. For example, PWC agreed to the following:

> We understand that our fees will be payable on a contingency basis. We will accumulate our hours. In the event that your action is successful when you achieve either a settlement or an award from the court, our fees will be payable on a pro rata basis with payment of your own fees and the fees of other members of your team. To this end, our usual fees for time incurred would attract the same multiplier applied to usual hourly rates as the multiplier applied to each of your team's members.
>
> Our expenses incurred will also be on a contingency basis. They will be paid, pro rata, with the disbursements of the members of your team from any proceeds received before distribution of any fees to the team members.
>
> In the event that your action does not result in a settlement or an award from the court, no amount will be payable to us on account of fees for time incurred or expenses.

104 The motion judge decided that the fees of PWC and Mr. Anand would be treated as disbursements of class counsel. The appellants submit that the motion judge erred by failing to approve PWC and Mr. Anand's fees in an amount consistent with the contingency basis on which they were retained. The time value, taxes and disbursements for the work of PWC amounted to $835,629.03; those of Mr. Anand amounted to $16,800. Though the motion judge treated these amounts as disbursements incurred by class counsel, class counsel say they remain contractually obligated to pay these service providers on the basis on which they were retained.

105 By way of relief, the appellants seek an order that a premium be added to the fees of PWC and Mr. Anand in proportion to the premium added to the fees of the appellants. The unstated premise of this request seems to be that treating the consultants' fees as contingency fees would enlarge the aggregate quantum of fees allowed. I do not agree that this would necessarily be so.

106 Insofar as the premium granted depends on the risk undertaken in a contingency case, the issue is the quantum of that risk, not the number of risk-takers who have shared it. It is illogical that the total amount of the premium allowed for a given total risk should be higher because there are more risk-takers. For example, the premium allowed should not increase because class counsel in this case was comprised of four law firms. Thus, if the premium allowed to class counsel is predicated on the risk of counsel's fees and disbursements, granting service providers a contingency premium should result in a redistribution of

the premium rather than an enlargement of the premium. After all, the risk undertaken by class counsel is diminished by the amount of risk the service providers undertake when they are retained on a contingency basis. If the CPA permits the court to allow contingency premiums to service providers, the appellants, to obtain an increase in the total premium allowed, would have to demonstrate that the motion judge did not base his determination of the premium on the total risk of undertaking the case, including the disbursements for the services of PWC and Mr. Anand.

107 As I mentioned earlier, the motion judge considered it unwise to determine the general question whether the CPA could be interpreted to permit contingency fee arrangements with service providers on what was "essentially an *ex parte* motion where the voices against any change are not being heard". He decided to treat the accounts of PWC and Mr. Anand as disbursements in this case because he was troubled by the appellants' contention for four reasons. First, as non-lawyers, the service providers could not be appointed class counsel. Second, the CPA does not envisage contingency fee agreements with anyone other than properly appointed class counsel. He pointed out that s. 32(2) of the CPA refers to an agreement respecting fees and disbursements "between a solicitor and a representative party". Third, it was not clear that the arrangement complied with the Law Society's Rules of Professional Conduct. Rule 2.08(8)(a), for example, provides that a lawyer shall not "directly or indirectly share, split, or divide his or her fees with any person who is not a licensee". And fourth, the arrangement with the non-lawyers might well be champertous. The motion judge pointed out that *An Act Respecting Champerty* was still in effect.

108 I agree that the appellants placed before him a fundamental question with far-reaching implications for the future of class actions, and that it is usually desirable to hear the perspectives of all the interests that might be affected before deciding such questions.

109 While that may be generally so, in my view the answer to the far-reaching question raised in this case is straightforward. The CPA does not contemplate contingency fee arrangements with persons other than class counsel and does not give the court the jurisdiction to allow a service provider a premium on its fees.

110 Section 33(1) allows a contingency agreement "between a solicitor and a representative party". Section 32(1) requires all agreements between a solicitor and a representative party, including contingency agreements, to meet certain formal requirements. Section 32(2) interferes with freedom of contract by providing that all agreements between a solicitor and a representative party are unenforceable unless approved by the court. If contingency agreements with service providers are allowed under the CPA as the appellants contend, I find it odd that the Act does not set out formal requirements for such agreements or make them unenforceable unless approved by the court.

111 Section 33(7), which the appellants wish to have applied in this case, could not be clearer. Read in context, s. 33(3)'s definition of "base fee" clearly refers to the hours worked by counsel multiplied by counsel's hourly rates. The only multiplier that the court has jurisdiction to grant under s. 33(7)(b) is one that results in a fair and reasonable compensation *to the solicitor* for the risk undertaken. Under s. 33(7)(c) the court has jurisdiction to determine the amount of disbursements, but these are disbursements "to which the solicitor is entitled". The text of s. 33 is not concerned with fair and reasonable compensation to others for risk incurred in undertaking work on the action on a contingency basis.

112 Section 32(4) may not be as rigidly structured, but still provides the court with authority to determine the amount owing *to the solicitor* in respect of fees and disbursements. As the appellants argue in their supplementary submissions, the application of the two sections should theoretically lead to roughly the same result — fair and reasonable compensation for class counsel. I do not read the broader more general authority granted to the court by s. 32(4) as extending to allow a premium to service providers in order to achieve fair and reasonable compensation for them for the risk undertaken in the provision of their services.

113 The grammatical and ordinary sense of ss. 32 and 33, read in the context of the entire statute and considered in light of its purpose, leads me to conclude that the legislature did not intend to grant the court jurisdiction to allow service providers a premium for providing their services on a contingency basis. The legislature's intent was to authorize the court to allow class counsel a premium or multiplier for the risk incurred by investing their time and underwriting disbursements, if they take on the case on a contingency basis. The representative plaintiff's selection of counsel who is prepared and able to carry the case

on a contingency basis is relevant to the court's determination whether the plan for the proceeding sets out a workable method of advancing the proceeding on behalf of the class.

114 As I find the text of the current legislation to be clear, I do not find it necessary to deal with the other legal and policy arguments advanced by the appellant. Suffice it to say I agree with the motion judge that what the appellants seek "would amount to a fundamental change to the design of the Act". The policy issues are not confined to access to justice considerations, the only one identified by the appellants. For example, the broad proposition the appellants assert, that contingency agreements with service providers should be allowed, would apply to expert witnesses and others whose work products are tendered in evidence. This could give rise to concerns about the quality and reliability of the work product.

115 I might add, I do not anticipate that this decision will have the dire impact on access to justice that the appellants assert. In the almost 20 years the CPA has been in effect, a great number of class actions have proceeded without the court allowing premiums to service providers.

**The fees of FMC and Prof. Krishna**

116 Class counsel also retained FMC and Prof. Krishna to perform certain specialized discrete tasks. The total time value of the work they performed was $32,002.96 and $10,237.50, respectively. Class counsel's agreements with them are not in the record, but the motion judge found that they too were retained by class counsel on a contingency basis. Class counsel requested that the multiplier or premium the motion judge granted to class counsel also be applied to the fees of FMC and Prof. Krishna. The motion judge refused this request and treated their fees as disbursements incurred by class counsel. On appeal, the appellants ask that the order of the motion judge be varied to treat Prof. Krishna and FMC as part of class counsel, and that a premium be added to their fees in proportion to the premium added to the fees of the appellants.

