# CLASS PROCEEDINGS AND LAWYERS' CONFLICTS OF INTEREST

*Paul Perell**

## 1. Introduction

In its 1982 *Report on Class Actions*, the Ontario Law Reform Commission predicated that difficult problems would arise from integrating class action procedure with the existing canons of legal ethics.[1] What emerges from reading the report is that the Commission was aware that class proceedings inevitably present ethical problems for the lawyers involved and that in the context of class proceedings the most problematic rule of professional conduct for lawyers would be the ethical canon that a lawyer must avoid of conflicts of interest. The Commission would also have been aware that the presence of a conflict of interest may expose a lawyer to disqualification and to claims of professional negligence.

Although aware of the potential problems, the approach of the Commission, however, was to report that the ethical problems that lawyers would confront should not stand in the way of developing a modern procedure for class proceedings because the goals of achieving access to justice, judicial economy and behaviour modification were in the public interest. It could be left to the profession to make the adjustments necessary to the rules of professional conduct by adapting the ethical rules and practices to suit the circumstances of a class proceeding. Eight years later, the Advisory Committee that reviewed the Commission's report and that prepared draft class actions legislation for Ontario recommended that the Law Society of Upper Canada consider rule changes to resolve potential conflicts between a lawyer's obligations to the representative plaintiff and to members of the class.[2] However, the Law Society did not amend its *Rules of Professional Conduct* to specifically address the unique circumstances of a class proceeding, and with Ontario in 1992 joining Quebec to have class actions legislation and with the subsequent enactment of class proceedings

* Judge, Superior Court of Justice, Ontario.

1. Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982), p. 201.
2. Ministry of the Attorney General, *Report of the Advisory Committee on Class Action Reform* (Toronto: Ministry of the Attorney General, 1990), p. 32.

legislation in other provinces across Canada, as prophesized, lawyers and the courts have had to grapple with the difficult problems associated with class proceedings and conflicts of interest.

The purposes of this article are: (a) to explore conflicts of interest in the context of class proceedings; (b) to examine what progress has been made in developing the ethical rules for class proceedings in the years following the Ontario Law Commission's report; and (c) to discuss the most recent developments in the case law. As will be seen, over 25 years after the Commission's prophesy, Canadian courts and the profession are just beginning to recognize, to address and to attempt to find solutions to the problems of conflicts of interest in class proceedings and to answer the question of what should a lawyer do in order to honour his or her professional and legal duties when engaged in a class proceeding.[3]

## 2. The Lawyer and Client Relationships in the Context of Class Proceedings

### (1) Introduction

The conflict of interest rules, to be discussed below, like many of the rules of professional conduct, are designed to set ethical standards to govern the relationship between a client and his and her lawyer. The first step to understanding conflicts of interest in the context of class proceedings is to analyze the nature of the various client and lawyer relationships in the context of a class proceeding and to point out some sources of conflicts of interest.

In the context of a class proceeding, the relationship between the defendant and its lawyer will be normal or unexceptional and the existing rules or canons of professional conduct seem adequate for the task of policing conflicts of interest; however, in contrast, the relationships between the plaintiff and his or her lawyer and between the plaintiff's lawyer and the multitude of class members are quite

3. S. Finn, "Summoning Leviathan: A Critical Analysis of Class Action Theory and the Ethics of Group Litigation" (2007), 4 Can. Class Action Rev. 119; J.J. Camp, "Avoiding Pitfalls and Potential Conflicts in Negotiating Class Counsel Fees and Obtaining Court Approval" (2006), 3 Can. Class Action Rev. 277; M.P.A. Carabash, "Ethical Conduct for Class Counsel in Ontario" (2006), 3 Can. Class Action Rev. 617; K. Rusli, "The Collusion Crisis: Problems and Proposals" (2005), 2 Can. Class Action Rev. 249; C.F. Szibel, "Settling for Less? Problems and Proposals in the Settlement of Class Actions" (2004), 1 Can. Class Action Rev. 165.

exceptional for the lawyer acting for the plaintiff and for the class members if the action is certified as a class proceeding.

The nature of the relationships among the representative plaintiff, the class members and the lawyer of record and their respective roles in the class proceeding are special, and defining the nature of these relationships and the attendant duties is one of the difficult problems of professionalism foreseen by the Ontario Law Reform Commission. This is an area, however, where there has been some meaningful progress made in the case law. However, as will appear from the discussion below, which points out sources of conflicts of interest between lawyer and client and which examines the legislature's and the court's approach to the different relationships, serious questions remain to be authoritatively answered about the legal and ethical principles that govern these relationships.

## (2) The Relationship between the Plaintiff and His or Her Lawyer

Under class proceedings legislation, a proposed class proceeding begins with a statement of claim or notice of application designating the action or application as a potential class proceeding. The plaintiff will be proposed as a "representative plaintiff", and he or she will be bringing the action on behalf of a proposed class whose membership will be defined as a part of the motion to certify the action as a class proceeding. At the outset of a class proceeding, the action or application is not yet a class proceeding although it is immediately governed by the class proceedings legislation. A class proceeding is a special type of action or application from the outset that may be certified into a class proceeding or converted into a regular individual proceeding.[4]

The class proceedings legislation is designed to have a genuine plaintiff. In the statement of claim or notice of application, the plaintiff's lawyer will be designated the lawyer of record in the normal way. The presence of a genuine claimant is part of the infrastructure for the civil procedure of a class proceeding and his or her participation reduces frivolous claims, acts as a check and balance to the excesses of entrepreneurial law firms sponsoring class

4. *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418 (QL) at paras. 11-12, 36 C.P.C. (5th) 176 *sub nom. Logan v. Ontario (Minister of Health)* (S.C.J.), affd 71 O.R. (3d) 451, 188 O.A.C. 294, 47 C.P.C. (5th) 1 (C.A.); *Boulanger v. Johnson & Johnson Corp.* (2003), 64 O.R. (3d) 208 at para. 34, 226 D.L.R. (4th) 747, 170 O.A.C. 333 (Div. Ct.), vard [2003] O.J. No. 2218 (QL), 174 O.A.C. 44 (C.A.); *Caputo v. Imperial Tobacco Ltd.* (2005), 74 O.R. (3d) 728 at para. 28, 250 D.L.R. (4th) 756, 9 C.P.C. (6th) 175 (S.C.J.).

proceedings, and provides a voice to protect the interests of the class of which the representative plaintiff will be a member.[5] The Ontario Law Reform Commission recognized and subsequent case law has confirmed that, notwithstanding the entrepreneurial interest of the lawyer acting for the plaintiff or applicant who typically will have agreed to a contingency fee in which the lawyer will share in any judgment, the proposed class proceeding has and needs to have a genuine plaintiff or applicant.

Typically, there will be a formal retainer agreement that provides for a contingency fee for the lawyer. With the issuance of the statement of claim or notice of application, there will be a lawyer and client relationship between the plaintiff or applicant and his or her retained lawyer. It follows from all this, that in his or her relationship with the plaintiff in the class proceeding, the lawyer for the plaintiff will be subject to fiduciary duties and to the normal rules of professional conduct. Further, it follows that the lawyer acting for the plaintiff is subject to the obligations associated with the famous cases of *MacDonald Estate v. Martin*[6] and *R. v. Neil*.[7] Thus, for example, in *Arabi v. Toronto-Dominion Bank*,[8] the plaintiff's lawyer in a proposed class action against a bank was disqualified from acting because of a conflict of interest; the lawyer had acted for the defendant bank in some of the mortgage transactions that were the subject-matter of the proposed class proceeding. The plaintiff's lawyer had a disqualifying conflict of interest in acting against a former client.

