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TAB 4

CLASS ACTIONS
- A BOOTCAMP FOR LITIGATORS

Professionalism Issues in Class Action Litigation

Monique Jilesen
Lenczner Slaght Royce Smith Griffin LLP

Christopher Naudie
Osler, Hoskin & Harcourt LLP

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Ethical Issues in Class Actions – Defence Perspective

By Monique Jilesen and Julia Brown[1]

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[1] Monique Jilesen and Julia Brown are lawyers at Lenczner Slaght. They were assisted by Rubal Bhadu, student-at-law.

I. OVERVIEW

Much of the commentary in Canada on the ethical issues which arise in the class action context relate specifically to plaintiff's counsel. Defence counsel should nevertheless be aware of the unique issues which can and do arise for defence counsel in this practice. In addition to the ethical issues which can arise in any litigation, class actions give rise to unique ethical issues for defence counsel to consider. This paper addresses two issues from the defence perspective.

A. Communications with Class Members

The Rules of Professional Conduct (Rule 6.03(7) and (9)) make it clear that a lawyer shall not communicate with a person or organization who is represented by a lawyer. In the normal course of litigation practice, rarely do ethical issues arise relating to communications with parties to litigation. Counsel should invariably communicate through counsel, in accordance with the Rule.

In class actions where the defendant may have an ongoing relationship with the class members, communications with the class members about the subject matter of the litigation may be necessary. Determining what communications are appropriate and whether those communications require court approval raises significant issues for defence counsel and their clients.

Communication Prior to Certification

The parameters of permitted contact with putative class members prior to certification for defence counsel depend, in part, on how the relationship between class members and class counsel during this period is defined. The law is settled that from the moment of certification, the representative plaintiff's counsel becomes counsel to the class, even during the opt-out period, triggering the application of Rule 6.[2] Unfortunately, there is uncertainty with respect to the nature and extent of the relationship between class counsel and putative class members pre-certification.

In *Lundy v Via Rail Canada Inc*., Justice Perell considered the nature of the relationship between putative class members and proposed class counsel in the context of settlement offers made by the defendant directly to certain putative

[2] See e.g. *Durling v Sunrise Propane Energy Group*, 2012 ONSC 6328 at para 54; *Ward-Price v Mariners Haven Inc.* (2004), 71 OR (3d) 664 [*Ward-Price v Mariners*].

class members before certification.[3] Though the offers were made by the defendant, rather than defence counsel, Justice Perell's comments are nevertheless instructive as they speak to principles which apply more broadly to communications with putative class members.

In *Lundy*, Justice Perell reaffirmed his view of the relationship between putative class members and proposed class counsel as set out in *Fantl v Transamerica Life Canada*, a case affirmed by the Divisional Court. In *Fantl*, Justice Perell stated that, "There is a *sui generis* relationship between the solicitor of record and the proposed class members, and the Court has the jurisdiction to protect the interests of the proposed class members."[4] This *sui generis* relationship places certain professional obligations on counsel to both the putative class and to the defendant.

In *Lundy*, Justice Perell identifies a danger that communications between the defendant and putative class members may interfere with the "nascent lawyer and client relationship;" may persuade putative class members against participating in the action; and may discourage the prosecution of the class action.[5] Justice Perell equally acknowledges that communications between the defendant and putative class members may be lawful, in the normal course of business, appropriate, and may in fact promote the aims of the *Class Proceedings Act, 1992*[6] by promoting access to justice.[7] Justice Perell found the offers made by the defendant in *Lundy* to be just such communications.

Justice Perell states that communications to putative class members ought not, in general, to be restricted.[8] He identifies three reasons for which regulating communication with putative class members is problematic. Briefly, these are:

- The legal nature of the relationship between most, if not all, of the putative class members and counsel for the representative plaintiff will be unclear pre-certification, as some members may have no interest in being part of the class;[9]

[3] 2012 ONSC 4152 [*Lundy*].
[4] *Fantl v Transamerica Life Canada*, [2008] OJ No 1536 (Sup Ct) [*Fantl*], aff'd [2008] OJ No 4928 (Div Ct); aff'd 2009 ONCA 377.
[5] *Ibid* at para 7.
[6] SO 1992, c 6 [*CPA*].
[7] *Lundy*, *supra* at para 8.
[8] *Ibid* at para 35.
[9] *Ibid* at para 14.