117 Different considerations apply to the work of FMC and Prof. Krishna because they are lawyers. The same concerns of fee splitting and champerty do not arise in relation to lawyers who have actually worked on the client's file.

118 The appellants' position is that FMC and Prof. Krishna became part of the class counsel team and their fees should be treated as class counsel fees. They say that the motion judge refused to recognize them as class counsel on the erroneous belief that court approval was necessary for any change in the plaintiff's representation. The motion judge did note that the litigation plan that the representative plaintiff had approved by the court defined class counsel to be the four law firms Sutts, Strosberg, Paliare Roland, Koskie, Minksy, and David Stratas of Heenan, Blaikie.

119 The appellants rely on this court's decision in *Fantl v. Transamerica Life Canada* (2009), 95 O.R. (3d) 767 (Ont. C.A.) to submit that no court approval was required to enlarge the class counsel group to include FMC and Prof. Krishna. *Fantl* merits closer examination. In *Fantl*, the law firm acting for the representative plaintiff in a class action split up and its former members disputed who should continue as class counsel. The narrow issue was whether the representative plaintiff could choose to retain one of the successor firms and serve a notice of change of solicitors without court approval. Winkler C.J.O. writing for this court said that he did not view it "as necessary for the plaintiff to seek and obtain approval of the court for every decision involving the selection or change of counsel." Yet he immediately added, "However, I am of the view that the case management judge charged with responsibility for the supervision of the proceeding should be immediately and directly notified of such a change."

120 *Fantl* is of little assistance to the appellants in this case.

121 First, in this case there is no indication the representative plaintiff made a decision to change the makeup of the class counsel team indicated in the litigation plan. In *Fantl* what was in issue was the client's choice of new counsel. Winkler C.J.O. said at para. 44 of *Fantl* that "[t]he representative plaintiff in a class action lawsuit is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report." I can see no indication in the record that the representative plaintiff made or participated in any decision to retain FMC and Prof. Krishna as class counsel in this action. While counsel may require assistance and may incur disbursements on the clients' behalf, clients decide who are their counsel.

122 Second, if there was a change in the composition of class counsel, the court was never immediately and directly notified of the change as *Fantl* indicates is required.

123 Moreover, the record does not indicate that Prof. Krishna or FMC were intended to have a solicitor-client relationship with the representative plaintiff. It is not clear to me in what sense FMC and Prof. Krishna are said to be class counsel except for the purpose of being entitled to the same premium allowed to class counsel. I briefly review the relevant portions of the record.

124 The affidavit of Patricia A. Speight, sworn February 1, 2010, in support of the motion under the heading "Class Counsel" states that "[t]he four law firms acting on behalf of the Class are SS [Sutts, Strosberg], Heenans [Heenan Blaikie], PR [Paliare Roland Rosenberg Rothstein] and KM [Koskie, Minksy]." It adds that other lawyers from other firms "assisted class counsel as required".

125 The affidavit goes on to describe the role fulfilled by each of Sutts, Strosberg, Heenan Blaikie, Paliare Roland and Koskie, Minksy, but does not mention Prof. Krishna or FMC in this section. The motion material includes costs briefs for Sutts, Strosberg, Heenan Blaikie, Paliare Roland and Koskie, Minksy setting out the supporting details for their fees and disbursements. The motion material before the motion judge did not contain costs briefs for FMC and Prof. Krishna. Without details of their rates and hours worked, it was not possible to treat their fees as class counsel fees under the CPA.

126 In a later section of Ms. Speight's main affidavit under the heading "Class Counsel Obtained Advice From Others" the affidavit sets out that "class counsel expanded the counsel group to include Professor Vern Krishna who is an expert in international taxation". In the same paragraph, it indicates that a U.S. insolvency firm was also retained and that Prof. Krishna and the U.S. counsel had "reviewed and approved the parts of this affidavit stating their information, opinions and beliefs." The affidavit does not mention FMC.

127 The details of FMC's retainer are set out in the supplementary affidavit of Ms. Speight sworn February 11, 2010:

> Money Mart had entered into a settlement agreement with counsel in an Alberta payday class action at the time that the Ontario action was structured as a national class. A class member, resident in Alberta, retained SS to file an objection to the proposed Alberta settlement. Mr. Strosberg attended in Alberta and met with plaintiffs' counsel in the Alberta action. As a result of this meeting, Alberta counsel did not proceed to tender the settlement to the Alberta court for approval. Money Mart then sued the objector and sought damages against him and plaintiffs' counsel in Alberta.... [Class counsel] arranged for Fraser Milner to act on behalf of the objecting class member ... with the responsibility of defending the action for the objector....

128 The material indicates that class counsel used FMC and Prof. Krishna as consultants to perform discrete, specialized tasks. FMC was retained on a different action to represent an individual other than the representative plaintiff in this case. Prof. Krishna's work product seems to have been treated like that of an expert witness on international taxation issues.

129 The appellants claim that paragraph 5(d) of the retainer agreement allowed them to include FMC and Prof. Krishna in the class counsel group. I disagree. Paragraph 5(d) authorizes the Solicitor to:

> use such persons or resources from the firms Paliare Roland LLP, Koskie Minsky LLP, Heenan Blaikie LLP and any other firm as the Solicitor deems necessary and their services shall be deemed to be provided as members of the Solicitor's law firm.

130 I do not read the paragraph as purporting to allow class counsel to unilaterally establish a solicitor-client relationship on behalf of the representative plaintiff with any person or resource "used" by class counsel. If the paragraph does intend to do so, it would be unacceptable as it is inconsistent with Winkler C.J.O.'s observation in *Fantl* that the representative plaintiff is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report. Whatever the import of this paragraph, to the extent it deals with fees, it is part of the fee agreement that was not approved and is not enforceable.

131 The appeal, which is brought on behalf of class counsel, indicates the appellants are the four law firms Sutts, Strosberg, Heenan Blaikie, Paliare Roland and Koskie, Minksy. Prof. Krishna and FMC are not included as part of class counsel for the purposes of this appeal.

132 The motion judge had the general discretion to determine the allowable fees and disbursements in this case. As the material before him did not show that the representative plaintiff made or was even aware of any change in the composition of counsel representing him, or that FMC and Prof. Krishna functioned in a solicitor-client relationship with him, I see no error in his treatment of the fees of FMC and Prof. Krishna as disbursements rather than as part of class counsel's base fee.

**Compensation for the representative plaintiff**

133 The motion judge agreed that the representative plaintiff's "contribution to the class action exceeded that which is normally expected of a representative plaintiff" and granted him compensation in the amount of $3,000 as requested by class counsel. However, without discussion, he ordered that the representative plaintiff's compensation be paid out of class counsel fees. The appellant argues that the motion judge erred by not ordering the representative plaintiff's compensation to be paid out of the settlement fund.