What is extraordinary is that this normal lawyer and client relationship rests on a foundation where it is possible to suggest — as defendants frequently do — that the design of the legislation is just a pretence to cover the reality that because the plaintiff's lawyer has an enormous amount personally to gain or to lose depending on the plaintiff's success in the class proceeding, the plaintiff's lawyer is as much a plaintiff as the plaintiff. Despite this suggestion, the case law accepts that, notwithstanding that the lawyer of record may ultimately have a greater financial interest and greater financial risks than the plaintiff, the lawyer of record is not a co-plaintiff or the *de facto* plaintiff.[9]

An exceptional aspect of the relationship between the

5. *Fantl v. Transamerica Life Canada*, [2008] O.J. No. 1536 (QL), 60 C.P.C. (6th) 326 (S.C.J.), affd [2008] O.J. No. 4928 (QL) (Div. Ct.).
6. [1990] 3 S.C.R. 1235, 77 D.L.R. (4th) 249, [1991] 1 W.W.R. 705.
7. [2002] 3 S.C.R. 631, 218 D.L.R. (4th) 671, [2003] 2 W.W.R. 591.
8. [2006] O.J. No. 2072 (QL), 30 C.P.C. (6th) 164 (S.C.J.), affd 233 O.A.C. 275, 53 C.P.C. (6th) 135 (Div. Ct.). See also *Vitelli v. Villa Giardino Homes Ltd.* (2001), 54 O.R. (3d) 334 at para. 47, 11 C.P.C. (5th) 65 (S.C.J.).
9. *Caputo v. Imperial Tobacco*, *supra*, footnote 4, at paras. 41-42; *Englund v.*

representative plaintiff and his or her lawyer and a source of conflicts of interest is the affinity of the lawyer-client relationship in a class proceeding to what in former times would be regarded as maintenance and champerty. The appearance of maintenance or champerty augments the defendant's argument that the presence of a genuine plaintiff is more apparent than real but, as will be seen, the class proceedings legislation attempts to address some of the problems.

Maintenance, which at one time was a crime and which remains a tort, is officious intermeddling in another person's litigation. The intermeddler is stirring up a dispute, has no interest in the lawsuit, and his or her intervention cannot be justified or excused. In determining whether there is maintenance, the court will consider the person's motive in stirring up the litigation. It is only when a person has an improper motive that he or she will be found to be a maintainer. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the proceedings of the litigation.[10]

Contingency fee agreements, which are a prominent feature of class action retainers, raise the spectre of maintenance and champerty. The lawyer's method of remuneration has the appearance and reality of supporting another's litigation for a profit. The practical dynamics of a class proceedings boost this appearance. The plaintiff's own claim is typically modest and would not have been advanced without the support of a lawyer prepared to act on the basis of a contingency fee agreement. And the lawyer's contingency fee is potentially very remunerative because it will be determined by reference to the aggregate claims of the class members.

In some jurisdictions, including Ontario, contingency agreements were at one time viewed as inherently champertous. The current general law in Ontario, which has fallen into line with the law in other provinces, is that contingency fee agreements are not inherently champertous but may be objectionable if the lawyer overreaches and the contingency fee agreement is unfair or unreasonable and reveals the improper motive that is the chief ingredient of the tort.[11] In

*Pfizer Canada*, [2007] S.J. No. 273 (QL) at para. 50, 284 D.L.R. (4th) 94, [2007] 9 W.W.R. 434 (C.A.).

10. *McIntyre Estate v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257, 218 D.L.R. (4th) 193, 164 O.A.C. 37 (C.A.); *Buday v. Locator of Missing Heirs Inc.* (1993), 16 O.R. (3d) 257, 108 D.L.R. (4th) 424 *sub nom. Ollmann Estate v. Locator of Missing Heirs Inc.*, 1 E.T.R. (2d) 237 (C.A.).

11. *McIntyre Estate v. Ontario (Attorney General)*, *ibid.*; *Raphael Partners v. Lam* (2002), 61 O.R. (3d) 417, 218 D.L.R. (4th) 701, 164 O.A.C. 129 (C.A.), revg 55 O.R. (3d) 289 (S.C.J.); *Cogan (Re)* (2008), 88 O.R. (3d) 38, 53 C.P.C.

*McIntyre Estate v. Ontario (Attorney General)*, Associate Chief Justice O'Connor stated that: "a fee agreement that so over-compensates a lawyer such that it is unreasonable or unfair to the client is an agreement with an improper purpose — *i.e.*, taking advantage of the client".[12] Such an agreement may be champertous and illegal.

The design of class proceedings legislation is to allow and even encourage contingency agreements as a vehicle to promote access to justice through class proceedings. The Ontario Act authorizes a particular kind of contingency arrangement, which permits a lawyer to charge a multiplier to his or her base fee. Section 33 of Ontario's *Class Proceedings Act, 1992*,[13] which was enacted before Ontario's change in attitude to contingency agreements, provides that despite the *Solicitors Act* and *An Act Respecting Champerty*, 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. In this way, the Act authorizes contingency fee agreements for class proceedings, subject to the court's jurisdiction to scrutinize the propriety of the agreement. The legislation requires that the court approve the plaintiff's lawyer's fee agreements. The contingency fee agreements that can be approved by the court, however, are not limited to those that contemplate the application of a multiplier to a base fee.[14]

Thus, the design of the class proceedings legislation depends heavily upon encouraging entrepreneurial lawyers to act for plaintiffs by permitting contingency agreements subject to court supervision to ensure that the lawyers do not let self-interest overcome their duties to the representative plaintiff and to the class. The relationship between the representative plaintiff and his or her lawyer in a class proceeding has an affinity to maintenance and champerty and is a source of conflicts of interest, but the Act recognizes the problem and has moderating features. Some of the problems associated with this design will be discussed later in this article under the heading "Conflicts of Interest from the Lawyer's Direct Financial Interest in the Class Proceedings."

Thus, in a class action, there is a real plaintiff who, albeit heavily

(6th) 75 (S.C.J.); P.M. Perell, "New Developments in Ontario Contingency Fee Agreements" (2003), 38 C.B.L.J. 472.

12. *McIntyre Estate v. Ontario (Attorney General)*, *ibid.*, at para. 76 (C.A.).
13. S.O. 1992, c. 6.
14. *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1996), 28 O.R. (3d) 523, 134 D.L.R. (4th) 470, 7 C.P.C. (4th) 189 (Gen. Div.); *Crown Bay Hotel Limited Partnership v. Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83, 160 D.L.R. (4th) 186, 21 C.P.C. (4th) 272 (Gen. Div.).

influenced by his or her lawyer, gives instructions for the carriage of the proceedings and who, in some jurisdictions, including Ontario, is subject to the rules about recovering and paying costs should his or her action succeed or fail. Aspects of the last point are worth emphasizing because they are another source of potential conflicts of interest between lawyer and client.

In Ontario and several other jurisdictions, the plaintiff in a class proceeding may be liable to pay a successful defendant's costs. As will be explored again later, this means that the plaintiff's benefit versus risk ratio in the class action may be much less favourable than the benefit versus risk ratio of his or her lawyer under the contingency fee arrangement. This is an obvious source of conflict of interest between lawyer and client. However, under the scheme in Ontario, the plaintiff's liability for costs may be assumed by the Law Foundation of Ontario pursuant to the *Law Society Amendment Act (Class Proceedings Funding), 1992*.[15] The Law Foundation's assistance, however, has a price.[16] A successful plaintiff must reimburse the fund for the disbursements and pay 10% from any settlement or judgment proceeds to the fund. In turn, if the Law Foundation does provide assistance to the plaintiff and the class action is successful, this may reduce the contingent fee recovery of the plaintiff's lawyer. For the lawyer, the role of the Law Foundation is thus another potential source of a conflict of interest because advising the client to seek funding from the Law Foundation may have an effect on the lawyer's financial interest in the class proceeding.

