

Financing Class Actions

James H. MacMaster and Ward K. Branch

**Branch MacMaster
1210-777 Hornby Street
Vancouver, B.C.
V6Z 1S4
Phone: 604-654-2999
Fax: 604-684-3429
Email: jmacmaster@branmac.com
wbranch@branmac.com
Website: www.branmac.com**

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*“I’m thirty-nine years old,” continued Schlichtmann, “and I’ve dug one f***** big hole. A man couldn’t dig a bigger hole.”¹*

Introduction

Jan Schlichtmann is a Boston attorney whose involvement as the lead counsel in the environmental contamination litigation against Beatrice Foods Ltd. and W.R. Grace & Co was described in excruciating detail in the book and movie *A Civil Action*. His story should be mandatory reading for all who are contemplating taking on mass tort or class action litigation and who are wondering about financing such an effort.

The case against Beatrice Foods Ltd. was lost and the plaintiffs ended up with an \$8 million dollar settlement with W.R. Grace & Co. The litigation expenses amounted to US\$2.6 million² of which \$1 million was lent to the firm by its banker who was affectionately referred to as “Uncle Pete”.³ After the creditors, the other lawyers and the staff in his firm, a referral fee to a local lawyer, and a fee to a public justice advocacy group were all paid,

Schlichtmann ended up with only thirty thousand dollars. He was debt-free, but there was no money left over for him to reclaim his Porsche. Nor could Gordon [his accountant] get him any new credit cards—Schlichtmann had destroyed his creditworthiness.⁴

Schlichtmann plugged on with the appeal against Beatrice Foods Ltd. but the appeal was unsuccessful. As well, he learned that not all the debts had been paid and no money had been set aside to pay taxes. Once the last appeal was lost, this chapter of his financial life

¹ Harr, Jonathan, *A Civil Action*, (New York: Vintage Books, 1995), page 491

² *ibid.*, page 453

³ *ibid.*, page 455

⁴ *ibid.*, pages 455-6

ends as follows:

Schlichtmann filed for bankruptcy. He had hoped to pay off his debts, but in the end he could not. He found himself unable to work on cases anymore. He decided to quit the practice of law and go to Hawaii. In the Chapter 7 papers filed in bankruptcy court in Boston, he listed his assets as fourteen dollars in a checking account, a fifty dollar cassette radio, one hundred dollars cash, and five hundred dollars worth of clothes...He owed his creditors \$1,231,542 of which state and federal taxes accounted for almost two-thirds.⁵

We suspect it is very difficult for most Canadian counsel to wrap their minds around the concept of financing \$2.6 million of disbursements. How many of us can claim an “Uncle Pete” relationship with our bankers that will support a million dollar loan to finance a single case? How many of us can finance the balance of \$1.6 million from our “war chest” left over from our successful cases?

Financing major litigation from the plaintiff’s perspective in Canada is made even more difficult by our economy, our smaller market, and our conservative legal tradition. As a general proposition, the prevalence of the jury trial, the absence of caps on non-pecuniary damages, more readily available punitive damages, the existence of a real economy, and a litigious society all combine to make it easier for American plaintiff lawyers to win verdicts or settlements that dwarf our experience in Canada. The more large verdicts you can win, the more likely it is that you can develop a “war chest” to finance more litigation.

The impediments to financing major litigation in Canada should be given greater recognition by the courts. In Canada, the simple fact of the matter is that only a few law

⁵ *ibid.*, page 491

firms will ever have the proper combination of experience, success, and financing to take on class action litigation. While it is quite appropriate for our courts to take a cautious, conservative approach to the development of the law relating to class actions, it is imperative that the courts appreciate that the benefits of aggregating claims does not make financing this complex litigation any easier. In the long run, the courts must recognize that the goals of the class action legislation will only be achieved if the successful cases help to finance the unsuccessful cases.

Until that day comes, Canadian lawyers must look elsewhere for financing for class actions. Assuming your firm cannot rely on “Uncle Pete” at the local bank, here are some of your options.

A. Public Funding

There is some level of public funding available in Ontario and Quebec.⁶ None of the other jurisdictions with legislation has created entities providing financial support for class actions. The Supreme Court of Canada’s expansion of class actions in *Western Canadian Shopping Centres v. Dutton*⁷ did not go so far as to mandate the creation of public bodies to provide funding in those jurisdictions.