134 In advancing this argument, class counsel relied upon the decision of Sharpe J. in *Windisman v. Toronto College Park Ltd.* (1996), 3 C.P.C. (4th) 369 (Ont. Gen. Div.). Counsel did not draw the court's attention to the more recent decisions of Cullity J. in *Garland v. Enbridge Gas Distribution Inc.* (2006), 56 C.P.C. (6th) 357 (Ont. S.C.J.) and *McCutcheon v. Cash Store Inc.*, [2008] O.J. No. 5241 (Ont. S.C.J.), and Cumming J. in *Walker v. Union Gas Ltd.* (2009), 74 C.P.C. (6th) 366 (Ont. S.C.J.). It seems that the most that can be said is that judges of the Superior Court have different approaches with respect to the payment of the representative plaintiff's fees. This court has never dealt with the issue.

135 I take the view that as a general matter the representative plaintiff's fee should be paid out of the settlement fund and not out of class counsel fees. Class counsel fees are predicated on the work that class counsel have done for the class. Allocating a part of that fee to a layperson, especially a representative plaintiff, raises the spectre of fee splitting, a concern the motion judge expressed at an earlier point in his reasons.

136 In the absence of any reason for providing otherwise, I conclude that the $3,000 compensation for the representative plaintiff should be paid out of the settlement fund. I would vary the motion judge's order accordingly.

**Conclusion**

137 I would allow the appeal in part by varying para. 31 of the motion judge's order to provide that the compensation for the representative plaintiff be paid out of the settlement fund. I would dismiss the appeal in all other respects.

***M.J. Moldaver J.A.*:**

I agree

***R.P. Armstrong J.A.*:**

I agree

*Appeal allowed in part.*

Footnotes

* Corrigenda received from the court on April 5, 2011 have been incorporated herein.

1 There is an error in the paragraph numbering in the reasons released by the motion judge. I refer to the corrected paragraph numbering in the Quicklaw version of his reasons.

**COURT FILE NO.:** 98-CV-158832
**DATE:** 20050321

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**



| | | |
|---|---|---|
| **B E T W E E N:** | ) | |
| | ) | |
| SHEILA WILSON | ) | ***Joel Rochon, Vincent Genova*** and ***Sakie Tambakos*** for the National Class |
| | ) | |
| Plaintiff | ) | |
| | ) | ***David Klein*** and ***Gary Smith*** for the B.C. Sub Class |
| **- and -** | ) | |
| | ) | |
| SERVIER CANADA INC., LES LABORATOIRES SERVIER, SERVIER AMERIQUE, INSTITUT DE RECHERCHES INTERNATIONALES SERVIER ("I.R.I.S."), SCIENCE UNION ET CIE, ORIL S.A., SERVIER S.A.S., ARTS ET TECHNIQUES DU PROGRES, BIOLOGIE SERVIER INSTITUT DE DEVELOPEMENT ET DE RECHERCHE SERVIER, ORIL INDUSTRIE, BIO RECHERCHE SERVIER, INSTITUTO DI RICERCA, IDUX, BIOPHARMA ARTEM, SCIENCE UNION S.A.R.L., LABORATOIRES SERVIER INDUSTRIE, I.R.I.S. ET CIE DEVELOPEMENT, INFORMATION SERVIER, SERVIER MONDE, SERVIER INTERNATIONAL, I.R.I.S. SERVICES S.A.R.L., ADIR, SERVIER R&D BENELUX, DR. JACQUES SERVIER and BIOFARMA S.A. | ) | ***William W. McNamara***, ***Stephen A. Scholtz***, and ***Seana Carson*** for the Defendants |
| | ) | |
| | ) | |
| | ) | |
| Defendants | ) | |
| | ) | |
| | ) | |
| | ) | |
| | ) | **HEARD:** October 18 and 19 and November 1 and 2, 2004 |

**PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992***

**REASONS FOR DECISION**



**CUMMING J.**

**The Motions**

[1] These Reasons for Decision deal with motions brought by class counsel under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6 as am. ("*CPA*") in respect of this class action: first, for approval of a proposed settlement; and second, assuming settlement approval, approval of the counsel fees.

[2] This class action involves a national class comprising all residents in Canada (except for Quebec) and a British Columbia subclass. The national class and B.C. subclass have each made discrete motions but they are conveniently treated together as one. I shall refer to Rochon Genova as National Class Counsel and Klein Lyons as B.C. Class Counsel and collectively, the two firms simply as "class counsel." (Capitalized terms employed in these Reasons are found in the definition section of the Settlement Agreement.)

[3] This was a cooperative effort by the two law firms and both gained significantly by the contribution of the personnel and resources of the other in this very demanding and protracted litigation. The two law firms have determined and agreed to a division between the two firms of the global class counsel fees approved by the Court. Thus, on the matter of the second motion as to the approval of class counsel fees, the Court will address the matter as though there is a single class counsel law firm.

[4] At the conclusion of the hearing in respect of the first motion, approval of the settlement was granted orally, so that implementation could be expedited, with reasons to follow. These are the Reasons for Decision in respect of that settlement approval and these are the Reasons for Decision in respect of the second motion, being the matter of the determination and approval of class counsel fees.

**The Motion for Settlement Approval**

[5] The representative plaintiff, Ms. Sheila Wilson, moves for approval of the Settlement Agreement in this national class action commenced November 17, 1998 on behalf of all residents in Canada, except for those individuals resident in Quebec, who had ingested the diet drugs Ponderal, Ponderal Recaps and/or Redux (collectively, the "diet drugs" or "Products"). Representative plaintiff Ms. Beverley Greenlees moves for approval on behalf of the B.C. subclass.

[6] Fenfluramine, and later dexfenfuramine, the active ingredients in the diet drugs, were anorexigens introduced in Europe in the 1960s and in Canada in the 1970s. The claim alleges

that the diet drugs caused primary pulmonary hypertension ("PPH") and/or valvular heart disease ("VHD") in some users of the diet drugs.

[7] Ms. Wilson ingested diet drugs between August, 1995 and August, 1996. She became ill in late 1996 and was ultimately diagnosed in March, 1998 as having PPH. This disease reportedly results in diminished right-heart function and leads ultimately to heart failure and death. The reported mean survival period from the onset of symptoms to death for PPH patients is about two to three years.

[8] VHD involves the failure of one or more of the valves of the heart to open or close properly. This results in regurgitation or the backwards flow of blood. This can lead to severe and potentially fatal complications, including congestive heart failure, shortness of breath, arrhythmias and bacterial endocarditis. Surgery may be necessary to repair or replace the defective valves.

[9] Ms. Greenlees consumed Ponderal and developed VHD. Her daughter also consumed Ponderal. She developed PPH and had a double lung transplant but has died.

[10] The first case report of a claimed association between PPH and the use of fenfluramine was published in the scientific literature in 1981. Ultimately, a multi-centre case-controlled epidemiologic study (known as the International Primary Pulmonary Hypertension Study ("IPPHS") led by Dr. Lucien Abenheim published its findings in the *New England Journal of Medicine* in August, 1996, concluding that there was a "causal relationship" between the use of fenfluramine derivatives and PPH. Several later scientific reports reached the same conclusion, being that a person's use of the diet drugs added definite risk factors for the development of PPH.

[11] The diet drugs were withdrawn from the Canadian market and other markets around the world in September, 1997. The claim alleges that the diet drugs increased the risk of developing PPH and VHD, were unfit for the purpose for which they were intended as designed and that the defendants negligently failed to adequately disclose the risks to physicians and consumers and negligently misrepresented the safety of the drugs.