A matter related to the plaintiff's exposure to costs and an exceptional and somewhat controversial aspect of the relationship between the plaintiff and his or her lawyer in class proceedings is the emergence of the practice of the plaintiff's lawyer agreeing to indemnify the plaintiff should he or she be ordered to pay costs in the proceeding that was commenced under the class proceedings legislation. The rationale behind this practice is that in jurisdictions like Ontario, where the plaintiff in a class proceeding is exposed to a

15. S.O. 1992, c. 7. See also O. Reg. 771/92. The Act was enacted contemporaneously with the *Class Proceedings Act, 1992*. This Act introduced the Class Proceedings Fund, which is administered by The Law Foundation of Ontario. A plaintiff may apply to the Foundation for support, and if the Foundation accepts the application, the Foundation will pay for disbursements, excluding the plaintiff's legal fees, and the Foundation will use its fund to indemnify the plaintiff for the costs he or she must pay the defendant if ordered to do so in the class proceedings.

16. If the Foundation does not provide assistance, then a plaintiff will be exposed to a potentially enormous costs exposure, which again demonstrates that there is a genuine plaintiff in the class proceeding.

costs award, it arguably would be negligent for the plaintiff's lawyer not to advise the client of the potential liability to pay costs. This advice should be given before the commencement of the class proceeding because, as a normal incident of legal services, a client should be told of the legal risks that attend upon his or her course of conduct. However, if the client is advised, then it is arguable that it would be unethical and a breach of the lawyer's fiduciary duties to the client to permit the client to accept the exposure to costs without the protection of an indemnity agreement from the lawyer, especially given that it will be the lawyer who has more to gain in the class proceeding than the client. In this regard, it is important to repeat that the lawyer is not a co-plaintiff or the *de facto* plaintiff and although he or she has a financial interest in the class action, this does not make the lawyer a party who would be exposed to a cost award in the normal course.[17] Thus, the thought is that since the lawyer has the more to gain, he or she should be prepared to provide the indemnity agreement and assume the plaintiff's costs burden which the lawyer would not normally share in litigation.

The significance of the presence or absence of an indemnity agreement was discussed in *Poulin v. Ford Motor Co. of Canada*,[18] which was a proposed products liability class action against Ford Motor Company. In this case, for the certification motion, Justice MacKenzie noted that the action against the car manufacturer was conceived by an American law firm that was pursuing identical claims in the United States.[19] The American firm was assisting the Canadian firm acting for Mr. Poulin, who was the proposed representative plaintiff for Canadian consumers. Justice MacKenzie viewed Mr. Poulin as having been recruited for a class action in Canada and as more a nominal plaintiff than a claimant with a genuine grievance. Without actually deciding the point, Justice MacKenzie observed that the absence of an indemnity agreement from his lawyers impugned Mr. Poulin's ability to adequately represent the class and to give instructions. Thus, the *Poulin* case suggests that the presence or absence of an indemnity agreement is relevant to whether the plaintiff is qualified to be a representative plaintiff.

In the *Poulin v. Ford Motor Co.* case, Justice MacKenzie dismissed

17. *Caputo v. Imperial Tobacco*, *supra*, footnote 4, at paras. 41-42; *Englund v. Pfizer Canada*, *supra*, footnote 9, at para. 50; *Fantl v. Transamerica Life Canada*, *supra*, footnote 5, at paras. 61-72.
18. [2006] O.J. No. 4625 (QL), 35 C.P.C. (6th) 264 (S.C.J.), affd 170 A.C.W.S. (3d) 463 (Div. Ct.) and [2007] O.J. No. 4988 (QL), 52 C.P.C. (6th) 294 (S.C.J.).
19. The firms had an agreement to share the proceeds of any recovery in the Canadian action.

the motion for certification and he subsequently ordered the plaintiff's lawyer to pay Ford's costs. After the certification motion was dismissed, the defendants sought costs to be paid by Mr. Poulin's lawyers, and to avoid the suggestion that they had a conflict of interest in making costs submissions, the lawyers offered to indemnify Mr. Poulin. Then they argued that there should be no order as to costs against them or Mr. Poulin. Justice MacKenzie, however, ruled that the late-arriving indemnity did not alter the situation. He ruled that because the lawyers had not offered an indemnity at the outset, they were taking advantage of Mr. Poulin. Justice MacKenzie stated "The fact remains that at the time of instituting the action and mounting the certification motion, Mr. Poulin was without an indemnity undertaking and it was accordingly, open for [the Canadian and American law firms] to obtain extremely large fees arising from a successful outcome without any concomitant risk of adverse costs consequences."[20] Justice MacKenzie concluded that it was appropriate to award costs payable by the lawyers.

The significance of the *Poulin v. Ford Motor Co. of Canada* judgment remains to be seen because this particular action was very much the entrepreneurial invention of the lawyers involved, who apparently had a very weak case for certification as a class proceeding. Moreover, the recruited representative plaintiff, Mr. Poulin, demonstrated only a modest understanding of his role as a proposed representative plaintiff. The *Poulin* case may be distinguishable and it has to be balanced against other cases where the entrepreneurial sentiments of the lawyers involved has not led the court to treat the lawyers as if they were parties liable for costs.

The *Poulin* case is problematic because it is unclear whether Justice MacKenzie went so far as to rule that indemnity agreements should normally be extended to representative plaintiffs by their lawyers. Arguably, on one hand, such a ruling would contravene the policy of the class proceeding legislation that there be a genuine plaintiff whose exposure to costs would act as a means to discourage unmeritorious class proceedings. On the other hand, allowing indemnity agreements might further the access to justice policies and behaviour modification goals of the Act by encouraging genuine plaintiffs whose ability to adequately represent the class would be enhanced and not diminished by their protection from costs awards. And permitting the indemnities would mean that entrepreneurial lawyers would bear even more responsibility for ensuring that the class proceeding was justified and not a frivolous claim.[21] The practice of

20. *Supra*, footnote 18, at para. 70.

21. The plaintiff's lawyer's existing risk is that they will not recover any fees and

indemnities for plaintiffs, assuming the indemnity agreement could be enforced, by the defendants who would be third-party beneficiaries, would certainly have a chilling effect on a law firm's support of claims of debatable merit.

At this juncture of the development of the law, what can be said is that there are very serious unanswered questions about the role of indemnity agreements, but there does appear to be a growing acceptance of their usage. For example, in *Bellaire v. Daya*,[22] implicitly accepting the propriety of indemnity agreements, the court held that the fact that counsel had agreed to indemnify the representative plaintiff was relevant to the issue of whether class counsel's fee should be approved. The indemnity agreement and counsel's assumption of risk saved the plaintiff from having to rely on the support of the Class Proceedings Fund whose claim to a share of any recovery in return for assuming the plaintiff's costs obligation would have diminished the class's recovery. The court viewed the indemnity agreement as a positive factor in the determination of whether to approve the lawyer's fees.

### (3) The Relationship between the Plaintiff's Lawyer and Class Members

Turning to the relationship between the plaintiff's lawyer and class members, in some situations the plaintiff's lawyer may have been formally or informally retained by some of the proposed class members who may have decided to nominate one or more of their members as the proposed representative plaintiff. In other cases, however, the proposed class members will be strangers to the plaintiff and to the lawyer of record. The lawyer may have had no direct contact with possible class members and the definition of the class and the inspiration for the class action may have come from entrepreneurial lawyers reacting to media reports of mass disasters, product recalls or regulatory interventions. Indeed, the number and the precise identity of the class members, in theory and often in reality, is often unknown until the court approves the definition of the class as part of the certification process.