- Some putative class members may have a solicitor-client relationship with the proposed class counsel, or with other lawyers: there will be a diversity of legal relationships present prior to certification; and,[10]
- It will not be possible to ascertain the attitude of each putative class member towards participation in the class action: some putative members will not wish to participate, and no true solicitor-client relationship will ever exist between them and class counsel.[11]

However, where communications to a class member are inaccurate, intimidating, coercive or made for an improper purpose the court will intervene.[12]

These issues make it difficult for defence counsel to be certain whether it is permissible to communicate directly with putative class members. As Justice Perell points out, there are no special provisions for professionalism and ethical problems of class action under the Rules of Professional Conduct.[13] However, he suggests that Rules 6.03(7), 6.03(7.1), and 6.03(8), prohibiting communications with a represented person, as well as Rule 2.04(14), delineating obligations towards self-represented persons, apply as usual.[14]

Though Justice Perell concedes that prior to certification, there cannot be, strictly speaking, a lawyer-client relationship between putative class members and putative class counsel, he is of the view that the *Class Proceedings Act, 1992* requires there to be a *sui generis* relationship between the proposed class lawyer and potential class members.[15] The extent and nature of this relationship is not explained, leaving it unclear whether this *sui generis* relationship alters the propriety of defence counsel communicating directly with putative class members.

Instead, Justice Perell canvases previous decisions to conclude that:

[10] *Ibid* at para 15.
[11] *Ibid* at para 16.
[12] *Ibid* at para. 35
[13] *Ibid* at para 22.
[14] *Ibid* at paras 22-23.
[15] *Ibid* at para 31. See also *Fantl*, *supra* at paras 73-80; *Heron v Guidant Corp*., [2007] OJ No 3823 at para 10 (Sup Ct), leave to appeal ref'd [2008] O.J. No. 48 (Div Ct).

- The court may exercise its discretion and impose conditions on communications where the integrity of the class proceeding is at issue;[16]
- Orders restricting communication by the defendant to class members are extraordinary, and appropriate only where communications are being made with improper purposes;[17]
- Defence counsel may contact putative class members pre-certification, but cannot make misleading statements or try to convince them to act adversely to their interests; and,[18]
- Settlement discussions pre-certification are permissible, but the court may order that the defendant give notice of the commencement and nature of the class proceeding to the putative class member.[19]

An example of a case in which defence counsel's communication with putative class members was considered to be inappropriate is *Vitelli v Villa Giardino Homes Ltd*.[20] In this case, the representative plaintiff brought an action against the builder, vendor and architects of a residential condominium building. A lawyer hired by the defendant visited condominium unit holders prior to the certification of the motion. The lawyer made enquiries on behalf of the defendants and requested them to sign a petition which included a declaration that "I have no desire to be involved in the law suit in any way."[21]

Justice Cumming held that:

- While defence counsel may contact putative class members pre-certification to gather evidence, they may not make misleading statements or try to convince them to act adversely to their interests;[22]
- The defendants may continue to communicate in the ordinary course of business with members of the class, as long as they do not infringe on what some courts have characterized as the constructive

[16] *Lundy*, *supra* at para 34.
[17] *Ibid* at para 35.
[18] *Ibid* at para 38.
[19] *Ibid* at para 39.
[20] 2001 CanLII 28067 (Ont Sup Ct) [*Vitelli*].
[21] *Ibid* at paras 15-16.
[22] *Ibid* at para 19.