[12] The defendant Servier Canada Inc. ("Servier") was the Canadian distributor of the diet drugs. The defendant Biofarma S.A. ("Biofarma"), a corporation in France, is the parent of Servier. Ultimately, several foreign corporations affiliated with Biofarma as well as its founder, Dr. Jacques Servier, were named and added as defendants. It is claimed that one or more of these foreign corporations manufactured and marketed the Products.

[13] The certification motion was granted pursuant to written reasons released September 13, 2000. *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (Sup. Ct.); motion for leave to appeal to Divisional Court denied November 21, 2000, 52 O.R. (3d) 20; leave to appeal to Supreme Court of Canada dismissed, [2001] S.C.C.A. No. 88.

[14] It is believed this class action has involved more court appearances than any other class action seen to date in Canada. There have been countless case conferences with at least thirty-five motions, and fifteen stay and leave applications and related appeals, including: (2000), 50

O.R. (3d) 219 (Sup. Ct.); [2000] O.J. No. 3722 (Sup. Ct.); (2000), 52 O.R. (3d) 20 (Sup. Ct.); [2001] S.C.C.A. No. 88; [2001] O.J. No. 1615 (Sup. Ct.); [2001] O.J. No. 4636 (Sup. Ct.); [2001] O.J. No. 4947 (Sup. Ct.); [2001] O.J. No. 5278 (Div. Ct.); [2001] O.J. No. 4636 (Sup. Ct.); [2001] O.J. No. 4626 (Sup. Ct.); [2001] O.J. No. 4716 (Div. Ct.); [2001] O.J. No. 4717 (Sup. Ct.); [2001] O.J. No. 4947 (Sup. Ct.); [2002] O.J. No. 60 (Div. Ct.); [2002] O.J. No. 1021 (Sup. Ct.); (2002), 58 O.R. (3d) 753 (Sup. Ct.); [2002] O.J. No. 1663 (Div. Ct.); (2002), 213 D.L.R. (4th) 751 (Sup. Ct.); [2002] O.J. No. 2138 (Sup. Ct.); [2002] O.J. No. 3470 (Sup. Ct.); [2002] O.J. No. 3722 (Sup. Ct.); [2002] O.J. No. 3723 (Sup. Ct.); (2002), 220 D.L.R. (4th) 191 (C.A.); [2002] O.J. No. 4566 (Div. Ct.); [2003] O.J. No. 155 (Sup. Ct.); [2003] O.J. No. 156 (Sup. Ct.); [2003] O.J. No. 157 (Sup. Ct.); [2003] O.J. No. 179 (Sup. Ct.); [2003] O.J. No. 280 (Sup. Ct.).



[15] The common issues trial was scheduled to commence February 24, 2003. A nine-month trial, conducted largely in the French language, was anticipated. A Court-ordered formal mediation under the supervision of Mr. Justice W. Winkler resulted in a settlement agreement-in-principle, reduced to writing February 21, 2003, three days before the scheduled commencement of the trial. An included provision stipulated that if agreement could not be reached on an implementing specific term, that the issue would be submitted to Winkler J. for a determination. He appointed Mr. Randy Bennett, a Toronto lawyer, as a Court-appointed Monitor, to facilitate the resolution of disputes in the process to achieve a final settlement agreement. A Settlement Agreement was ultimately accomplished with finality after more than 18 months, on September 17, 2004.

**The Settlement Agreement**

[16] Information and detailed particulars as to the Settlement Agreement can be found on the web sites of class counsel: www.rochongenova.com and www.kleinlyons.com. Important matters and details pertinent to the motion for settlement approval at hand are dealt with in affidavits in the motion records of the plaintiff class and subclass, including the affidavits of: Ms. Sheila Wilson, Ms. Beverley Greenlees, Ms. Annelis Thorsen, Mr. Dana Graves, Dr. John Granton, Dr. Stephen Raskin and Mr. Kerry F. Eaton (of the claim administrator, Crawford Class Action Services).

[17] The Settlement Agreement provides for a payment by the defendant, Servier Canada Inc. ("Servier"), to establish a Settlement Fund of $25 million. This Fund is to be administered by Crawford Class Action Services as Settlement Administrator. A further $15 million in "Additional Settlement Funds" is to be made available in the event that the Fund is insufficient to satisfy the claims made by class members. In addition, Servier is obliged to pay the administration costs and the costs of the two notice programs.

[18] The Settlement Agreement provides for a reversionary interest in the $25 million Fund whereby, if the claimants' take-up does not exhaust the Fund, the residual unused amount will largely revert to Servier, and an additional amount will revert to provincial health providers.

[19] If the $25 million is exhausted by claimants but the entirety of the guaranteed Additional Settlement Funds of $15 million is not necessary for claimants, any residual amount of this committed amount remains with Servier.

[20] Given the reversionary interests of Servier in respect of the settlement monies, defendants' counsel asked to make submissions relating to the determination of the question of approved class counsel fees.

[21] The Court welcomed this submission. In the usual course of events, a court is left alone when it comes to considering the reasonableness of the requested class counsel fees. Defendants have agreed to a settlement and want it approved in the interest of their own clients and are indifferent to the fees paid to class counsel by class members.

[22] Given the reversionary interest of Servier in the instant situation, defendants seek the Court's determination of "reasonable" class counsel fees that accord with their own view of reasonableness.

[23] While the Court welcomes the submission of the defendants on this matter as a positive, constructively critical aid, this Court does not view the intervention of the defendants as a "right." The defendants have a clear "interest" in the outcome of the motion for the approval of class counsel fees. They are permitted to make submissions for that reason. But, in my view, they do not have the "right" to intervene in the determination of class counsel fees.

[24] In *Parsons v. Canadian Red Cross Society*, [2001] O.J. No. 214 (C.A.), leave to appeal to Supreme Court of Canada denied, [2001] S.C.C.A. No. 190, the Court of Appeal found at para. 13 that "[t]he settlement agreement… was the place where the defendants, if they intended to participate in the subsequent fixing of the fees and disbursements of class counsel, could have reserved their rights in this regard. There is no provision in the settlement agreement to this effect." The present case differs slightly in that paragraph 11(c) of the Settlement Agreement provides that the defendants are entitled to notice of a motion to determine "any further amount of Class Counsel Fees." The defendants submit that paragraph 11(c), on its face, clearly permits them to participate fully at the hearing of the motion to approve Class Counsel Fees. I disagree. On its face, the provision entitles them to reasonable notice of the hearing. That provision should not be extended to include a *right* to make submissions. As in *Parsons*, the defendants could have, but did not, ensure their right to make submissions by specifically including words to that effect in paragraph 11(c).

[25] The defendants further submit that to deny them full participation in the hearing would be contrary to fundamental principles of justice and fairness, given their interest in the issue. They submit that theirs is the only interpretation of paragraph 11(c) that is consistent with the Settlement Agreement. The Settlement Agreement does not require that paragraph 11(c) be interpreted to include a right to standing and a right to make submissions. A contractual right to notice can be consistent with the lack of a corresponding right to full participation. Under various provisions of the Claims Administration Procedures, the defendants have a right to review all information and correspondence regarding approved claims, but no standing with regard to their determination by the claims adjudicators. I note that the defendants cannot challenge a claims adjudicator's determination. The defendants' various rights to information and notice reflect their role in the overall implementation of the settlement, but do not automatically include full participation rights in every hearing.

