"YOU GET WHAT YOU PAY FOR"

THE PROBLEM WITH THE CANADIAN APPROACH TO CLASS COUNSEL FEES

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> The legislature has not seen fit to limit the amount of fees awarded in a class proceeding by incorporating a restrictive provision in the *CPA*. On the contrary, the policy of the *CPA*, as stated in *Gagne*, is to provide an incentive to counsel to pursue class proceedings where absent such incentive the rights of victims would not be pursued. It has long been recognized that substantial counsel fees may accompany a class proceeding.[3]

A. INTRODUCTION

It is common ground that the goals of class action legislation are judicial economy, access to justice and behaviour modification.[4] In order to realize those goals, all provinces have provided in their legislation that a class proceeding must be certified if (a) the pleadings disclose a cause of action, (b) there is an identifiable class of 2 or more persons; (c) the claims of the class members raise common issues; (d) a class proceeding would be the preferable procedure for the resolution of the common issues, and (e) there is an adequate representative plaintiff[5]. These ingredients do not, however, automatically translate into a successful class action and the attainment of the objectives of class action legislation. There must also be an industrious lawyer, who is the catalyst of the equation by willing to shoulder enormous financial risk in to act on behalf of the class.

The appropriate amount of compensation for the successful class counsel has been the subject of considerable controversy. This paper will examine how that industrious lawyer should be compensated. Specifically, this paper will compare the multiplier and percentage methodologies for determining class counsel's fees, weigh the pros and cons of each approach, and examine the ranges of percentages awarded by Ontario and British Columbia courts.

Ultimately, it will be argued that unless the courts fulfill the promise of generous class counsel fees, the plaintiff's class action bar will become much more selective in accepting cases resulting in a failure of the realization of the goals of class action legislation. In order to avoid this, this paper posits that class counsel's compensation should, in most circumstances, be calculated based on a percentage of the recovery.

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[4] *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 15.
[5] AB *Class Proceedings Act*, S.A. 2003, c. C-16.5, s. 5(1); BC *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 4(1); MB *Class Proceedings Act*, C.C.S.M. C. C130, s. 4; NB *Class Proceedings Act*, S.N.B. 2006, c.C-5.15, s. 6(1); NFLD & Labrador *Class Actions Act*, S.N.L. 2001, c.C-18.1, s. 5(1); SK *Class Actions Act*, S.S. 2001, c. 12.01, s. 6(1); NS *Class Proceedings Act*, N.S. 2007, c. 28, s.7(1); and ON *Class Proceedings Act, 1992,* S.O. 1992, c. 6.

B. THE POLICY SUPPORTING SUBSTANTIAL CLASS COUNSEL FEES

Class proceeding statutes contemplate that class counsel's fee may be "contingent on success or not". However, given the nature of class proceedings, in the absence of third party funding, it is virtually impossible for counsel to be paid their hourly rate by the representative plaintiff. A contingent fee is the only practical option.. For example, if the representative plaintiff has a potential claim for $2,000, why would that individual agree to be personally responsible to pay class counsel's fees on an hourly basis?

In agreeing to prosecute a class action, a lawyer will face enormous risks. Some of the risks may include the following:

1. the risk that class counsel will spend a substantial amount of time prosecuting the case without being compensated at all;

2. the risk that substantial disbursements will be incurred and if the action is unsuccessful, the lawyer will not be reimbursed for the funds spent to finance the disbursements;

3. the risk that the action will not be certified as a class proceeding;

4. the risk that the common issues trial will be resolved in favour of the defendant; and

5. the risk that if a judgment is obtained, there will be insufficient funds to satisfy the judgment.