Thus, the case law has accepted that before certification, there is no traditional lawyer and client relationship between the plaintiff's lawyer and the numerous putative class members. This makes sense

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unless in Ontario the Law Foundation is supporting the litigation, the lawyers are at risk of not recovering the disbursements associated with advancing the class proceeding.

22. [2007] O.J. No. 4819 (QL) at para. 81, 49 C.P.C. (6th) 110 (S.C.J.).

because if the motion for certification fails then, as Justice Nordheimer observed, there will be no class of claimants for the lawyer to have a relationship with and it is hardly fair or even feasible to impose tort, contract and fiduciary responsibilities on a lawyer in these circumstances.[23]

However, there is always a potential lawyer and client relationship between the plaintiff's lawyer and the putative class members and the needs of the class proceedings scheme require that there be a *sui generis* relationship between the plaintiff's lawyer and potential class members and that some responsibilities that are owed to the potential class members be imposed on the plaintiff's lawyer.[24] The court has the means to shape this relationship and to impose the duties. Indeed, the court has jurisdiction from the outset and throughout the proceedings to fully govern the procedure including the authority to supervise the relationships among (a) plaintiff and proposed class; (b) lawyer and plaintiff; (c) lawyer and proposed class; (d) representative plaintiff and certified class; and (e) lawyer and certified class.[25] For present purposes, the major point that needs to be made is that while acting for a putative representative plaintiff, the lawyer will have some responsibilities to putative class members.[26]

Both the plaintiff's lawyer and the plaintiff have duties to fairly and adequately represent the interest of the class members.[27] In this regard, it is important to emphasize that the most significant feature of class proceedings is that the outcome will bind class members who will not be active participants in the civil procedure. Class members will be notified of the class proceeding and afforded the opportunity

23. *Pearson v. Inco Ltd.*, [2001] O.J. No. 4877 (QL), 57 O.R. (3d) 278, 16 C.P.C. (5th) 357 (S.C.J.); *Ward-Price v. Mariners Haven Inc.*, [2004] O.J. No. 2308 (QL), 71 O.R. (3d) 664, 3 C.P.C. (6th) 116 (S.C.J.).
24. *Fantl v. Transamerica Life Canada*, *supra*, footnote 5; *Heron v. Guidant Corp.*, [2007] O.J. No. 3823 (QL) at para. 10 (S.C.J.), leave to appeal refused [2008] O.J. No. 48 (S.C.J.).
25. *Fantl v. Transamerica Life Canada*, *ibid.*
26. The court also has the authority to govern the relationship between the defendant and his or her lawyer with putative and actual class members. How the courts are regulating these relationships is, however, currently a work in progress. Most of the work concerning the propriety of communications with class members by the plaintiff's and the defendant's lawyers, which itself is a problematic and complex issue, is outside the scope of this article about conflicts of interest in class proceedings.
27. *Fantl v. Transamerica Life Canada*, *supra*, footnote 5; *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 201 D.L.R. (4th) 385 *sub nom. Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*, [2002] 1 W.W.R. 1; *Fenn v. Ontario*, [2004] O.J. No. 2736 (QL) at para. 18, 5 C.P.C. (6th) 147 (S.C.J.); *Heron v. Guidant Corp.*, *supra*, footnote 24, at para. 10 (S.C.J.).

to withdraw by opting out but, if they do not opt out, they will be bound by the determination, be it settlement or adjudication, of the common issues certified by the court. Most if not all of the class members will not participate in the civil procedure yielding the determination of the common issues. Thus, to maintain the integrity and propriety of this means to administer civil justice, it is imperative to establish and maintain principles and procedures that protect the interests of the absent class members and that make it just and fair to adjudicate or settle their claims.

In contrast to the somewhat uncertain status and responsibilities of the plaintiff's lawyer to potential class members before certification, which are still being developed by the courts, the case law holds that there is a lawyer and client relationship between the plaintiff's lawyer and the class members after certification.[28] The scope of this relationship, however, also remains unclear and once again this is an area under development.

In *Ward-Price v. Mariners Haven Inc.*,[29] Justice Nordheimer certified a small class proceeding. After certification, a copy of the plaintiff's lawyer's opinion letter came into the hands of the defendants. Justice Nordheimer, however, viewed the opinion letter as being subject to the privilege accorded communications between a lawyer and client. He also concluded that the privilege could not be waived by a single member of the class and that the defendant's lawyer ought to have returned the letter in accord with the convention that inadvertently disclosed privileged communications should be returned and the advice of the court obtained if necessary. To reach these conclusions, Justice Nordheimer held that the certification of a class proceeding entails the creation of a lawyer and client relationship between the plaintiff's lawyer and class members; he stated:[30]

> In essence, therefore, by deciding that certification is to be granted, the court has been satisfied that the representative plaintiff has selected competent counsel to represent the class. At that point, the court has, in effect, imposed the selection of that counsel on the members of the class. This follows from the simple fact that there must be counsel for the class. It is a necessary adjunct to the decision to certify an action as a class proceeding for class counsel to be selected in this fashion. It also follows that there is, at that point, a practical requirement for imposing a solicitor

28. *Ward-Price v. Mariners Haven Inc.*, *supra*, footnote 23; *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada*, [2003] O.J. No. 1016 (QL), 121 A.C.W.S. (3d) 426 (S.C.J. (Master)).
29. *Ward-Price v. Mariners Haven Inc.*, *ibid.*
30. *Ibid.*, at para. 15.

> and client relationship between counsel for the representative plaintiff and the class members without their knowledge or consent. The consent of class members to this selection is not completely foreclosed, however. If a class member is not satisfied with the counsel that has been selected, at least one option for that class member is to choose to opt out of the proceeding. If a class member does not opt out, they may then be seen as consenting to the selection of class counsel.

Justice Nordheimer realized that class members during the opt-out period required legal advice and the lawyer designated as class counsel was in the best position to give that advice, especially given that the typical circumstances of class proceedings entail that class members are unlikely to obtain independent legal advice given their modest individual claims. The creation of a lawyer and client relationship between class members and the representative plaintiff was consistent with and fostered the access to justice purposes of the class proceedings legislation.

For present purposes, the major point to note is that with certification, the plaintiff's lawyer, practically speaking, has a joint retainer in which he or she acts as the lawyer both for the representative plaintiff and also for the class members. This is the relationship that the Ontario Law Reform Commission predicted would give rise to difficult problems under the existing canons of legal ethics, which do not envision joint retainers involving an individual and a large group. Some of the problems associated with this joint retainer relationship will be discussed in the next sections of this paper.[31]

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31. The above discussion reveals that the lawyer and client relationships in the context of a class proceeding are complicated. One more complication may be noted. The lawyer's role in a class proceeding may be shared. In class proceedings, particularly class proceedings with class members in more than one jurisdiction, courts have allowed a consortium of lawyers and law firms to have carriage of the action for the plaintiff and the multi-jurisdictional class members. In *Grasby v. Merck Frosst Canada Ltd.*, [2007] M.J. No. 149 (QL), [2007] 8 W.W.R. 245, 216 Man. R. (2d) 117 (Q.B.), Justice McKelvey held that a consortium of law firms does not as such have a conflict of interest that would disqualify them from having carriage of a multi-jurisdictional class proceeding. For the purposes of the discussion that follows, it will be assumed that in circumstances where more than one law firm acts for the representative plaintiff and for class members, the analysis of what counts for a conflict of interest does not change.

## 3. Lawyers' Conflicts of Interest and Class Proceedings

### (1) Introduction

With this background to the relationships among the plaintiff's lawyer and the participants in class proceedings, the discussion can turn to the rules of professional conduct that regulate lawyers' conflicts of interest. Using the Law Society of Upper Canada's *Rules of Professional Conduct*[32] as an example, lawyers have an ethical obligation to avoid conflicts of interest. Rule 2.04(3) states that: "A lawyer shall not act or continue to act in a matter when there is or is likely to be conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents."