> attorney-client relationship that exists between counsel for class representatives and the members of the class[23]

Pursuant to his remedial discretion under section 12 of the *CPA*, Justice Cumming restrained the defendants from soliciting the signing of the petition and required that any agents of the parties communicating with potential class members should expressly disclose if they are counsel and shall declare that they are working exclusively in the interests of the class members or the defendants, as they case may be.[24]

In *Pearson v Inco*,[25] Justice Nordheimer considered *Vitelli* and made it clear that there is no solicitor client relationship prior to class certification and that generally proposed class members should be treated no differently than any other non-party to an action:

> My analysis of this issue and of the existing authorities leads me to the conclusion that counsel for the proposed representative plaintiff does not stand in a solicitor-client relationship, whether constructive or otherwise, with the proposed class members. **I further conclude that members of the proposed class ought not to be treated any differently [from how] non-parties to any other action would be treated subject to one exception. The exception is where either the plaintiff or the defendant purports to communicate, or otherwise deal, with members of the proposed class in a fashion, and to a degree, that would visit an injustice on those persons or would otherwise undermine the integrity of the class proceeding itself.** [26]

Justice Nordheimer's characterization of members of a proposed class as being "like anyone else"[27] differs fairly significantly from Justice Perell's "*sui generis*" analysis in the more recent *Lundy* decision. The possible consequences of this difference are considered below.

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[23] *Ibid* at para 19, quoting Herbert B. Newberg and Alba Conte, *Newberg on Class Actions*, 3rd ed (McGraw-Hill, 1997) at 15-41 [Newberg].
[24] *Ibid* at para 47.
[25] 2001 CanLII 28084 (Ont Sup Ct) [*Pearson*].
[26] *Pearson*, at para 18 [emphasis added].
[27] *Ibid* at para. 18

1176560 Ontario Ltd. v Great Atlantic & Pacific Co. of Canada Ltd. dealt with a situation in which the defendant's pre-certification conduct attracted condemnation from the court. *A&P* was a proposed class action between the defendant franchisor, A&P, and its franchisees.[28] The proposed representative plaintiff brought a motion seeking to restrict the defendant's communication with class members, contending that the defendant was seeking to subvert the class proceeding process by intimidating the proposed class members.[29] The conduct complained of involved:

1. Monitoring of franchisee legal fees;
2. Rent increases on franchisees who refused to sign a release in A&P's favour;
3. Sending its statement of defence and counterclaim to franchisees without including the plaintiff's reply and defence to the counterclaim; and,
4. The president of A&P's franchise operations expressing his intention to personally deliver new Franchise Agreements and Releases to franchisees.[30]

In deciding to grant the extraordinary relief sought by the plaintiff, Justice Winkler (as he then was) expressly did not consider the ethical issues arising from A&P's conduct.[31] He did, however, find that

> The class members are being asked to effectively 'opt out' of the class proceeding by A&P prior to certification, through the execution of the releases, without the benefit of the information that would be provided in a certification notice …to ensure the integrity of the opt out process, absent class members must be fully informed of the issues in the proceeding and the impact on them as individuals.[32]

He further found that the defendant's actions constituted conduct that was "intimidating, threatening, and coercive, and in consideration of the information vacuum, sufficiently misleading to vitiate any notion that the franchisees

[28](2002), 62 OR (3d) 535 (Sup Ct) [*A&P*], aff'd 70 OR (3d) 182 (Div Ct).
[29] *Ibid* at 555.
[30] *Ibid*.
[31] *Ibid* at 559.
[32] *Ibid* at 561.

executing releases are doing so on an informed basis."[33] Moreover, given the defendant's relationship with the putative class members, as the franchisor of their franchises, he found A&P's conduct to be especially egregious.[34] Justice Winkler took particular exception to the imbalance of information between the franchisor and franchisee, stating that,

> Given the absence of information provided to the franchisees by A&P, it would be impossible for the franchisees to make an informed decision as to whether or not to sign the release from this lawsuit, especially in light of the misleading nature of the recital and exculpatory clause in the release.[35]