⁶ For an overview of the legislation see Ward K. Branch, *Class Actions in Canada*, (Aurora: Canada Law Book, 2001), chapter 8 “Funding Agency Support”; *Law Society Amendment Act (Class Proceeding Funding)*, 1992, S.O. 1992, c. 7; *An Act Respecting the Class Action*, R.S.Q., c. R-21, s. 31; For a discussion of the problems with the Ontario Fund, see: Watson, Garry D., “Fee shifting in Ontario Class Actions and the Failure of Ontario’s Class Proceedings Fund to Meet its Intended Purpose”, and for a more detailed review of the Quebec Fonds operations, see Desmeules, Claude, “Public Funding of Class Actions in Quebec”, both articles in First Annual Class Actions Symposium, *Class Actions: Where Are We and Where Are We Going* (Toronto: Osgoode Hall Law School of York University, 2001).

⁷ (2001), 201 D.L.R. (4th) 385 (S.C.C.)

The funding approach taken is, in whole or in part, driven by the approach taken to the payment of costs. In Ontario and Quebec, the representative plaintiff may be liable for the costs and disbursements of the defendant if the class action is unsuccessful. In Ontario, this may be a very significant exposure. In Quebec the risk is moderated because the costs payable are nominal although the disbursements may still be substantial. In B.C., Saskatchewan, and Newfoundland, the representative plaintiff does not face any cost exposure except in certain narrow circumstances of improper conduct.

1. **Quebec**

Quebec has the longest history of class action funding. The Quebec system managed by the Fonds d'aide aux recours collectives ("Fonds") is quite active, and by all accounts seems to function quite effectively. Up to 1999, the Fonds had made 955 decisions on applications for funding. Funding was granted in 79% of these cases. Even more significantly, funding was provided to 66% of the class actions filed since the Fonds was established.

The Fonds is well capitalized with yearly provincial subsidies (in excess of \$600,000 in 2000) and warranties from the provincial government which guarantee payment of capital and interest of any loan or other financial commitment made by the Fonds.⁸ The Fund also retains a percentage of any recovery made in every class action (see below).

An application for funding must include the following information:

1. the nature of the action;
2. the class sought to be represented;
3. the financial condition of the representative and other known class members; and
4. the purposes for which funding is sought.

In assessing the application, the Fonds will consider both whether the action can proceed without assistance, and the probable success of the application for certification and the underlying action.

The Fonds can provide assistance with both legal fees and disbursements.

In terms of the ongoing viability of action, the Fonds has a right of subrogation over the amounts provided. The Fonds is also entitled to:

1. 2-10% of each individual award (if no aggregate award is made);
2. 50-90% of the balance remaining after claims by class members from any aggregate award;
3. 30-70% of the total award less costs and attorney's fees if the court decides not to allow individual claims.

⁸ Desmeules, *supra*, footnote 1, page 1

Significantly, the Fonds' right to compensation applies to every action, not simply those in which the Fonds has provided funding. Given this feature, as well as the potential ongoing legal fee support supporting class counsel's cash flow, there is a real incentive to apply for funding. This is borne out by the statistics listed above.⁹

2. **Ontario**

By contrast, the Ontario Class Proceedings Fund (the "Fund") has been virtually moribund in comparison to its Quebec counterpart. The Fund was initially provided with a seed grant of \$500,000 from the Ontario Law Foundation. There is an array of information that must be provided before a funding application will be considered, including:

1. the identity of the applicant and the proposed defendant;
2. the stage of the proceeding, including copies of the pleadings;
3. a description of the class and an estimate of the number of members;
4. the proposed class lawyers and their qualifications;
5. a description of the fee agreement;
6. an estimate of the number of hours that will be spent on the case;
7. a discussion of the defendant's ability to pay the judgment;
8. a budget of the disbursements.

⁹ See Page 4

The Fund's decision whether to fund the action will be based on the following factors:

1. the merits of the case;
2. whether the representative has made reasonable efforts to raise funds from other sources;
3. whether the plaintiff has a clear plan for the use of the funds;
4. the public interest;
5. the likelihood of certification;
6. allocations made in other cases;
7. the amount of funding required;
8. any other factor that the Fund considers relevant..

The representative must submit a legal opinion assessing the case and the likelihood of certification. The committee administering the Fund will lean towards funding cases which raise issues of broad public importance or which are directed towards improving the situation of persons or groups who are historically disadvantaged.¹¹ There appears to be much more of a public interest emphasis than in the Quebec funding program.

The committee sought directions in *Garland v. Consumers Gas Co.*¹² on two issues. The first was whether the committee should receive submissions from a proposed defendant

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¹¹ O. Reg. 771/92, s. 5; *Edwards v. Law Society of Upper Canada* (1994), 36 C.P.C. (3d) 116 (Ontario Class Proceedings Committee)

¹² (1995), 122 D.L.R. (4th) 377 (Ont. Gen.Div.) (summary judgment application), affirmed 155 D.L.R. (4th) 671, 30 O.R. (3d) 414n, 93) O.A.C. 155, revd [1998] 3 S.C.R. 112, 165 D.L.R. (4th) 385; (1995) 22 O.R. (3d) 767 (Gen. Div.) (costs).

in deciding whether to grant funding. As a result, the committee now will ask if the plaintiff consents to obtaining the proposed defendant's analysis. If consent is refused, the committee must not disclose the application to the defendant. If consent is granted, the defendant will be informed of the funding decision but not the basis for the decision.