Rule 2.04(1) defines a conflict of interest or a conflicting interest as: "an interest (a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or (b) that a lawyer might be prompted to prefer to the interests of a client or a prospective client."

The commentary that accompanies the conflict of interest definition states:

> Conflicting interests include, but are not limited to, the financial interest of a lawyer or an associate . . . and the duties and loyalties of a lawyer to any other client, including the obligation to communicate information. For example, there could be a conflict of interest if a lawyer . . . had a personal financial interest in the client's affairs or in the matter in which the lawyer is requested to act for the client, such as a partnership interest in some joint business venture with the client.

The commentary alludes to the fact that for lawyers, there are many types of conflicts of interest. The situations where there may be conflicts of interest include situations associated with: disclosing information to a client; keeping confidences of a client; misappropriating confidential information; acting for multiple clients (joint retainers); doing business with a client; accepting gifts from a client; and acting as a witness and counsel in court proceedings.[33]

In the context of class proceedings, of the many types of conflicts of interest, three types call for particular examination: (1) conflicts arising from a lawyer's direct financial interest in the class proceedings; (2) conflicts arising from a divergence in interest

32. Adopted by Convocation on June 22, 2000, in effect November 1, 2000.
33. P.M. Perell, *Conflicts of Interest in the Legal Profession* (Butterworths: Markham, 1995).

between the representative plaintiff and class members; and (3) conflicts arising from the lawyer's divided loyalties arising outside of the class proceeding. The discussion that follows will focus its attention on these three main types of conflicts of interests for lawyers involved in class proceedings.

## (2) Conflicts of Interest from the Lawyer's Direct Financial Interest in the Class Proceedings

As already noted several times above, one exceptional aspect of the lawyer and client relationship in a class proceeding is that from the very outset, the lawyer acting for the plaintiff will have a financial interest in the client's litigation. This circumstance unavoidably presents a conflict of interest between the lawyer and the plaintiff and the proposed or certified class members that falls within the definition of a conflict of interest found within the canons of professional conduct. The reality of the conflict can be quickly demonstrated.

The *raison d'etre* of most class proceedings is that the wrongdoer has wronged many individuals but individual claims are not financially viable to pursue; however, by aggregating the claims, the pursuit of justice becomes feasible. In this situation, the lawyer for the plaintiff in the class proceeding usually has overwhelmingly much more to gain than the plaintiff or the individual class members. This result holds because under his or her fee agreement, the lawyer will recover very high legal fees, often a percentage of the total compensation payable by the wrongdoer. In most class proceedings, the individual claims of the representative plaintiff and the class members will be minuscule compared to the aggregate claim against which the value of the lawyer's fee will be determined. Therefore, the plaintiff's lawyer in a class proceeding has a personal financial interest in the client's affairs. As suggested in the first part of this article, the lawyer's conflict of interest is exacerbated in costs-shifting jurisdictions where the plaintiff, but not the lawyer, is exposed to liability for costs.

A particularly acute example of the inevitable financial conflict of interest arises in the context of settlement negotiations to resolve the class proceeding. The plaintiff's lawyer, who may be receiving a substantial sum from the legal fees portion of the settlement, may be inclined to accept a less than optimum settlement offer as measured against the interests of the class members. Put bluntly, there is the prospect of a collusive settlement that is not in the best interests of the members of the class bound by the resolution of the lawsuit. The lawyer may be motivated by compelling self-interest and not the best

interests of the class members. The conflict of interest associated with settlements is perhaps most pronounced when the defendant offers a lump sum payment and the lawyer's share of the settlement diminishes the recovery of the class members, but, even if the settlement is separated into components, who is to say that the lawyer's discrete share does not come at the expense of what the representative plaintiff and class members ought to recover?

Although financial conflict of interest situations are not unique to class proceedings and occur when there are contingency fees and in the settlements of litigation generally, the lure of disloyalty is very strong in class proceedings given the substantial amount of money in the aggregate to be divided. Moreover, the expense and risk of continuing the litigation may have overburdened the plaintiff's lawyer who has invested so much in carrying the financial burden of the interlocutory stages of the litigation. In particular, there is the nagging question of whether the lawyer was seduced by the defendant's offer to recommend a less than optimum settlement for class members whose individual recovery may be trifling and thus lightly regarded. Further, there is a conflict of interest if a settlement for the class members is made conditional on the settlement of the lawyer's claim for fees. Such a conditional settlement can benefit class counsel only at the expense of the class.[34] In this circumstance, the class members cannot receive independent legal advice as to the merits of their settlement alone and 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 his or her fees.[35]

The lawyer's financial conflict of interest in sharing in the proceeds of a class action, whether from a judgment or a settlement, seems an unavoidable incident of the scheme of class proceedings. As they are currently written, the existing canons of legal ethics are of little assistance to managing this situation. Courts, however, have responded, and the response has been to rely on the authority to approve lawyers' contingency fee arrangements and on the authority provided by the class proceeding legislation to regulate settlements. The courts have used this authority to determine if the plaintiff's lawyer has acted with probity and in the best interests of class

34. *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4273 (QL), 38 C.P.C. (6th) 70 (S.C.J.).

35. *Northwest v. Canada (Attorney General)*, [2006] A.J. No. 1612 at para. 65, 45 C.P.C. (6th) 171 (Q.B.). In this case, although McMahon J. approved a settlement, he stated that he was not endorsing connecting the approval of the settlement with approval of the lawyer's fees and that the approval of the settlement should come first with the lawyer's fee scrutinized after the merits of the settlement were scrutinized.

members including the representative plaintiff. The court's oversight acts as an incentive to encourage forthright and vigorous representation of the representative plaintiff and of the class and court supervision of settlements deters unethical conduct. It should, however, also be said that while judicial scrutiny of settlements and counsel fees are desirable, one need not descend to cynicism to justify the court's approach. Most lawyers practice with integrity and many class counsel are passionate champions for their client's causes and will work for a settlement that does not sacrifice the client's interest and genuinely earns the lawyer his or her remuneration. The current rules of professional conduct, however, provide little guidance.

Using Ontario's legislation as an example of the basis for the court's supervision of the propriety of settlements and of lawyers' fees, s. 29(1) and (2) of the *Class Proceedings Act, 1992* provides that a proceeding commenced under the Act and a proceeding certified as a class proceeding may be discontinued only with approval of the court and that a settlement is not binding unless approved by the court.[36] Under s. 32(2), an agreement respecting fees and disbursements between a lawyer and a representative party is not enforceable, unless approved by the court. Under s. 32(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 (c) direct that the amount owing be determined in any other manner.