An interesting British Columbia case dealing with ongoing pre-certification communication between a defendant employer and class member employees, rather than between franchisor and franchisee as in *A&P*, is *Dominguez v Northland Properties Corp (c.o.b. Denny's Restaurants)*.[36] This class action was brought by temporary foreign workers against their employer, Denny's Restaurants, for overtime pay and failure to pay promised airfare reimbursements.[37]

In an unreported decision in this case, the representative plaintiff brought a motion seeking an order restricting communication by the defendant with class members. The court's summary of its decision on this motion illustrates the fraught nature of correspondence between defendant employers and class member employees:

> During the course of these proceedings, and given the continued close working relationship between Denny's and most of the class members, the nature of certain communications by Denny's management employees to the putative class members became an issue. In April 2011, Herminia Dominguez, as representative plaintiff, sought relief from the court to restrict communications by Denny's with respect to the putative class members in order to avoid improper communications that

[33] *Ibid* at 562.
[34] *Ibid*.
[35] *Ibid* at 564.
[36] 2012 BCSC 539 [*Dominguez*].
[37] *Dominguez v Northland Properties Corp. (c.o.b. Denny's Restaurants)*, 2013 BCSC 468 [*Dominguez Settlement*].

> were having or might have the effect of intimidating or coercing them from participating in these proceedings. Ultimately, on April 19, 2011, a consent order was entered into…
>
> …Further issues arose following certification because of interactions between certain of Denny's management employees and the class members. The evidence from various class members suggests that these management employees communicated with them for the purpose of dissuading them from participating in these proceedings. More specifically, they allege that it was suggested to them that they should decide to opt out of these proceedings rather than run the risk of losing their employment with Denny's or otherwise losing support from Denny's in relation to their work permits or in obtaining permanent residency status in Canada.[38]

Amidst the consent orders sought and given regulating the defendant's communications with class members, the representative plaintiff brought a motion seeking disclosure by the defendant of putative class members' addresses, in order to provide them with notification. The court allowed the motion, finding that the defendants were likely to have up-to-date information, given their relationship with the putative class members.[39] The court found that it was preferable to have class counsel mail out the notices, given the "somewhat delicate relationship between the defendants and the class members who are still employed by them."[40] The court in *Dominguez* regulated correspondence between the defendant and the putative class members with an eye on their ongoing employer-employee relationship.

Dominguez is an interesting case in that the defendant engaged in communications with class members that, if true, could fairly be characterized as intended to undermine the class proceedings. The settlement decision in *Dominguez* states that a contempt proceeding was brought by the representative plaintiff against Denny's in order to address its persistent intimidation of class members, but was not pursued, as Denny's agreed to enter into mediation. At the settlement hearing, Denny's denied any wrongdoing by its employees. Perhaps for this reason, the court did not make the strongly critical remarks that

[38] *Ibid* at paras 11, 13.
[39] *Ibid* at para 75.
[40] *Ibid* at para 73.

might have been expected for the defendant's alleged violation of the consent orders and failure to abide by the principles for communication with putative class members established in previous cases. However, the court did invalidate the opt-out notices received by class counsel on grounds including the class' likely fears of retribution and the chilling effect the firing of one of the class members likely had on other class members' involvement in the proceedings.[41]

A&P and *Vitelli*, and to a lesser degree *Dominguez*, are instances in which the defendant conduct that might be questionable regardless of the class action proceedings has been condemned and constrained by the courts. The more problematic question is whether, or to what degree, Justice Perell's more recent characterization of the relationship between proposed class counsel and putative class members as being *sui generis* will affect defence counsel's interactions with putative class members. Practically speaking, his comments ought not to impact the general rule stated by Justice Nordheimer in *Pearson,*[42] though his comments may give pause to prospective class counsel, which now owes potential clients vague and unclear duties. For defence counsel, so long as the ethical obligations required when dealing with unrepresented and represented plaintiffs are adhered to, and so long as communications are not made for improper purposes,[43] it would appear that pre-certification communication remains acceptable.