The risks identified above are real. Each time a lawyer agrees to act on behalf of a putative class, the real possibility exists that she may prosecute a class action for many years (against well-resourced defendants), spend hundreds of thousands of dollars on account of disbursements, docket millions of dollars of time, and face the prospect of never recouping the investment.[6]

As class counsel will most likely only be compensated in the event of success, there has to be an incentive for him or her to agree to dedicate a substantial amount of time and resources in order to act on behalf of the class. The possibility of a fee award that not only compensates class counsel for the amount of time actually incurred, but also rewards him or her for the risk assumed on behalf of the class is therefore key to ensuring that

[6] Consider the *Authorson* class action. The action was commenced in 1999 against the federal government. The plaintiff alleged that the failure of the federal government to invest the pensions of veterans or pay interest on them was a breach of fiduciary duty. In 2003, the Supreme Court of Canada effectively dismissed the class action. The plaintiff tried to resurrect the action, but in 2007, the Court of Appeal for Ontario ruled that the plaintiff could not do so. The law firm that had prosecuted the litigation dissolved shortly thereafter.

class counsel remain motivated to assume the necessary risks to act as class counsel. If class counsel is not adequately compensated, lawyers will not have an economic incentive to prosecute class actions and members of the public who have been wronged will be denied access to justice. Thus, the objectives of the legislation will not be realized, even if all certification criteria are theoretically met. As explained by Justice Goudge in *Gagne v. Silcorp Ltd.*:

> Another fundamental objective is to provide enhanced access to justice to those with claims that would not otherwise be brought because to do so as individual proceedings would be prohibitively uneconomic or inefficient. The provision of contingency fees where a multiplier is applied to the base fee is an important means to achieve this objective. The opportunity to achieve a multiple of the base fee if the class action succeeds gives the lawyer the necessary economic incentive to take the case in the first place and to do it well. However, if the Act is to fulfill its promise, that opportunity must not be a false hope.[7]

The legislature has recognized that class counsel faces increased risk in the context of a class action as compared to general litigation. This recognition is reflected in section 33(4) of the *CPA* which expressly authorizes class counsel to apply to have his or her fees increased.[8]

Although *Gagne* was decided ten years ago, it is important that courts not lose sight of the dangers that may exist if class counsel is under-compensated.

C. THE LEGISLATIVE INTENT

The starting point in any analysis of class counsel's compensation is to examine the legislative intention concerning the issue.[9]

Section 32(1) of the *CPA* sets out the requirements of the agreement between class counsel and the representative plaintiff concerning fees and disbursements:

> 32. (1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,
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> (a) state the terms under which fees and disbursements shall be paid;
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> (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
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> (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

Section 38(1) of the BC *CPA* contains identical requirements with respect to the agreement between class counsel and representative plaintiff.

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[7] *Gagne v. Silcorp Ltd.*, 41 O.R. (3d) 417 (OCA) at para. 14.

[8] S. 32(4) provides that "An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier."

[9] The authors will examine Ontario's *Class Proceedings Act*, 1992, S.O. 1992, c.6 (the "*CPA*") and the British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50

While neither the *CPA* nor the BC *CPA* contain any restrictions in terms of how the fee should be calculated, section 33(4) of the CPA expressly authorizes class counsel to "make a motion to the court to have his or her fees increased by a multiplier", and therefore clearly show that the legislator contemplated the need to increase class counsel's compensation so that it would result "in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success" (see s. 33(7)(b)).

The inclusion of an express provision in the CPA authorizing the increase of a fee based on a multiplier approach caused some to call into question whether any other forms of fees could be sought in Ontario. For example, In *Nantais*, defendant's counsel argued that the retainer agreement[10] entered into by the plaintiff and her counsel was illegal because the only permitted contingency arrangement contemplated by the *CPA* is the multiplier methodology set out in section 33. Class counsel argued that the word "otherwise" in section 32(1)(c) did not preclude any other financial arrangement (subject, of course, to court approval). Justice Brockenshire accepted class counsel's interpretation:

> [11] In my view, this interpretation flies in the face of the wording of the Act. ... Section 33(1) and (2) make it clear that generally under the Act, despite the *Solicitors Act* and the *Act Respecting Champerty,* there can be an agreement between a solicitor and a representative party (on behalf of that party and those represented by that party) for the payment of fees and disbursements only in the event of success. Section 32 makes it clear that any fee arrangement entered into is not enforceable unless approved by the court, and unless it estimates the expected fee, whether contingent or not, and states the method by which payment is to be made, whether by lump sum, salary or otherwise. If so approved, any amounts owing thereunder are a first charge on any settlement funds or monetary award. Section 33(3) through (9), in my view, creates a special type of "otherwise" under s. 32(1)(*c*)—an arrangement under which hourly rates are quoted, with a provision for applying to the court after the fact, for an increase in such hourly rate, based on the risk incurred in undertaking the case under an agreement to be paid only if successful.
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> [12] <u>I do not view the special provisions relating to "multipliers" for hourly rates as preventing, in any way, other arrangements as specifically authorized under s. 32(1)(*c*). I view s. 33(1) and (2) as permitting, despite other statutes, all kinds of fee arrangements contingent upon success, and not just hourly rate multipliers</u>. I reject the contention that the fee agreement is illegal, as not authorized under the Act.[11] [emphasis added]

Justice Brockenshire's interpretation has been frequently cited with approval, and it is now beyond question that class counsel may negotiate and seek to approve percentage fee agreements in Ontario.

Further, both statutes confer upon the court an overriding discretion to *"direct that the amount owing [to class counsel] be determined in any other manner"* if the court does not approve the fee agreement (see CPA s. 32(4)(c) and BC CPA s. 38(7)(c)).

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[10] Among other things, the retainer agreement provided that class counsel would receive $5,000 per implanted class member upon resolution of the litigation.

[11] *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1996), 28 O.R. (3d) 532 (S.C.J.) at p. 528, leave to appeal to the Court of Appeal denied.

Having established that the legislation affords complete flexibility in determining how class counsel should be compensated, the question that must be answered, therefore, is whether there is a preferable way for class counsel to be compensated?

D. MULTIPLIER vs. PERCENTAGE

There are two principal ways in which class counsel fees can be determined: the multiplier approach, and the percentage approach.

The multiplier approach follows the "Lindy Lodestar" approach developed in the U.S. and consists of a two-step process: first, the Court will determine the "base rate" which is the number of hours reasonably spent by counsel in connection with the proceedings, and second, the Court determines what multiplier, if any, should be applied to the base rate. In Ontario, approved multipliers have varied between 1.1 and 4.8[9], and the median multiplier approved in cases between 1996-2006 was 2.74[10].

The most common criticism of the multiplier approach is that it encourages inefficiency and does not promote the early resolution of proceedings becauseit rewards class counsel in direct proportion to the hours spend in connection with the proceedings. and. It also does not allow the representative plaintiff to gauge the magnitude of the fee award at the time the fee agreement is signed, and requires the Court to scrutinize the amount of time spent by class counsel and his or her team in the prosecution of the proceedings.

The percentage approach follows the well-established practice of assessing fees based on a straight percentage of the total recovery, as agreed as between class counsel and the representative plaintiff, or as modified by the Court. Unlike the multiplier approach, the percentage approach gives the representative plaintiff a clear understanding of how much of the ultimate award will be used to pay counsel's fees, and how much will be left for distribution to the class. Because it is not based on the hours actually spent in connection with the proceedings, the percentage approach encourages an efficient use of counsel's time and the early resolution of the proceedings.

The authors assert that in most circumstances, the class members and class counsel are best served if class counsel fees are determined based on a percentage of the recovery. In short, relying upon the multiplier methodology may encourage inefficiency and discourage early resolution of the proceeding. On the other hand, the percentage approach is fixed, and can be reasonably estimated at the outset of the litigation. On the other hand, a fee based on the multiplier methodology may be difficult to estimate at the outset of the litigation and may discourage efficient time-management of class counsel and preservation of scarce judicial resources.