Thus, the class action legislation responds to the conflicts of interest inherent in settlements by requiring the court to approve both settlements and the lawyer's fee agreements. 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 those affected by it.[37] A court approval of the settlement ensures that the immediate parties are not abusing the legislation, the administration of justice, or settling for improper or inadequate reasons.[38] In determining whether to approve a settlement, the court has an ongoing obligation to protect the interests of the absent class members both in determining whether the settlement meets the test for approval and in ensuring that the administration and

36. Under s. 29(3) of the Ontario Act, a settlement of a class proceeding that is approved by the court binds all class members.
37. *Dabbs v. Sun Life Assurance*, [1998] O.J. No. 1598 (QL) at para. 9 (Gen. Div.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (QL) at paras. 68-73, 40 C.P.C. (4th) 151 (S.C.J.).
38. *Epstein v. First Marathon Inc.*, [2000] O.J. No. 452 (QL), 2 B.L.R. (3d) 30, 41 C.P.C. (4th) 159 (S.C.J.).

implementation of the settlement are done in a manner that delivers the promised benefits to the class members.[39] This court has the jurisdiction to reject any proposed settlement that constitutes an abuse of process or that is inconsistent with the purposes of the class proceedings legislation.[40]

Where the fee arrangements are a part of the settlement, the court must decide whether the fee arrangements are fair and reasonable and this means that counsel are entitled to a fair fee, which may include a premium for the risk undertaken and the result achieved — but the fees must not bring about a settlement that is in the interests of the lawyers but not in the best interests of the class members as a whole.[41] Where the defendant is paying the legal fees, the court should satisfy itself that class counsel have not been bought off or have had their obligations to their clients affected by receiving a substantial amount of fees.[42] Where the class counsel's fees are not coming out of the class member's compensation fund, then the court's role in the event of a negotiated settlement on fees is limited to whether or not class counsel truly got the best settlement available for the class members.[43]

In *Dabbs v. Sun Life Assurance Co. of Canada*,[44] a case from the early days of the class proceedings legislation, Justice Winkler (as he was then) addressed the ethical problems of lawyers negotiating the settlement of a class proceeding including bargaining for their own share of the recovery. In *Dabbs*, the proposed settlement involved the defendant insurer paying: (a) the class members a sum estimated to be $65 million; and (b) the plaintiffs' lawyer's fees, which were to be fixed by arbitration in a range between a minimum of $1.4 million and a maximum of $6.5 million. Although they had a contingency fee agreement, the representative plaintiffs' lawyers agreed not to seek any further payment from the clients. The parties moved for approval of the settlement, but objectors to the settlement argued that the plaintiffs' lawyers, who had simultaneously negotiated the payment

39. *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at paras. 12 and 50-51, 40 C.P.C. (6th) 129 (S.C.J.).
40. *Epstein v. First Marathon Inc.*, *supra*, footnote 37.
41. *Sparvier v. Canada (Attorney General)*, [2006] S.J. No. 752 (QL) at para. 43, 290 Sask. R. 111, 35 C.P.C. (6th) 110 (Q.B.), affd [2007] S.J. No. 145 (QL), [2007] 7 W.W.R. 682, 397 W.A.C. 54 (C.A.).
42. *Adrian v. Canada (Minister of Health)*, [2007] A.J. No. 620 at para. 29, 418 A.R. 210 *sub nom. Adrian v. Canada (Attorney General)* (Q.B.).
43. *Ibid.*, at para. 29.
44. (1997), 35 O.R. (3d) 708, 48 C.C.L.I. (2d) 146, 14 C.P.C. (4th) 122 (Gen. Div.), leave to appeal refused 36 O.R. (3d) 770, 1 C.C.L.I. (3d) 42, 20 C.P.C. (4th) 87 (Gen. Div.).

to their clients and for themselves, had a disqualifying conflict of interest.

Justice Winkler disagreed, and he reasoned that prohibiting the simultaneous negotiation of the settlement corpus and the lawyers' fees would discourage settlements by defendants who would be disinclined to settle without defining their ultimate liability and by plaintiffs who might perceive that the defendant was lowering the value of its offer on the merits to provide a cushion against the possibility of a large fee award. Justice Winkler concluded that the simultaneous negotiation of fees and settlements did not necessarily create a disqualifying conflict of interest for class counsel and the ability of the defendant to consider its total exposure to both damages and fees might encourage settlement whereas the contrary would discourage settlement. Further, he stated:[45]

> Moreover, any inherent tension is addressed by the scheme of the Ontario *Class Proceedings Act, 1992*. The statute provides for extensive judicial supervision of the remuneration of class counsel, and requires that both the settlement of a class action (including any terms respecting fees and costs) and the fee agreement of counsel receive court approval. The Act permits fee agreements contingent upon success, stipulates scrutiny of class counsel's fee in terms of both quantum and structure, and confers upon the court the discretion to award a multiple of the base counsel fee. In short, all aspects of the fee arrangement and settlement are contingent upon final court approval.

### (3) Conflicts of Interest from a Divergence in Interest between the Representative Plaintiff and Class Members

A second type of conflict of interest that may arise in the context of class proceedings does not involve a lawyer's financial interest in the plaintiff's litigation. The second type of conflict of interest concerns circumstances where the lawyer's duty to some clients conflicts with his or her duties to other clients.

Intrinsic to the notion of conflicts of interest is the idea of divided loyalties and, in the context of litigation, the rules of professional conduct absolutely prohibit a lawyer from acting for both sides of a dispute.[46] This particular rule, of course, is not engaged in class proceedings because the plaintiff's lawyer will be acting only for claimants and not for both sides of the dispute. In this context, the conflict problem rather concerns joint retainers, which historically

45. *Ibid.*, at p. 715.
46. Rule 2.04(2).

have been perhaps the predominant source of conflicts of interest problems for lawyers.

Given that the class proceeding legislation and the case law recognize that the lawyer was in a lawyer and client relationship with the plaintiff and given that, with certification, the plaintiff's lawyer enters into a lawyer and client relationship with the members of the class, with certification, a class proceeding may be viewed as a massive joint retainer with the plaintiff's lawyer acting for both the representative plaintiff and also for the many members of the class defined by the court as part of the certification order. If this true, then, to echo the prophecy of the Ontario Law Reform Commission, integrating class action procedure with the existing canons of legal ethics for joint retainers presents very difficult problems.

The rules of professional conduct do not generally prohibit joint retainers; rather the rules regulate these retainers with a variety of provisions, including provisions aimed at the avoidance of conflicts of interest. Once again, using the Law Society of Upper Canada's *Rules of Professional Conduct* as the example, the following rules address joint retainers:

*Joint Retainer*

2.04(6) Before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that

(a) the lawyer has been asked to act for both or all of them,
(b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and
(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

*Commentary*

Although this subrule does not require that, before accepting such a retainer, a lawyer advise the client to obtain independent legal advice about the joint retainer, in some cases especially those in which one of the clients is less sophisticated or more vulnerable than the other the lawyer should recommend such advice to ensure that the client's consent to the joint retainer is informed, genuine, and uncoerced.

(7) Where a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and

recommend that the client obtain independent legal advice about the joint retainer.

*Commentary*

Although the parties concerned may consent, a lawyer should avoid acting for more than one client when it is likely that an issue contentious between them will arise or their interests, rights, or obligations will diverge as the matter progresses.

(8) Where a lawyer has advised the clients as provided under subrules (6) and (7) and the parties are content that the lawyer act, the lawyer shall obtain their consent.

(9) Save as provided by subrule (10), where clients have consented to a joint retainer and an issue contentious between them or some of them arises, the lawyer shall

(a) not advise them on the contentious issue, and
(b) refer the clients to other lawyers, unless

(i) no legal advice is required, and
(ii) the clients are sophisticated,
in which case, the clients may settle the contentious issue by direct negotiation in which the lawyer does not participate.

*Commentary*

The rule does not prevent a lawyer from arbitrating or settling or attempting to arbitrate or settle, a dispute between two or more clients who are not under any legal disability and who wish to submit the dispute to the lawyer.

Where after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

Practically speaking, many of the rules of professional conduct, particularly those associated with the formation of the joint retainer, are not feasible in the context of a class proceeding. The plaintiff's lawyer will not formalize a joint retainer with the class members at the outset of a proposed class proceeding, and, as already noted above, typically, putative class members do not participate in the proposed class proceedings before the certification motion.

Practically speaking, the rules and policies for joint retainers have been supplanted by the notice and opt-in or opt-out provisions of the class proceedings statutes. For many class members, their first awareness of their status as a class member will come with the court-approved formal notice of certification, which notice will provide

them with the opportunity to opt in or opt out of the class proceeding. Their right to opt in or to opt out would appear to have a function similar to the requirement under the rules of professional conduct that the co-client consent to the joint retainer. In effect, the class members consent to being represented by the representative plaintiff and by his or her lawyer for the purposes of pursuing a claim that they otherwise would be unable economically to pursue. The notice of certification is meant to make the class members' participation a fully informed consent and to explain the financial and other implications of being bound by the outcome of the class proceedings.