Communication Post Certification

The basic principle for communications between defendant counsel and class members post-certification is that they must be directed through class counsel, as class counsel has a solicitor-client relationship with all class members.[44] However, in situations where an ongoing relationship exists, such as employer-employee, or franchisor-franchisee, the courts have contemplated direct communication between defendants and class members.

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[41] *Ibid*.
[42] I.e. "that members of the proposed class ought not to be treated any differently [from how] non-parties to any other action would be treated subject to one exception. The exception is where either the plaintiff or the defendant purports to communicate, or otherwise deal, with members of the proposed class in a fashion, and to a degree, that would visit an injustice on those persons or would otherwise undermine the integrity of the class proceeding itself." *Pearson, supra* at para 18.
[43] See e.g. the *Lundy* factors, *supra* at paras 34-39.
[44] See e.g. *Durling v Sunrise, supra*; *Ward-Price v Mariners, supra*.

Justice Strathy's decision in *1250264 Ontario Inc. v Pet Valu Canada Inc.* illustrates the difficulties that can attend post-certification communication.[45] In *Pet Valu*, the strongly adversarial nature of the proceedings between the class members (franchisees) and the defendant (franchisor) caused the court to intervene with respect to the necessary ongoing communications between the parties. Justice Strathy recognized the need for Pet Valu to continue communicating with its franchisees, given their ongoing commercial relationship. However, both he and the parties were concerned that there was a danger that unregulated contact between the parties during the opt-out period would undermine the integrity of the opt-out process, through unfair, misleading or oppressive communications by either party.[46] Justice Strathy was of the view that the ongoing nature of the class' relationship with the defendant increased the risk that such communications might occur.[47] Justice Strathy outlined parameters for communication aimed at decreasing this risk, requiring correspondence to class members to be approved by the court.[48]

In another Pet Valu decision, Justice Strathy was asked to make a declaration that certain Buyback Transactions between Pet Valu and individual franchisees, entered into post-certification, were valid.[49] Though direct communication between the defendant and the franchisees is not explicitly addressed, the facts underlying the motion are such that direct communication must have occurred. However, it should be noted that the communications likely would have been initiated by franchisees, and would have been made directly to the defendants, rather than to defence counsel.

The Buyback Transactions in question had been entered into following the certification of the class action. The buybacks were a regular part of Pet Valu's business: where franchisees were unable to find purchasers for their franchises, but wished to terminate their business relationship with Pet Valu, Pet Valu had a policy of buying back the franchisee's business. As part of this interaction, franchisees were required to sign a release. Given the pending class action suit to which the franchisees were party, the release affected their rights as class

[45] 2012 ONSC 4317 (Sup Ct) [*Pet Valu*], rev'd on other grounds 2013 ONCA 279.
[46] *Pet Valu*, *supra* at paras 14-15.
[47] *Ibid* at para 15.
[48] *Ibid*.
[49] *1250264 Ontario Inc. v Pet Valu Canada Inc.*, 2011 ONSC 3871 (Sup Ct) [*Pet Value 2011*].

members. This situation was complicated by the deferral of the distribution of the notice of certification, which meant that the franchisees were not fully informed regarding the class action.[50]

Class counsel urged Justice Strathy to follow Justice Perell's decision in *Berry v Pulley*, in which Justice Perell states unequivocally that, "an individual litigant loses the right to settle the action when he or she is a class member in a class proceeding."[51] Justice Strathy declined to do so, stating that the case at hand was readily distinguishable from *Berry v Pulley*, as no settlement offer had been made directly to a cohort of class members, and as the Buyback Transactions were not explicitly a settlement of the claims in the class action (though the releases would have impacted the ability of class members to participate in the class actions).[52] Justice Strathy went further, clearly keeping the door open for settlements post-certification, stating that, "A case might be made … that an individual class member should be permitted to settle individually with the opposing party, if the court is satisfied that there is no unfairness to the individual or to the class at large and no threat to the integrity of the class proceeding."[53]