The proposition that class counsel fee awards should be calculated based on a percentage of the recovery rather than a multiplier is supported by academic literature. In the article *Rethinking the Approval of Class Counsel's fees in Ontario Class Action* (which has been

cited with approval in several recent decisions) Professor Benjamin Alarie said the following:

> The first recommendation is to de-emphasize the use of the lodestar method of determining the compensation of class counsel. In most Ontario class actions, the retainer agreement between class counsel and representative plaintiffs provides for a contingency fee calculated on a percentage of the settlement or judgment. Unless a compelling case can be mounted for regarding this agreement as unsuitable, compensation at the rate agreed to by the representative plaintiff should be the court's starting point in deciding a "fair and reasonable fee". First resort should not be made to the base fee and multiplier method, because of the considerable incentives class counsel and defendants have for tacit collusion in allowing class counsel's base fee to rise to a level conducive to settlement, and the inefficiencies this engenders. If this recommendation is taken up, and the percentage method (if agreed to by the representative plaintiff and class counsel) is specified in the retainer agreement, there are four specific concerns judges should consider. First, the court should examine whether there is any reason to think that the compensation provided for by the retainer agreement does not represent a fair and reasonable return to the class counsel given what was known *ex ante* about the strength of the case, the costs of making the case, and the likelihood of success. This may be a difficult determination to make; nevertheless courts should strive to make accurate determinations in this regard. Second, the court should consider whether the settlement takes the form of coupons of in-kind benefits to class members. If so, the court should discount the judgment appropriately. Third, if there is a reversionary interest to the defendant of the settlement found, then the court should consider allowing class counsel to recover the stated percentage only of the amount actually distributed to class members. Finally, the court should be attuned to the incentives class counsel have under the percentage method of premature settlement. If it appears that class counsel has settled too quickly for an amount grossly lower than what one might consider to be the value of the claims of the class members, then the lodestar method might be more appropriately used than the percentage method (assuming the percentage method is provided for in the retainer agreement).[12]

Calculating fees based on a percentage methodology has also received considerable judicial support. Justice Winkler (as he then was) said the following concerning class counsel fees based on a percentage of the recovery in the *Crown Bay* decision:

> A contingency fee arrangement limited to the notion of a multiple of the time spent may, depending upon the circumstances, have the effect of encouraging counsel to prolong the proceeding unnecessarily and of hindering settlement, especially in those cases where the chance of some recovery at trial seems fairly certain. On the other hand, where a percentage fee, or some other arrangement such as that in *Nantais*, is in place, such a fee arrangement encourages rather than discourages

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[12] Rethinking the Approval of Class Counsel's Fees in Ontario Class Actions (2006 Class Actions Without Borders) at pp. 23-24.

> settlement. In the case before this court the settlement averted a seven- to ten-day trial. Fee arrangements which reward efficiency and results should not be discouraged.[13]

Justice Smith in *Endean* made the point that a percentage fee best reflects result when he wrote:

> Here, the fees proposed are very large. The total value of the time docketed by all plaintiffs' counsel for the transfused class, including those who acted for individual plaintiffs and who will be paid their fees by Mr. Camp, amounts to approximately $4,000,000. Accordingly, the proposed fee is roughly 3.75 times the value that they have ascribed to their work. However, that is not necessarily a reliable measure, as I have already noted. Moreover, it must be remembered that good counsel can often achieve with a minimal effort what it might take less skilful counsel a great deal of time to achieve, as was seen in Commonwealth No. 1 and Commonwealth No. 2. Good counsel should not be penalized for their acuity and efficiency by basing their fees only on the amount of time it took them to accomplish their client's objectives.[14]

More recently, Justice Cullity commented upon the deficiencies of the "lodestar" approach in *Martin* v. *Barrett*:

> [38] The method of determining fees in accordance with section 33—the "lodestar" method—was imported into the CPA from the United States. It has no counterparts in other Canadian jurisdictions and has been expressly rejected in British Columbia as an "undesirable and unnecessary" approach: *Endean* v. *Canadian Red Cross Society*, [2000] C.J. No. 1254 (S.C.); *Pearson* v. *Boliden Ltd.*, [2006] B.C.J. No. 1512 (S.C.). In *Endean*, the court accepted the strong criticisms of the lodestar method enumerated in the report of a task force set up by a federal court in the United States. These criticisms were as follows:
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> > 1) It increases the workload on an already overtaxed judicial system; 2) the elements of the process are insufficiently objective and produce results that are far from homogeneous; 3) the process creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law; 4) the process is subject to manipulation by judges who prefer to calibrate fees in terms of percentages of the settlement fund or the amounts recovered by the plaintiffs or of an overall dollar amount; 5) the process, although designed to curb abuses, has led to other abuses, such as encouraging lawyers to expend excessive hours engaging in duplicative and unjustified work, inflating their normal billing rates, and including fictitious hours; 6) it creates a disincentive for the early settlement of cases; 7) it does not provide the...court with enough flexibility to reward or deter lawyers so that desirable objectives, such as early settlement, will be fostered;