[26] In *Parsons*, *supra* the Ontario Court of Appeal found at para. 12 that having made submissions to assist Winkler J. in approving counsel fees did not mean that the defendants were parties to the motion since they did not seek, and were not granted, party status. While finding that the defendants were not parties, the court went on to say at para. 19 that "[n]othing we have said, of course, is intended to reflect a view on whether or not defendants in some class proceedings should have the right to participate as parties with rights of appeal in fee-fixing motions or applications. Much will depend on the facts of the particular case." In this case, the defendants attempt to distinguish *Parsons* based on the fact that they have "a clearly-defined contractual" interest in any residual Settlement Funds, and control of the Additional Settlement Funds. At para. 17 of *Parsons* the Court of Appeal recognized that the defendants had an interest in the fund surplus, but that the interest was "highly speculative and contingent." In my view, and I so find, the defendants' interest in the present case is similarly contingent and speculative. That the contingent, speculative interest is a contractual one does not sufficiently distinguish the facts of *Parsons*.

[27] Finally, Servier is committed to pay $3 million in respect of partial indemnity costs to the plaintiff class plus $1 million in compensation for the plaintiffs' litigation disbursements. It is noted parenthetically as well that class counsel was awarded some $626,000 in party and party (or partial indemnity) costs resulting from the plaintiffs' success in motions throughout the course of litigation. Servier has also agreed to pay all reasonable costs of the notice programs and the costs of settlement administration. Thus, the overall global benefits to the plaintiff class from the settlement approximates a potential total of some $45 million.

[28] The Settlement Agreement is subject to the express stipulation that there is not any admission on the part of any of the defendants as to liability. In particular, there is no admission that the defendants' products are the cause of any of the injuries for which the class members may claim.

[29] Payment from the Fund of a total $1 million is to be made to Canada's provincial and territorial health ministries in satisfaction of their subrogated claims. If monies remain in the fund at the expiration of the Administration Period (a period of five years commencing immediately upon the expiration of the Claim Period – being in turn the period of 15 months following first publication of the Approval Notice) the public health insurers are entitled to a share of such remaining monies.

[30] Medical experts have prepared a Medical Conditions List (Exhibit "E" to the Settlement Agreement) ("MCL"). A roster of Canadian physicians with the requisite medical expertise has been created to act as Claims Adjudicators. They will review a claimant's submitted Claim Package and determine whether the claimant is entitled to benefits from the related medical records. An appeal process allows a claimant to challenge in writing before the Court any final determination regarding a claimant's eligibility for benefits.

[31] The MCL stipulates specific eligibility criteria in respect of benefits for a range of levels of disease severity for claimants who have ingested the defendants' Products and who suffer from VHD. Benefits are accorded to a matrix which identifies varying levels of VHD severity. Product Recipients with PPH can also make claims pursuant to the eligibility criteria.

[32] The compensation values for Matrix level benefits are incorporated into the Matrix Grid (Exhibit "F" to the Settlement Agreement) and vary based on the level of disease severity and the Product Recipient's age at diagnosis.

[33] One level of benefit under the Settlement Agreement is for FDA Positive valvular regurgitation. There will be a *per capita* payment up to $2,500.00 in recognition of an individual FDA Positive Benefit, subject to an overall ceiling of $3 million for such claimants. An FDA Positive is a defined physiological condition. Product Recipients who qualify for an FDA Positive or greater VHD benefit and whose VHD worsens during the Administration Period can submit a progressive claim such that the initial benefit may be increased accordingly.

[34] The estimated class is one of approximately 160,000 members, being the estimated number of individuals who consumed the Products, whether or not any injury has been sustained.

[35] National Class Counsel advise they have been contacted by some 886 individuals to date, with 126 of that number providing information regarding injuries or diseases they believe are related to the ingestion of the Products. National Class Counsel estimates on the basis of an initial review that 69 of the 126 have provided medical information which allows a claim to be advanced. Of these 69 class members, 27 may qualify for FDA Positive Benefits with the remaining 42 perhaps qualifying for Matrix-level benefits because of having VHD or PPH.

[36] B.C. Class Counsel estimate 29 class members within the B.C. subclass suffer from PPH (15 primary and 14 secondary to VHD) and 86 class members who have VHD (including the 14 who appear to have PPH) with 45 of this number having FDA positive levels as defined in the MCL and the remaining 41 having Matrix level conditions as defined in the MCL.

[37] Class members asserting claims which are derivative to the claims of Product Recipients and are based upon the loss of care, guidance and companionship of the Product Recipient may be compensated within a range of $1,000 to $10,000 if the Product Recipient's claim is other than a FDA Positive of Matrix Level I claim.

[38] Claimants must submit a Claim Package (which includes a Claim form and Medical diagnosis form along with instructions) to the Settlement Administrator within the Claim Period.

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

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

> all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a

> standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation: *Dabbs v. Sun Life Assurance Co. of Canada, supra*, at 440 (Gen. Div.); H. Newberg, A. Conte, *Newberg on Class Actions*, 3d ed., looseleaf (Colorado: Shepard's/McGraw-Hill Inc., 1992) at 11-104.

[41] The representative plaintiffs for both the national class and for the British Columbia sub-class have approved the settlement. There were only two class members who have raised any objections or queries.

[42] In determining whether to approve a proposed settlement a court takes into its assessment several factors, including:

(a) the likelihood of recovery or likelihood of success if the action were to proceed to trial;
(b) the amount and nature of discovery, evidence or investigation;
(c) the settlement terms and conditions;
(d) the recommendation and experience of class counsel;
(e) the future expense and likely duration of on-going litigation;
(f) the number of objectors and the nature of objections;
(g) the presence of arms-length bargaining and the absence of collusion; and
(h) the degree and nature of communications by class counsel and the representative plaintiff(s) with class members during the litigation.

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

[43] As stated above, the litigation in respect of the subject class action has been a very lengthy process with extensive discovery evidence. Settlement was only achieved through the office of an effective mediator at the last moment with a nine-month trial scheduled to commence shortly.

[44] Class counsel had significant information about the case and a good understanding of liability and damages issues before embarking upon the settlement negotiation process. Class counsel's grasp of these issues was assisted by medical experts and by experienced American counsel, familiar with like litigation involving diet drugs in the United States.

[45] Given that the settlement was achieved only some three days before the scheduled trial, there was considerable trial preparation time required of class counsel. Some 20 expert reports had been exchanged.

[46] Given the information available to class counsel, they were well situated to negotiate, and ultimately to agree to a settlement for the resolution of the class action.

[47] There is sufficient evidence before the Court to allow it to exercise an objective assessment of the fairness of the proposed Settlement Agreement.

[48] There is the risk that if the matter had proceeded to trial, any judgment against Servier might exceed its exigible assets. Servier has $15 million in insurance coverage but that amount is subject to reduction for defence costs which, while unknown, might well have exhausted the coverage. Finally, there are uncertainties regarding any eventual judgment being effectively enforceable in France where the defendants' major assets are located.