Though Justice Strathy did not find that the franchisees were necessarily precluded from entering into individual settlements with Pet Valu post-certification, he declined to provide the declaratory relief sought, on a number of grounds, including the possible mootness of the issue, should the franchisees choose to opt-out of the class action following receipt of the notice.[54] Justice Strathy stated, "It is possible that, in the context of such a motion at the instance of the franchisee, the court could grant appropriate declaratory relief to give commercial certainty to both the franchisor and the franchisee with respect to that particular transaction."[55]

Whether and for what purpose a defendant may communicate with a class member post-certification is therefore uncertain. In light of the solicitor client relationship that class counsel was is in at this stage, any communications by defence counsel (as opposed to the defendant itself) which could in any way

[50] *Ibid* at para 6.
[51] *Berry v Pulley*, 2011 ONSC 1378 (Sup Ct).
[52] *Pet Value 2011*, *supra* at para 35.
[53] *Ibid* at para 37.
[54] *Ibid* at paras 39-43.
[55] *Ibid* at para 43.

relate to the litigation will be prohibited by Rule 6. Justice Perell has stated that post-certification settlement with individual class members is not permissible. Justice Strathy, by contrast, contemplates the possibility of permitting such settlements to occur. In order to comply with defence counsel's obligations not to communicate with a party who is represented by counsel, it is not clear how post certification settlement communications could occur with defence counsel's involvement unless the settling party was independently represented.

B. Settlements

While settlement agreements with individual putative class members raise the communication issues discussed above, settlement agreements entered into through negotiations with class counsel raises an independent ethical issue.

Settlements in class actions require approval from the court.[56] In *Dabbs v Sun Life Assurance Co of Canada*, Justice Sharpe (as he then was) stated that the standard for approval of settlements is whether the settlement is "fair, reasonable and in the best interests of those affected by it."[57]

Justice Sharpe suggested several factors to be considered in determining whether the court ought to approve a settlement agreement. These are:

1. Likelihood of recovery, or likelihood of success
2. Amount and nature of discovery evidence
3. Settlement terms and conditions
4. Recommendation and experience of counsel
5. Future expense and likely duration of litigation
6. Recommendation of neutral parties if any
7. Number of objectors and nature of objections
8. The presence of good faith and the absence of collusion[58]

The last of these requirements poses an interesting question for defence counsel. What is the content and extent of defence counsel's duty to ensure that a settlement agreement has not been entered into through collusion? How does

[56] *CPA*, *supra*, section 29; *Dabbs v Sun Life Assurance Co of Canada*, [1998] OJ No 1598 at para 8 (Gen Div) [*Dabbs*].
[57] *Ibid* at para 9. Note that additional factors have been considered in later cases, i.e. *Parsons v Canadian Red Cross Society*, (1999), 40 CPC (4th) 151 at para 72 (Ont Sup Ct).
[58] *Ibid* at para 13, citing Newberg, *supra* at para 11-43.

this obligation interact with defence counsel's obligation to reach the most beneficial settlement possible for its client?

In a speech titled "Caught in a Trap – Ethical Considerations for the Plaintiff's Lawyer in Class Proceedings," Chief Justice Winkler (as he then was) explains that one of the sources of the court's concerns with respect to settlement is the loss of the adversarial nature of the proceedings where class counsel and the defendant together seek the court's approval of settlement.[59]

The courts have emphasized the importance of their role in supervising settlements for class actions. In *Waldman*, Justice Perell states,

> Settlement approval is the most important and difficult task for a judge under all class action regimes, including Ontario's *Class Proceedings Act, 1992*. Since most class actions settle, the integrity and the legitimacy of class actions as a means to secure access to justice largely depends upon the court properly exercising its role in the settlement approval process.[60]

Courts are, therefore, vigilant in approving settlement agreements in class actions. Though collusion between class counsel and defence counsel is seldom explicitly addressed, there have been instances in which the court has rejected settlement agreements as failing to meet the "fair, reasonable and in the best interests of those affected by it" standard. However, responsibility for this failure appears to be laid at class counsel's door, leaving open the question of whether, and to what degree, defence counsel has an obligation not to "collude" with class counsel in coming to a settlement agreement and what "collusion" means in the context of the settlement of an adversarial litigation.