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[13] *Crown Bay Hotel Ltd. Partnership* v. *Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 (Gen. Div.).

[14] *Endean* v. *Canadian Red Cross Society*, [2000] B.C.J. No. 1254 (B.C.S.C.) at paras. 74, 75.

> 8) the process works to the particular disadvantage of the public interest bar because, for the example, the lodestar is set lower in civil rights cases than in securities and anti-trust cases: and 9) despite the apparent simplicity of the lodestar approach, considerable confusion and lack of predictability remain in its administration.

> [39] I am not aware of anything in the experience in this jurisdiction that would suggest that the above criticisms are not equally applicable under the CPA. Section 33 does, however, remain in the statute and, unlike the position in British Columbia, there is no doubt that counsel here are entitled to adopt the lodestar method. There is also no doubt that in a case like these it presents the court with a task of some difficulty.[15]

Although the multiplier approach is falling out of judicial favour, an interesting question exists as to whether judges should test the reasonableness of the percentage fee by comparing what the result would have been had a multiplier approach been used. There appears to be a divergence of opinion concerning this issue.

In *Cassano*, Justice Cullity approved a fee of $11 million (based on a contingency fee of 20 percent of the recovery) even though the multiplier would have been 5.5. In doing so, he made the following comments:

> [59] The second matter is that the fee of $11 million represents the application of a multiplier of approximately 5.5 to counsel's approved time. This might well be considered to be excessive if the retainer agreements had provided for the adoption of the "lodestar approach" reflected in section 33 of the CPA. They did not do this.

> [60] While it has been said that the appropriateness of a fee calculated in the lodestar manner might be tested by comparing it with the percentage of gross recovery it represents, I would be hesitant to use the lodestar method as a firm indicator of the reasonableness of a fee determined by the application of a percentage to the amount recovered. In *Martin v. Barrett*, [2008] O.J. No. 2105 (S.C.J.), at paras 38 - 39, I referred to criticisms of the lodestar method. One of these that has been repeatedly mentioned in other cases in this jurisdiction and elsewhere is that the application of a multiplier to a base fee may not only encourage an inefficient use of time and a padding of dockets, it may also fail to reward efficient time-management and the exercise of superior skill by class counsel.[16]

Justice Cullity seems to suggest that the court does not have to test the reasonableness of a legal fee by measuring the multiplier if the retainer agreement does not provide for the "lodestar approach".

However, Justice Perell engaged in that very practice when he cross-checked the reasonableness of the fee by using the multiplier approach despite the fact that counsel did not seek a fee based on the multiplier methodology:

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[15] *Martin* v. *Barrett*, [2008] O.J. No. 2105 (S.C.J.) at paras. 38-39.

[16] *Cassano v. The Toronto-Dominion Bank*, 2009 CanLII 35732 (ON S.C.) at paras. 59-60.

> I turn now to determining a fair and reasonable fee by using the base fee and a multiplier. Here, I appreciate that Class Counsel's retainer agreements did not envision a multiplier being applied to their base fee, but in the circumstances of this case, where the evils of a multiplier approach are missing (visualize, a multiplier approach encourages inefficiency and padded dockets), it makes sense to me to use a multiplier approach, at least, for the information it may provide as to what is a fair and reasonable counsel fee.[17]

In the authors' view, the lodestar approach should not be used to gauge the reasonableness of a percentage fee agreement, for a couple of reasons:

1. The Court's role in the fee approval process is to determine whether the fee agreement should be enforced. If the court concludes that the agreement should be enforced considering the results achieved, the risks undertaken, the time expended, the legal and factual complexity of the matter, the degree of responsibility assumed by counsel, the monetary value of the matters in issue, the degree of skill and competence demonstrated by counsel, the ability of the class to pay, the client and the class' expectations as to the amount of the fee, other awards made in similar cases and the integrity of the legal profession, why should it be constrained based on a measure of recovery that was expressly not agreed as between the parties to the fee agreement? and

2. While it is common for fee agreement to include a multiplier approach as an alternate means to assess the amount of fees payable to class counsel, the multiplier provisions in the CPA were designed to allow class counsel to bring a motion to increase the *existing* fees agreed upon between class counsel and the representative plaintiff, and as such their use to create a ceiling for amount of fees agreed upon as between the parties is not consistent with the intention of the legislator. The fact that there are absolutely no constraints within the CPA as to the maximum amount payable in fees lends support to this position.

E. HOW ARE OTHER PROFESSIONALS COMPENSATED?

In considering the appropriate methodology to determine class counsel fees, it is useful to consider the structure of compensation in other business situations. The authors considered the compensation structure of investment banks, hedge funds and management consultants.

Investment Banks

For small to mid-sized companies with valuations below $100 million, investment banks typically charge fees in three ways: an upfront or monthly retainer, a cash fee paid upon closing of financing, and additional equity compensation. The closing fee (also called a

[17] *Fantl v. Transamerica Life Canada*, 2009 CanLII 55704 (ON S.C.) at para. 89.

"success fee") is usually an additional variable fee that ranges from 2% and 10% of the total capital raised. In addition to cash fees at closing, investment banks often seek equity compensation at closing. Most equity compensation is paid in the form of warrants. Similar to the closing fee, warrants can vary substantially, but the initial value of warrants could equal additional compensation of 5% to 10% of the capital raised.[18]

Hedge Funds

Hedge fund manager will typically receive both a management fee and a performance fee from the fund. Most hedge fund managers charge a management fee of 2% of the hedge fund's net asset value each year and a performance or incentive fee of 20% of the hedge fund's profit.[19]

Consultants

Consultants often agree to be compensated based on a performance model. This model provides that consultants are paid based on a percentage of the client's future revenues, profits or commissions.[20]

F. IS THERE A "RIGHT" PERCENTAGE?

Although there is no statutory maximum fee percentage in either the CPA or the BC CPA, is there a "right" percentage? And should this percentage change depending on the ultimate take up rate, or the stage at which the proceedings are settled? The potential for "selling out" the Class in an early and not as favourable settlement is one of the criticisms of the percentage approach.

Whereas British Columbia has a long history of approving fees based on a percentage of the recovery (typically, between 10 and 30%)[17], Ontario has only recently approved such arrangements. Percentage fee agreements in British Columbia are subject to statutory constraints imposed in relation to personal injury claims, which provide that the maximum amount that can be claimed is 33 1/3 % in cases involving out of the use of a motor vehicle, and 40% in any other claim for personal injury or death[21].

In *Raphael Partners v. Lam*,[22] (the action was not commenced under the *CPA*) the Court of Appeal for Ontario considered whether a contingency fee arrangement was enforceable under the *Solicitors Act*.[23] In concluding that the agreement was enforceable, Justice Cronk commented on the range of percentages approved in Ontario:

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[18] White Paper: Investment Banking Fees Examined (Lantern Capital Advisors).
[19] AIMA'S Roadmap to Hedge Funds (www.aima.org).
[20] See *Consulting Fee rates / Consultant Fees*, May 26, 2006, Consultant Journal.
[21] Law Society Rule 1055
[22] *Raphael Partners v. Lam* (2003), 61 O.R. (3d) 417 (C.A.).
[23] *Solicitors Act*, R.S.O. 1990, c. S. 15.