[49] The function of the Court in reviewing a settlement is not to reopen and enter into negotiations with litigants in the hope of possibly improving the terms of the settlement. It is within the power of the Court to indicate areas of concern and afford the parties an opportunity to answer those concerns with changes to the settlement. However, the Court's power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement. See *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 at para. 10 (Gen. Div.); *Manual for Complex Litigation*, Third §30.42 (1995).

[50] Possible concerns, as raised by the Court during the course of submissions, include: that there will be sufficient funds to meet all proper claims, that sufficient and effective notice is given to prospective claimants, that the process for claiming is straightforward and expeditious, and that the latency period for the diseases or injuries alleged to arise from the ingestion of the Products has already passed such that all medical problems will be known by Product Recipients or, at least known well before the end of the Claim Period. Class counsel have provided explanations and assurances in respect of these queries.

[51] The Product Recipient class members with viable claims in this class action, such as Ms. Wilson and Ms. Greenlees, have suffered grievous and serious injury and illness (indeed, in some cases, death), because of the defendants' allegedly defective Products.

[52] The path to a resolution of the litigation has been long and extremely arduous. Taking into account all the circumstances, in my view and I so find, the Settlement Agreement is fair and reasonable and in the best interests of all the class members.

**The Motion for Approval of Class Counsel Fees**

[53] Class counsel (including Ontario, British Columbia and United States counsel) seek approval of class counsel fees of $13 million at this time. They do this with the express proviso that they will seek additional fees to a maximum of $5 million if at the conclusion of the Claim Period it appears "there will be sufficient funds remaining." About $626,000 in party and party (partial indemnity) costs (an estimated $500,000 toward fees and $126,000 for reimbursement of disbursements) has been paid by the defendants in the course of the proceedings of the litigation to date.

[54] Affidavit evidence in support of the motion by class counsel for the approval of fees includes the affidavits of Ms. Annelis Thorsen, Ms. Sheila Wilson, Mr. Dana Graves, and Ms. Beverley Greenlees.

[55] Public notice was given in advance of this hearing as to the quantum of fees being requested by class counsel. There has not been any objection by class members to the fees requested.

[56] A United States law firm, Lieff Cabraser Heimann & Bernstein, with considerable expertise in product liability class actions, has been joined in the application for class fees by the submission of the Canadian class counsel. The factum of class counsel of Rochon Genova includes the U.S. firm, together with the B.C. subclass counsel, Klein Lyons.

[57] I do not question the value of the contribution of the U.S. firm to the conduct of the class action and its successful conclusion. However, in my view, the U.S. firm is properly to be paid from the counsel fees awarded to class counsel. The U.S. law firm was not appointed as class counsel by the Court nor is there anything on record to indicate the firm is licensed to provide legal services directly to the public and to represent the class in court in Ontario.

[58] The U.S. firm has provided legal advice to class counsel and it is the responsibility of class counsel to meet their obligation of payment to the U.S. firm, whatever that commitment might be. The services provided by the U.S. firm are, of course, legal services indirectly for the benefit of the class but it is not an obligation of the class to pay this charge. Hence, my use of the term "class counsel" embraces only the counsel for the national class, Rochon Genova, and the counsel for the B.C. subclass, Klein Lyons.

[59] Class counsel assumed a truly daunting task in pursuing this class action given that it became quickly apparent the defendants were certain to challenge them in every way possible at every single step of the litigation process.

[60] The efficacy of the underlying three policy objectives to the *CPA* are seen in the litigation at hand. The first policy objective is 'access to justice.' The individual class members most certainly could not realistically have had access to justice if forced to pursue their claims individually. The short answer, in effect, of the defendants throughout the course of the litigation to the Canadian class members' claims (in respect of allegedly defective drugs marketed by the defendants in Canada) was that each claimant should come to France and individually sue the defendants.

[61] The second policy objective is to achieve 'efficiency in the use of resources' necessary to the litigation process. By combining all claimants in one class action there is obvious greater efficiency and economy for all participants (including the courts) in the adjudication of common issues. One cannot realistically imagine a nine-month trial for each of a vast multitude of claimants to determine issues common to all, in particular, whether the defendants' Products cause VHD or PPH.

[62] Finally, the third policy objective is 'behaviour modification.' There are limited public resources available to ensure that defective drugs are not brought into or maintained in the Canadian market upon it being realized there are possible problems. The public regulator is assisted greatly by the private sector through the *CPA* enabling class actions. In exchange for the possibility of sizeable legal fees through a class action on behalf of a private group of claimants, class counsel indirectly serves a public purpose. The drug industry knows that it is more likely to be held accountable for unlawful behaviour in the marketplace. Hence, it is more likely that drug companies will act responsibly in the first instance in researching, manufacturing and marketing drugs and in advising and disclosing to the public known risk factors in using drugs.

[63] As stated above, there was a plethora of pre-trial motions and appeals (about 50 in total). These included, to give a few examples, several motions by the defendants challenging jurisdiction, challenging the constitutionality of a national class action, asserting the purported 'blocking' provisions of Article 15 of France's *Civil Code*, and asserting non-compliance with the service rules of the *Hague Convention*. Court orders were also required for the discovery of representatives from the Health Protection Branch of Health Canada.

[64] Class counsel were obliged to bring several motions to add defendants as knowledge of the defendants' large corporate empire gradually unfolded. To gain meaningful access to documentary production, some seven motions were necessary for answers to undertakings given and for answers which had been improperly refused.

[65] There was voluminous documentary production. The initial production was reportedly some 2,895 documents without an index nor a searchable database or electronic coding. Some 80,000 individual documents were reportedly delivered by the defendants unbound (albeit each separated by a blue sheet of paper) on April 2002 in 122 banker's boxes without being organized according to chronology or subject matter. A later agreement between counsel for production of electronic copies with a searchable index was in fact reportedly not searchable by keyword.

[66] Class counsel was required to bring a motion to force the release of relevant documents produced in the U.S. Multi-District Litigation *Re: Diet Pills*. Another motion was required to gain access to the non-privileged documents in the defendants' electronic database of over 300,000 documents.

[67] Class counsel were required to develop a database maintained by a California-based document management company.

[68] The oral discovery took place mainly in France. Discovery had to be conducted to a considerable extent before there was any meaningful production. Examinations for discovery took an approximate total of 11 weeks. There were hundreds of thousands of pages of production. Court orders were required for consular authority to gain access to the release of documents.

[69] There were extreme difficulties in piercing the corporate maze of the defendants' business empire consisting of dozens of privately-held companies whose interconnectivity was not readily apparent. An order was required to force the defendants to produce a meaningful organizational chart identifying the various corporate entities involved in bringing the Products to the Canadian market. This ultimately resulted in the plaintiff class moving successfully to add 19 new defendants.

[70] Two excerpts from decisions of this Court in the course of the litigation are illustrative, as examples, of the nature of the litigation faced by class counsel. The first is from *Wilson v. Servier*, [2001] O.J. No. 4717 at paras. 22-23 (Sup. Ct.):

> It is fundamental to the administration of justice in Canada that plaintiff consumer users of an alleged defective product which allegedly has caused very severe health problems (and allegedly death for some class members) have a

determination of the common issues on the merits through their certified class action in a timely way. Even if they are successful in the trial of the common issues there will then remain a lengthy process to determine individual issues.