In the recent case of *Waldman v Thomson Reuters Canada Ltd.*, Justice Perell rejected a proposed settlement agreement using highly critical language. Justice Perell characterized the agreement as an excellent result for the representative plaintiff, defendant and class counsel, but unfair and unreasonable for the other

[59] Chief Justice Warren K. Winkler and Sharron D. Matthews, "Caught in a Trap: Ethical Considerations for Plaintiff's Lawyer in Class Proceedings," online: <http://www.ontariocourts.on.ca/coa/en/ps/speeches/caught.htm> (accessed September 12, 2014).
[60] *Waldman*, *supra* at para 80.

class members.[61] Though Justice Perell had obvious doubts regarding the representative plaintiff's motives for accepting the proposed agreement,[62] he nevertheless found that the agreement had been arrived at after hard bargaining, and did not suggest that collusion between class counsel and the defendant had taken place.[63]

In a case from British Columbia, *Burnett Estate v St Jude Medical Inc*., the court found that it was appropriate to order that objectors to a proposed settlement agreement have access to certain documents that had informed the proposed settlement.[64] However, again, though the order in and of itself suggests the court's vigilance in ensuring that collusion not exist, the court made no statements on the nature or possibility of collusion between the plaintiff and defendant.

In *Patel v Groupon Inc.*, Justice Belobaba provides some insight into the court's fears surrounding collusion:

> The risk of collusion, significant in any settlement agreement, is especially high in a case where counsel have agreed to pre-allocate monies that would otherwise have gone to the class, to the class counsel as fees. The concerns about collusion and conflict of interest in 'pre-cutting the cake' have been widely discussed in the class action literature.[65]

This statement aligns with the fears canvassed by Chief Justice Winkler in his speech, and by Justice Perell in *Waldman*. Though Justice Belobaba was alive to the concern of collusion, he did not find that collusion between counsel had taken place, nor did he provide guidance with respect to defence counsel's obligations in avoiding collusion with class counsel.

Fee agreements are a necessary aspect of a settlement agreement. What, then, can counsel do to prevent suspicions of collusion, and to show a proposed fee agreement is fair?

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[61] *Waldman*, *supra* at paras 94, 106.
[62] See e.g. *Waldman*, *supra* at para 105.
[63] *Ibid* at para 94.
[64] 2008 BCSC 1163 at para 35.
[65] 2013 ONSC 6679 at para 18 (Sup Ct).

There are certain steps counsel can take to counter the appearance of conflict. For example, counsel can ensure that fee negotiations happen at arm's length.[66] Counsel can also structure proposed settlements so that approval of the settlement is not contingent on fee approval (the practice of linking the two has been criticized by the courts on numerous occasions).[67]

Collusion is defined by the Merriam-Webster dictionary as a "secret agreement or co-operation especially for an illegal purpose." [68]

In order for both defence and plaintiff's counsel to avoid collusion or allegation of collusion in reaching a settlement, they must therefore have regard to the seven other factors for approving a settlement and consider whether the settlement is fair and reasonable and in the best interests of those affected by it.

II. CONCLUSION

The cases canvassed above demonstrate the tensions and inconsistencies class action counsel must navigate. In the context of class action proceedings defence counsel must not only consider their obligations to their client and to the Court, but potentially must also have regard to the best interests of the class (particularly in the context of settlements). In light of the *sui generis* nature of class actions, the prudent way to proceed when in doubt about counsel's rights or obligations may be to seek Court approval about a proposed course of conduct. In some cases this will not always be possible (settlement communications for example) in which case counsel should first consider her obligations to the Court and the administration of justice.

[66] *Caught in a Trap, supra*.
[67] See e.g. *Waldman*, *supra* at para 115.
[68] www.merriam-webster.com/dictionary/collusion

Contact

Monique Jilesen
416-865-2926
mjilesen@litigate.com

Julia Brown
416-865-3716
jbrown@litigate.com