Viewing the participation of class members as a joint retainer, there will be no immediate conflict of interest between the class and the representative plaintiff. Indeed, one of the qualifications for the representative plaintiff is that he or she does not have a conflict of interest with the class members that he or she would represent. Under s. 5(1)(e)(iii) of Ontario's *Class Proceedings Act, 1992*, for certification there must be a representative plaintiff "who does not have, on the common issues for the class, an interest in conflict with the interests of other class members". A class action should not be certified if class members have conflicting interests,[47] or if there is a conflict of interest between a representative plaintiff and the class that he or she would represent, a different representative plaintiff should be selected.

Thus, the court will scrutinize the relationship between the representative plaintiff and class members, and a plaintiff with an interest in conflict with the interests of other class members would not qualify as a representative plaintiff.[48] Further, to address the possibility that a conflict might develop later between a representative plaintiff and the members of a class, the legislation provides for the creation of a subclass or the decertification of the proceeding.[49]

47. *Western Canadian Shopping Centres Inc. v. Dutton*, *supra*, footnote 27, at para. 40; *Peter v. Medtronic Inc.* [2007] O.J. No. 4828 (QL) at para. 95, 167 A.C.W.S. (3d) 256 (S.C.J.), leave to appeal refused [2008] O.J. No. 1916 (QL), 55 C.P.C. (6th) 242 (Div. Ct.); *Lacroix v. Canada Mortgage and Housing Corp.*, [2003] O.J. No. 2610 at paras. 54-55 (QL), 36 C.P.C. (5th) 150, 37 C.C.P.B. 53 (S.C.J.); *Public Service Alliance of Canada Pension Plan Members v. Public Service Alliance of Canada*, [2005] O.J. No. 2693 (QL) at paras. 24-28 (S.C.J.).

48. *MacDougall v. Ontario Northland Transportation Commission*, [2006] O.J. No. 5164 (QL), 56 C.C.P.B. 296, 31 C.P.C. (6th) 86 (S.C.J.), affd [2007] O.J. No. 573 (QL), 221 O.A.C. 150, 59 C.C.P.B. 194 (Div. Ct.), leave to appeal to Ont. C.A. refused July 31, 2007, leave to appeal to S.C.C. refused February 21, 2008.

49. *Class Proceedings Act, 1992*, S.O. 1992, c. 6, ss. 5(2) and 10. *1176560 Ontario*

A peculiar example of how the legislation tends to avoid conflicts of interest between the plaintiff and class members occurred in *Kerr v. Danier Leather Inc.*[50] In this case, the proposed representative plaintiffs included a member of the law firm acting for the plaintiff and also the lawyer's spouse was proposed as a representative plaintiff. They were both disqualified from being a representative plaintiff because they would have some interests in conflict with the best interests of the class as a whole when making recommendations or decisions that could have an impact upon the law firm's fees.

Thus, in class proceedings, right from the outset the lawyer for the plaintiff should not have a conflict of interest because of a divergence of interest between his or her clients. However, a conflict of interest between the representative plaintiff and the class members may develop as the action proceeds. If this conflict develops and is not resolved by the creation of a subclass with a new representative plaintiff for the affected class members, it will mean that the lawyer will also have a conflict of interest because he or she will be acting for clients with divided interests. This circumstance presents the problem of integrating the existing canons of professional conduct about a joint retainer with the exigencies of class proceedings. Once again, the case law has more to say than the rules of professional conduct.

*Richard v. British Columbia*[51] is an example of the emergence of a conflict of interest arising from the joint retainer for the representative plaintiff and the class members. In *Richard,*[52] William Mcarthur was one of the representative plaintiffs in a class action against the province of British Columbia. He sued on behalf of former detainees of a provincial institution known as Woodlands School. Mr. Mcarthur alleged that he and others had been physically, sexually and psychologically abused at the school. Their class action was certified and the law firm of Poyner Baxter was appointed lead counsel and thus, as noted by Justice Butler in his reasons for judgment, Poyner Baxter had a solicitor and client relationship with Mr. Mcarthur on three foundations; (1) pursuant to a retainer

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*Ltd. v. Great Atlantic and Pacific Co. of Canada* (2004), 70 O.R. (3d) 182, 184 O.A.C. 298, 50 C.P.C. (5th) 25 (Div. Ct.), affg 62 O.R. (3d) 535, 28 C.P.C. (5th) 135 (S.C.J.), leave to appeal to C.A. refused 50 C.P.C. (5th) 34; *Peppiatt v. Royal Bank of Canada* (1996), 27 O.R. (3d) 462, 27 O.R. (3d) 462, 44 C.P.C. (3d) 8 (Ont. Ct. (Gen. Div.)); *Dhillon v. Hamilton (City)*, [2006] O.J. No. 2664 (QL) at para. 29, 53 C.C.P.B. 146 (S.C.J.).

50. [2001] O.J. No. 4000 at paras. 68-73, 14 C.P.C. (5th) 292 (S.C.J.).

51. [2007] B.C.J. No. 1645 (QL), 284 D.L.R. (4th) 481, [2008] 2 W.W.R. 450 (S.C.), motion to quash appeal dismissed [2008] B.C.J. No. 221 (QL), 290 D.L.R. (4th) 336, [2008] 6 W.W.R. 670 (C.A.).

52. *Ibid.*

agreement with Mr. Mcarthur; (2) as solicitor of record to Mr. Mcarthur, who was the representative plaintiff; and (3) as class counsel for the class of which Mr. Mcarthur was a member.

The relationship between Poyner Baxter and Mr. Mcarthur, however, became troubled because of a decision released by the British Columbia Court of Appeal. In *Arishenkoff v. British Columbia*,[53] the British Columbia Court of Appeal ruled that the *Crown Proceedings Act* was not retroactive and the province could not be liable for a tort committed by its servants that occurred before August 1, 1974. The *Arishenkoff* judgment was a problem for Mr. Mcarthur because his time at the Woodlands School had occurred before August 1, 1974. The judgment caused trouble for Poynter Baxter because the province proposed a settlement for class members who resided in the Woodlands School and the settlement would have involved redefining the class to exclude Mr. Mcarthur and others who resided at the school before August 1, 1974. Notably, the settlement negotiations were kept secret from Mr. Mcarthur, who, when he learned of them, did not approve. He was not in favour of the proposed settlement and he moved to have Poynter Baxter removed as counsel. Poynter Baxter countered with a motion to redefine the class and to have Mr. Mcarthur removed as a representative plaintiff. In the result, Justice Butler concluded that Poynter Baxter had indeed breached its duty of loyalty and this breach could not be excused by the fact that it was acting as class counsel. Justice Butler did not decide whether the statement of claim should be amended to redefine the class.[54]

Justice Butler provided the following analytical legal framework for defining the responsibilities of class counsel to the representative plaintiff and to class members, and Justice Butler ultimately concluded that it was up to the court to determine how the problem of the emergence of a conflict of interest between the representative plaintiff and the class should be solved. He stated:[55]

> From the above authorities and the provisions of the Act, I extract the following principles:
>
> (1) The representative plaintiff has the mandate to act in the best interests of the class as a whole.
> (2) The representative plaintiff has a significant role to play in the

53. [2005] B.C.J. No. 2091 (QL), 260 D.L.R. (4th) 469, [2006] 2 W.W.R. 310 (B.C.C.A.), leave to appeal to S.C.C. refused 263 D.L.R. (4th) vii.
54. Subsequently, the defendant province moved to have the class definition amended. Justice Satanove granted the motion: *Richard v. British Columbia*, [2008] B.C.J. No. 341 (QL) (S.C.).
55. *Supra*, footnote 51, at para. 42.

proceedings after certification. He or she acts in the class' best interest by directing litigation, instructing class counsel and authorizing settlement.