Our society's concept of justice dictates that fairness is inherently fundamental to our court processes. Timeliness in the determination of claims on their merits is critical to achieving fairness to the parties. Justice must be done and it must be seen to be done in a timely way and manner. It is prejudicial to plaintiffs to deny them fairness through further substantial delays by granting Servier's motion. To grant Servier's motion would inevitably have the result of delaying and frustrating a determination of the common issues on their merits. A basic objective of the judicial system is access to justice. Indeed, that is an express policy objective underlying the CPA [citation omitted]. Access to justice means access to timely justice. A fair judicial process requires much more than simply an endless war of attrition waged by defendants with considerably greater resources than an individual representative plaintiff and the plaintiff class.



[71] The second excerpt is from *Wilson v. Servier*, [2003] O.J. No. 157 at paras. 31-33 (Sup. Ct.):

The record establishes that the defendants resist providing any fulsome understanding as to the role of Dr. Servier and the nature of the vast and complex structure of the Servier enterprise which manufactured and marketed the subject diet drugs sold in Canada. The defendants have volunteered nothing and have confronted the plaintiff with a confusing, complex and extensive corporate enterprise which is largely situated in France. Plaintiff's counsel has been forced to comb through more than 100,000 documents and endure a multitude of discoveries with many objections, simply to try to establish incrementally the nature of the Servier enterprise and the structure of decision-making in respect of the subject diet drugs. See (2000), 50 O.R. (3d) 219 at 228 (Sup. Ct.), leave to appeal denied (2000), 52 O.R. (3d) 20, leave to appeal to S.C.C. denied September 6, 2001; [2002] O.J. No. 1002 (Sup. Ct.) at para. 10.

The approach of the defendants could have been to elucidate voluntarily and in a straightforward manner upon the true nature of the Servier enterprise and its relationship to the subject diet drugs in Canada, and proceed to meet the issues in this class action directly on their merits.

However, the defendants have chosen to resist the plaintiff at every stage in this proceeding on every procedural and asserted legal basis imaginable, through seemingly endless motions. The defendants have attempted to try to throw up an impenetrable defensive wall whereby plaintiff's counsel has been forced to expend extensive resources and time simply to attempt to determine the factual history and corporate structure underlying the manufacturing and marketing of the subject drugs in Canada.

[72] The technical subject matter involved emerging, complex and unsettled areas of medicine and medical science. Topics requiring expert reports included: whether epidemiological principles supported a conclusion of causation between the use of the Products and the development of PPH and VHD; the incidence, diagnosis, latency period, treatment options and prognosis for patients suffering form PPH or VHD; the issue of progression in the disease process of VHD; the applicable regulatory and industry standards relating to adverse reaction reports and whether the defendants complied with such standards; whether there was adequate disclosure of known risks associated with use of the Products and whether potential benefits from the use of the Products outweighed the attendant risks.

[73] The fixing of counsel fees is governed by sections 32 and 33 of the *CPA*. The essential criterion is whether the requested fees are fair and reasonable.

[74] Factors to consider include the time expended by class counsel, the legal and factual complexity of the matters dealt with, the risk of success or failure assumed by class counsel in pursuing the litigation, the degree of skill and competence demonstrated by class counsel, the degree of responsibility assumed by class counsel, the results achieved, the benefits achieved for class members through a settlement, the importance of the matter to the class members, and the client's expectation as to the quantum of fees to be paid.

[75] The fairness and reasonableness of the requested fee is commonly measured by several standards. One is the use of a multiple of the base fee for the docketed time expended, that is, for the opportunity cost to class counsel of not being able to bill for his/her time as would be done in the normal course in respect of a fee paying client.

[76] The retainer contingency fee agreement of National Class Counsel with Ms. Wilson in the first instance set forth a 25 percent fee plus any award of costs, disbursements and applicable taxes. Ms. Wilson has signed a revised retainer authorizing an award of legal fees to class counsel in accordance with the amount now sought in total.

[77] The retainer contingency fee agreement with Ms. Greenlees in respect of the B.C. subclass provides for 40 percent of the recovery; however, B.C. Class Counsel have agreed to request fees on the same basis as National Class Counsel. That is, class counsel as a single group, seek for fees 25 percent of the settlement amount of $40 million plus applicable taxes plus the $3 million in the partial indemnity costs and $1 million in disbursements contributed by the defendants, plus an additional $5 million if there are funds which remain after all claims are met.

[78] Rochon Genova state that they have docketed time of some 14,800 hours (this includes 2,000 hours in respect of discovery, 2500 hours in reviewing documentary productions, 5,500 hours in respect of court appearances and some 1,500 hours in respect of settlement negotiations and drafting) resulting in docketed fees of about $5 million. Rochon Genova spent some 11 weeks in examinations for discovery of representatives of the defendants in France, Canada and Belgium. They say they have disbursements of $720,883.32, inclusive of G.S.T. They advise that their American legal advisers, Lieff Cabraser, have docketed time of some 3,661.5 hours with docketed fees of about CDN $1.5 million and disbursements totaling $465,926.61.

[79] The defendants question two aspects of the base fee as calculated by Rochon Genova. First, they say that 700 hours of time up to the successful certification motion was not included in an earlier Bill of Costs given to defendants' counsel. Rochon Genova answer that the earlier lesser calculation was an error. Second, defendants question the hourly rates employed, asserting that 2004 rates are used retrospectively.

[80] As an aside, it is noted that defendants' counsel do not volunteer their own docketed time, fees and disbursements in support of this class action. They are, of course, under no obligation to do so. Yet their own fees would offer an additional rough standard by which to measure the reasonableness of class counsel's base fee and requested counsel fees.

[81] B.C. Class Counsel put their docketed time at some 8700 hours, including more than 3000 hours by Mr. Gary Smith of the Klein Lyons firm. The defendants say that these rates are higher than prevailing market rates. They also assert that some of the time charges relate to administrative matters for which costs have been awarded and paid.

[82] The defendants hired KPMG Forensic Inc. ("Forensic") to thoroughly analyze the charges comprising the asserted base fee by class counsel. That analysis would reduce the base fee to $3,005,681 from the base fee calculated by Rochon Genova of $4,997,884. Forensic's analysis would reduce the base fee of Klein Lyons from $3,753,270 to $2,452,811. Thus, the two base fees would be reduced in the range of some 35 to 39 percent by the analysis of Forensic.

[83] Taking the combined reduced base fee from the analysis of Forensic of $5,458,492 one is in all events left with a very substantial base fee. Moreover, this omits a notional revised base fee of CDN $1,349,732 as calculated by Forensic for the value of the contribution by Lieff Cabraser.

[84] It is not necessary for me to deal with the differences in the calculation of the base fee and determine which figure is more probably accurate. I say this because, in my view, the counsel fee approved in this case, taking into account all the circumstances (putting aside for the moment the factor of the total amount of recovery), could certainly justify a multiplier of 4 times the base fee.

[85] It is enough to say that the record establishes a base fee of class counsel of at least $5,458,492. The defendants themselves submit that a reasonable base fee would be this figure of $5,458,492.