> In *Desmoulin v. Blair*, this court approved solicitors' fees in a personal injury action equivalent to thirty-one percent of the assessed damages and disbursements. In *656203 Ontario Inc. v. Soloway Wright*, solicitors' fees equal to twenty-one percent of the clients' damages recovery, net of costs awarded, were approved by the court even in the absence of an express agreement with the client authorizing such fees. In this case, the solicitors' charged fees in the sum of $461,313.62 represent eighteen and one-half per cent of the settlement amount of $2.5 million allocated to general damages. Those fees, in all of the circumstances, are not unreasonable.

If the courts approve percentages in the range of 20 to 30 percent in non-class action litigation, shouldn't similar percentages be awarded in the class action context? Given that the risks faced by class counsel are generally much high than the risks faced in general litigation (see above), the authors submit that the appropriate percentage should be higher in the context of class action litigation. Consider Justice Winkler's (as he was then) comments in the *Parsons* case:

> The fees being sought are substantial. However, the quantum of a counsel fee, in and of itself, does not provide a valid basis for attacking the fee. The test in law, as set out in *Gagne*, is whether the fees are fair and reasonable in the circumstances. The legislature has not seen fit to limit the amount of fees awarded in a class proceeding incorporating a restrictive provision in the *CPA*.[24]

Justice Winkler's comments are accurate – had the legislature intended that class counsel fees be capped at a certain level, it would have imposed such a cap in the *CPA*. Interestingly, the Ontario legislature has imposed caps in other circumstances:

1. S.138.1 of the *Securities Act*[25] establishes "liability limits" (cap on damages) for officers, directors, responsible issuers, experts and influential persons in actions commenced pursuant to Part XXIII.1; and

2. the *Ticket Speculation Act*[26] establishes a maximum commission of $.50 per ticket that may be charged in addition to the face price of the ticket.

In the absence of such a cap, the court should not hesitate to award substantial fees to class counsel in the appropriate circumstances.

Further support for the proposition that fees based on a percentage of the recovery should not be reduced because of the overall size of the legal fee is found in the recent decision of *Martin v. Barrett*:

> On that basis, the fee would be $4,086,870 which is approximately 29 per cent of the gross recovery – a percentage that I consider is not out of line with those awarded in previous cases involving, and not involving, the application of a multiplier.[27]

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[24] *Parsons v. Canadian Red Cross Society*, supra, at para. 56.
[25] *Securities Act*, R.S.O. 1990, c. S.5.
[26] *Ticket Speculation Act*, R.S.O. 1990, c. T.7.
[27] *Martin* v. *Barrett*, [2008] O.J. No. 2105 (S.C.J.) at para. 55.

In Professor Alarie's 2006 article (referred to above), he analyzed a sample of 27 reported Ontario class action decisions. The study revealed that class counsel fees averaged 14.85 percent of the recovery. Interestingly, 22 of the 27 cases considered were decided before 2004.

A more recent review of class action settlements from 2006 to 2009 reveals that class counsel fees (measured by a percentage of the recovery) have substantially increased over time. The chart set out below abstracts recent decisions concerning legal fees. In the 12 cases identified in the chart below, the average fees awarded by the court amounted to 22.3 percent of the recovery.

Decision	Amount Recovered	Fee	Percentage
Martin v. Barrett[28]	$13,926,195	$4,086,870	29%
Garland v. Enbridge Gas Distribution Inc.[29]	$22 million plus savings	$10.13 million	27%
Stone v. Bayer Inc.[30]	$3,371,712 plus interest	$834,000	25%
Stastny v. Southwestern Resources Corp.[31]	$15,527,500	$3.2 million	25%
Casselman v. CIBC World Markets[32]	$4,340,000	$846,247 (approximately)	19.5%
Irving Paper Limited v. Atofina Chemicals Inc.[33]	$20,790,085	$3,170,239.98 (for Ontario counsel only)	21.45%
Cassano v. Toronto-Dominion Bank[34]	$55,000,000	$11,000,000	20%
Robertson v. Thomson Canada Limited[35]	$11 million	$4 million	36%
Georghiades v. Scotia Capital Inc.[36]	$3,457,194	$915,600	26.48%
Lawrence v. Atlas Cold Storage Inc.[37]	$40,000,000	$6.3 million	15.75%
Fantl v. Transamerica Life Canada	$40,500,000	$6.6 million	16%
Skopit v. Merrill Lynch Canada	$3,662,145	$991,090	27%