(3) Class counsel has a solicitor-client relationship with class members and owes the duties and obligations that arise as a result of that relationship to the class members. Class counsel also has a duty to act in the best interests of the class as a whole.

(4) Class counsel also has a solicitor-client relationship with the representative plaintiff and owes the duties and obligations that arise as a result of that relationship to the representative plaintiff. This includes a duty of loyalty to the representative plaintiff, which includes the duty to avoid conflicting interests, the duty of commitment to the client's cause and the duty of candour.

(5) While class counsel has a significant role to play in the conduct of proceedings, class counsel may not ignore the wishes of the class representatives in making fundamental litigation decisions and may not prosecute an action with unfettered discretion.

(6) Given the relationship between the class, class counsel and the representative plaintiff, there is a risk that conflicts may arise. Class counsel must be conscious of the conflicts that may arise between the representative plaintiff and other class members, or between his or her own interests and the interests of the class members.

(7) When conflicts arise and cannot be resolved between the class members, class counsel and the representative plaintiff, an application for directions under s. 12, or for approval of the settlement pursuant to s. 35, should be made to resolve the conflict.

(8) The ultimate responsibility to ensure that the interests of the class members are not subordinated to the interests of either the representative plaintiff or class counsel rests with the court.

Justice Butler's judgment confirms that a class action has a genuine plaintiff who has duties to the class that he or she represents and that after certification class counsel has a lawyer and client relationship with both the representative plaintiff and with class members. In other words, there is a joint retainer from which conflict of interest problems may emerge. Poynter Dexter's actions to resolve that conflict of interest were improper and it was necessary to remove them as lawyers. In acting to advance only the interests of the class members for whom they were confident there was a sustainable claim against the provincial government, Poynter Baxter had been disloyal to Mr. Mcarthur. It was no answer for Poynter Baxter to submit that Mr. Mcarthur could opt out of the class proceeding and make his own case. The firm could not unilaterally abandon its responsibilities to Mr. Mcarthur.

*Burnett Estate v. St. Jude Medical Inc.*[56] is another example of how conflicts of interest between the plaintiff and the class he or she would represent may arise during the course of an action and how these conflicts, in turn, present difficulties for the plaintiff's lawyer. In this case, the problems emerged in a proposed class action that had not been certified and so the action had not reached the stage where there could be said to be a joint retainer. The conflict for the lawyer was thus between the duty to the client and whatever duties were attendant on the *sui generis* relationship between the lawyer and the putative class.

The facts of this British Columbia case were that the plaintiff sued St. Jude Medical Inc., alleging that it had manufactured defective Silzone-coated heart valves. In anticipation that the Province of British Columbia would enact legislation that gave the province a subrogated claim for the expenses it had incurred providing health care to the class members, the plaintiff included claims on behalf of the province. The province, which had separate legal representation, provided the plaintiff's lawyers with the information necessary to advance the subrogated claim. The province, however, did not introduce any legislation and, when the defendant offered a settlement that excluded the province as a class member, the plaintiff amended its statement of claim to remove the province as a party. The province responded by asserting that it did not need legislation and that it had a common law subrogated claim. Relying in part on *Richard v. British Columbia*, it moved to have the amendments set aside *nunc pro tunc* and to have its right to participate in the class proceeding recognized. It argued that the amendments were made in breach of the duties that were owed to it by counsel for the proposed class.

Justice Sigurdson dismissed the province's motion. He agreed with the view that before certification there was no lawyer and client relationship between the plaintiff's lawyer and putative class members but held that there might be duties owed to putative class members. Justice Sigurdson agreed with the analysis of Justice Cullity in *Coleman v. Bayer Inc.*,[57] where the plaintiff sought to amend its statement of claim in order to certify and settle an action for a narrower class than the putative class for which the proceedings were commenced. This involved a discontinuance, or abandonment, of part of the action and court approval was required. Justice Cullity ruled that the test for approving a discontinuance was whether the putative class members would be prejudiced. This is a different test

56. *Burnett Estate v. St. Jude Medical Inc.*, [2008] B.C.J. No. 192 (QL) (S.C.).
57. [2004] O.J. No. 1974 (QL), 47 C.P.C. (5th) 346 (S.C.J.), supp. reasons [2004] O.J. No. 2775 (QL), 47 C.P.C. (5th) 148 (S.C.J.).

than the test applied for the approval of settlements, where the best interests of the class members must be considered. The fact that putative members of the class would be excluded from the settlement and obtain no benefit from it was not by itself sufficient to constitute prejudice to their interests. In the *Burnett Estate v. St. Jude Medical Inc.* case, Justice Sigurdson concluded that given the concession that no limitation period defence would be raised against it, the province was not prejudiced by having to advance its subrogated claim as a separate claim.

## (4) Conflicts of Interest from the Lawyer's Loyalties outside the Class Proceedings

A third type of conflict for lawyers acting in class proceedings may arise because of their relationship to persons who are strangers to the class proceedings. The lawyer acting for the representative plaintiff and class members may have a conflict of interest because of obligations of loyalty arising outside of the immediate class proceedings. This type of conflict is now associated with the Supreme Court of Canada's decision in *R. v. Neil*, [58] where in speaking about a lawyer's obligations of loyalty Justice Binnie stated:[59]

> [I]t is the firm not just the individual lawyer, that owes a fiduciary duty to its clients, and a bright line is required. The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client — *even if the two retainers are unrelated* — unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.

That a lawyer has a conflict of interest where one client's interests are directly adverse to the immediate interests of another client in an unrelated retainer is problematic for several reasons, including the difficulty of appreciating the presence of adversity in separate retainers. Another difficulty is the unfeasibility of being loyal to all the individual members of a large group as distinct from being loyal to their collective interests or aspirations. *Setterington v. Merck Frosst Canada Ltd.*[60] provides an illustration of the difficulties.

In *Setterington*, there was a motion to determine which of several class proceedings by purchasers of a drug known as Vioxx should

58. *R. v. Neil*, *supra*, footnote 7.
59. *Ibid.*, at para. 29 (emphasis in original).
60. [2006] O.J. No. 376 (QL) at paras. 25-26, 26 C.P.C. (6th) 173 (S.C.J.).

proceed against the defendant, the drug's manufacturer. This kind of motion has come to be known as a "carriage motion", and the competing proposed representative plaintiffs were Daniel Walsh, who was represented by the Merchant Law Group as counsel, and Carol Setterington, who was represented by a consortium of law firms.

Setterington successfully sought a stay of the Walsh action. In granting the stay, Justice Winkler took into consideration that the Merchant Law Group had a conflict of interest. The conflict arose because in addition to it acting for Walsh and the class of purchasers in the class action that was brought on behalf of those who had used the drug, the law firm was acting for a putative class of plaintiffs that included employees, shareholders, mutual funds, brokerage firms, venture capital firms, pension funds, insurance companies and the Canada Pension Plan, among others. This group of claimants was seeking $26 billion for losses in share value allegedly caused by the manufacturer's misrepresentations. Justice Winkler noted that if the misrepresentation claimants were successful in whole or in part, this could jeopardize the recovery of the claims of the drug user class members. He concluded that the misrepresentation lawsuit commenced and prosecuted by the Merchant Group brought the firm into direct conflict with the interests of the putative class proposed in the Setterington or Walsh actions and that this conflict was a sufficient basis to preclude the Merchant Group from acting as counsel for the drug consumer class.