[86] As class counsel are seeking maximum fees of $18 million, if approval of this amount were to be granted, it would imply a multiplier of only 3.3 upon the base fee (*i.e.*, 3.3 times $5,458,492).

[87] The defendants also have done an analysis of the claimed disbursements. The defendants take the position that $2,619,536 represents the total reasonable disbursements (this includes the notional base fee of $1,349,732 of Lieff Cabraser being treated as a disbursement).

[88] The defendants propose a formula for class counsel fees which would cap the overall fees at a maximum of $9.4 million. The defendants propose that class counsel receive an interim

payment of fees at this time of $6.4 million, $2.6 million for disbursements and the right to apply for additional fees when the 'take-up' by claimants is known. The defendants would fix such additional fees at an amount equal to the lesser of 10 percent of the settlement take-up by claimants or $3 million. By this approach, the maximum in additional fees would be $3 million.

[89] By the defendants' formula, the maximum possible fees of $9.4 million would imply a multiplier of only 1.72 on the base fee (said by the defendants to be reasonable) of $5,458,492. If the take-up was less than $30 million the effective multiplier would be even less.

[90] The defendants submit in their factum that "even when fees are awarded on the basis of a fixed sum or a multiplier basis, the percentage of the potential fee awarded as compared to the quantum of the settlement or judgment becomes a significant factor in determining the fee awarded" (*Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 at 425). Certainly, the amount of the settlement or judgment is one important factor to be taken into account. If the base fee as multiplied constitutes an excessive portion of total recovery, the multiplier may be too high. As I have said above, leaving this single factor of total recovery aside, a multiplier of 4 is appropriate in this case, given all other factors.

[91] But other significant factors must also be kept in mind given the idiosyncratic nature of this class action. Class counsel could not reasonably estimate the total number of class members actually injured by ingestion of the defendants' diet drugs. Even if it is determined ultimately it is only a relatively few of the total users who have been injured, their injuries are severe (including death in several instances) and these persons would not have achieved any redress at all but for the efforts of class counsel.

[92] Finally, the very extensive cost in time and resources in respect of this prolonged litigation has been largely because the defendants refused to deal with their customers' claims (notwithstanding cogent evidence suggesting a foundation to the claims) until just immediately before trial, but rather 'circled the wagons' and imposed every hurdle imaginable (as was their *legal* right, if not the preferred *moral* position) at every step of the legal process to block the claimant customers and their counsel in seeking to gain justice.

[93] As an aside, I mention that one can argue that any provider for profit of prescription drugs to consumers in the marketplace, as a responsible corporate citizen, should want to see a neutral, independent process established immediately upon any plausible medical problems surfacing, whereby the medical/scientific issues of causation and effect are addressed expeditiously, seriously and authoritatively with an administrative/arbitral regime then established to provide appropriate compensation if suggested by the results of the medical/scientific inquiry.

[94] It is hardly an appropriate answer for an off-shore multinational, global enterprise drug provider to say, in effect, to individual Canadian consumers 'if you claim our drug has seriously injured you, come to France and prove it.' Nor is it arguably an appropriate answer for the Canadian Government, as the public health regulator through Health Canada, to remove a drug from the market when serious medical problems for consumers surface, and not then also require the drug seller to agree to an appropriate mechanism to address immediately in a cost-effective and fair manner the consequences of the medical problems left in the wake of the marketing.

[95] National Class Counsel requests a separate payment for Ms. Wilson from the Settlement Fund of $15,262 as compensation on a *quantum meruit* basis based on some 230 hours at $65 per hour. I do not dispute Ms. Wilson's significant contribution to the carriage of this class action. However, National Class Counsel can deal with this add-on claim by making the requested payment to her out of their pocket.

[96] Class counsel have stipulated that there will not be any additional fees payable by class members for their services beyond those awarded pursuant to the motion at hand. In particular, this means that even if there might be separate contingency fee agreements with individuals who are now in the B.C. subclass there will be no extra fees charged to such individuals. (That is, there will be no so-called double-dipping.)

[97] The individual class members have a maximum fund available for their claims of $43 million (provincial health authorities receiving $1 million from the $40 million Fund). I consider the $3 million added in the settlement for partial indemnity of costs and the $1 million added for partial indemnity of disbursements to be properly considered as part of the global fund available for class members.

**Disposition**

[98] In my view, and I so find, class counsel fees in the amount of $10 million plus applicable G.S.T. of $700,000 plus $2,619,536 (inclusive of any taxes on disbursements) are approved and to be paid at this time. (The disbursement calculation includes $619,699 allocated for Rochon Genova, $203,566 for Klein Lyons and $1,796,271 to Rochon Genova on account of Lieff Cabraser.) (The party and party costs awarded throughout the litigation process, about $700,000, are apart from, and over and above, the $10 million in fees awarded. However, the $4 million in partial indemnity costs paid as part of the settlement are credited to the global Fund (or considered otherwise, are credits against the $10 million in fees and $2,619,536 for disbursements hereby awarded.)

[99] It is appropriate for the Court to know how the claims process has worked for claimants, the actual take-up by claimants, and the overall achievement of the settlement for class members before determining with finality the full and final amount of class counsel fees.

[100] Without implying any appropriate overall final quantum of class counsel fees at this time, I will remain seized of the motion for approval of class counsel fees. The hearing is adjourned for a continuance to a date to be fixed by the Court. A further hearing on the matter is appropriate after the Settlement Administrator, Crawford Class Action Services, has provided a comprehensive report on the implementation of the settlement. Such report should not be provided until after at least a year following the expiry of the Claim Period *i.e.*, until after at least a full year has been completed in the Administration Period. Given the reversionary interest of

Servier in respect of the settlement monies, the defendants are permitted to make such submissions as they consider appropriate at the continued hearing to assist the Court in its determination of the appropriate overall final quantum of class counsel fees.

Cumming J.

**Released: March 21, 2005**

**COURT FILE NO.:** 98-CV-158832
**DATE:** 20050321

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**



**B E T W E E N:**

SHEILA WILSON

Plaintiff

**- and -**

SERVIER CANADA INC., LES LABORATOIRES SERVIER, SERVIER AMERIQUE, INSTITUT DE RECHERCHES INTERNATIONALES SERVIER ("I.R.I.S."), SCIENCE UNION ET CIE, ORIL S.A., SERVIER S.A.S., ARTS ET TECHNIQUES DU PROGRES, BIOLOGIE SERVIER INSTITUT DE DEVELOPEMENT ET DE RECHERCHE SERVIER, ORIL INDUSTRIE, BIO RECHERCHE SERVIER, INSTITUTO DI RICERCA, IDUX, BIOPHARMA ARTEM, SCIENCE UNION S.A.R.L., LABORATOIRES SERVIER INDUSTRIE, I.R.I.S. ET CIE DEVELOPEMENT, INFORMATION SERVIER, SERVIER MONDE, SERVIER INTERNATIONAL, I.R.I.S. SERVICES S.A.R.L., ADIR, SERVIER R&D BENELUX, DR. JACQUES SERVIER and BIOFARMA S.A.

Defendants

---

**REASONS FOR DECISION**

---

Cumming J.

Released: March 21, 2005