There have been a number of decisions in Ontario which suggest that the fee award should be informed by the ultimate recovery made by the class members. For example, in *Stewart v. General Motors of Canada Inc.*, the Court did not approve payment of the

[28] *Martin* v. *Barrett*, supra.
[29] *Garland* v. *Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (S.C.J.).
[30] *Stone* v. *Bayer*, Endorsement dated April 19, 2006 (S.C.J.).
[31] *Stastny v. Southwestern Resources Corp.*, Reasons dated November 3, 2008 (S.C.J.).
[32] *Casselman* v. *CIBC World Markets Inc.*, Judgment dated December 21, 2007 (S.C.J.).
[33] *Irving Paper Limited v. Atofina Chemicals Inc.*, Endorsement dated September 11, 2009.
[34] *Cassano v. Toronto-Dominion Bank*, [2009] O.J. No. 2922 (S.C.J.)
[35] *Robertson v. Thomson Canada Limited*, 2009 CanLII 32703 (S.C.J.).
[36] *Georghiades v. Scotia Capital Inc.*, Endorsement dated January 23, 2009 (S.C.J.).
[37] *Lawrence v. Atlas Cold Storage Inc.*, [2009] O.J. No. 4271(S.C.J.), aff'd 2009 ONCA 690

entirety of the fee agreed as between class counsel and the representative plaintiff, and ordered that a portion of the funds allocated for payment of class counsel's fees be held in escrow pending completion of the claims process and further other of the Court. In doing so, the Court reasoned[31]:

> I am, however, not satisfied that, in this case, I can appropriately disregard the possibility that, when all claims have been dealt with, the lawyers and not the class members may turn out to be by far the principal beneficiaries of the settlement. The defendants have not agreed to contribute a minimum amount for the benefit of the class members, and there is no assurance that the net recovery for them will not be significantly less than the amount of the fees....

While the Court ultimately approved the entirety of the fee agreement despite a low take-up rate, the decision to defer the approval of class counsel's fees until the conclusion of the claims process suggests that counsel should be compensated based on the benefits actually utilized by the class, as opposed to the benefits made available. In the author's view, this is not the correct approach, given that the objective of class proceedings legislation is access to justice, as opposed to exercised access to justice.

The most frequent criticism to the percentage approach is the potential for "buying" class counsel's approval to an early and otherwise unfavourable settlement by maximizing the amounts made available for payment of fees. In the authors' view, this concern can only exist in circumstances where unused portions of the settlement fund revert to the defendant and give rise to a defendant's interest in the claims process. If reversionary settlements are eliminated, then the defendants will not have an interest in the claims process and class counsel is free to design a claimant-friendly process that does not discourage claims and maximizes individual recovery. In this environment, the amount of claims ultimately made becomes completely unrelated to the class counsel's efforts, and should not be used to limit class counsel's fee recovery.

G. BEST PRACTICES

Regardless of the type of contingency fee agreement with the representative plaintiff, it is in the best interests of the class if the terms of the agreement are disclosed to the class members as early in the litigation as possible. This may assist the class members in deciding whether they should stay in the action or opt out.

Class counsel may consider adopting the following practices:

1. Although there is no requirement that the retainer agreement must be signed at an early stage of the proceeding, consider executing the agreement as early as possible.

2. If inserting an alternate multiplier method of calculating the fees in the fee agreement, consider whether that will invite the court's comparison

in the event that a percentage award is sought, and whether the multiplier in the agreement will create a ceiling for the fee award.

3. Disclose the existence of and the terms of the agreement on the website established for the litigation immediately after it is executed.

4. If the action is certified (before the action resolved), consider disclosing the terms of the retainer agreement in the court-approved notice.

5. Absent special circumstance, do not try to renegotiate the terms of the agreement once you have a better understanding of the extent of damages. If class counsel engages in this practice, there may be an argument that the risk faced by class counsel has diminished.