The second was how best to ascertain the plaintiff's efforts to obtain funding from other sources. The court directed that the committee should require an applicant to declare what financial resources are available to the applicant and delve into the issue in some depth. The applicant is required to disclose any affiliation or support which it may have and which may directly or indirectly provide financial or other support, such as support in kind, which would have financial implications to the plaintiff's case.

In Ontario, the bureaucratic load is increased with the requirement that all disbursements be invoiced from the plaintiff counsel to the Fund before payment is made.

Disbursements are paid in advance only if the representative would suffer undue hardship if advance payment is refused.¹³ Disbursements incurred for an expert will not be paid unless the committee has been given the opportunity to approve the use of the expert.¹⁴ Further, once funding is approved, the committee must be given notice of all motions in the class action. Counsel in Ontario report the administrative structure for making application is excessively cumbersome.

If the proceeding is discontinued or abandoned, the committee may pursue the

¹³ O. Reg. 771/92, s. 6(2).

¹⁴ O. Reg. 771/92, s. 4

representative plaintiff for return of the funds provided.¹⁵ However, the real kicker is that if the class proceeding succeeds or settles, the Fund is entitled to a levy payable out of the proceeds of the litigation. The levy includes the amount paid by the Fund plus 10% of the award or settlement.¹⁶

Obviously, the representative plaintiff and class counsel must seriously consider whether the need for financial assistance from the Fund justifies such a large deduction from the ultimate award. Requests for funding in Ontario have been limited, which suggests that the percentage payable to the Fund may be too high.

In his April 2001 article, Professor Watson reports that only 22 applications have been considered in Ontario.¹⁷ Of these, funding has been given to only 8 class actions; funding paid to applicants was only approximately \$86,000. Apparently, there is a concern that the Fund may be wiped out by one substantial cost order. The initial capitalization of the Fund, at \$500,000, was likely far too low. As of December 2000, Watson reported that the Fund stood at \$685,000 with a contingent liability greater than \$300,000 for several unpaid costs awards.¹⁸

The Fund has seen far less use than its Quebec counterpart. Why the difference? There are three main flaws with the Ontario scheme when compared to its Quebec counterpart:

¹⁵ O. Reg. 771/92, s. 9

¹⁶ O. Reg. 771/92, s. 10 (3) (b)

¹⁷ *Supra*, footnote 1, pages 3- 4

¹⁸ *Ibid.*, page 4, see footnote 13 in Watson's article for a description of the several cost exposures

1. There is no funding for legal fees, only disbursements, making it less attractive to class counsel;
2. The levy that must be paid back to the Fund includes the original amount paid, plus 10% of the award or settlement (compared to 2-10% of claims in Quebec), making it less attractive for the class and for class counsel;
3. The levy is only payable in cases where the Fund provided assistance, providing less incentive to make application in all cases.

The only relative advantage of the Ontario scheme is that the representative who obtains funding obtains protection from costs (which will instead be paid by the Fund). In Quebec, if a representative is unable to pay costs, the defendant may apply to the Fonds for payment, but the Fonds retains the right to pursue the representative. However, this advantage is marginal when one considers that the costs payable within class actions in Quebec are capped at very low levels.

B. Private Funding

1. Risk spreading with class participation

The first option that many lawyers will consider is the traditional concept that the class or certain members of the class will finance or help to finance the proceeding. This type of financing is most often used to fund the preliminary investigations required in order to make a decision to commence an action.

Financing by class members is more likely to occur where a relatively small, cohesive, identifiable group is aggrieved. Shareholders of a company, members of a clubs, groups of investors, and support groups of victims of defective products, particularly health products, are all situations where class members are more likely to know and be in a position to locate each other. Frequently they are drawn together for a variety of purposes and will organize themselves to pursue a variety of options including a class action. In this context, it is often possible for the group to raise money from its members in order to provide some financing for the action.

The concept of class participation in the financing of the class action can also be approached formally during the certification process. Class counsel in Ontario and B.C. may seek an order that the notice to the class include a solicitation for funds to assist in paying solicitor's fees and disbursements.¹⁹

However, soliciting funds from the class pursuant to the statutory authority is not a common practice. In B.C. at least, the concept is not consistent with the usual practice of the plaintiffs' bar to finance 100% of the disbursements in most personal injury cases done on a contingency fee basis. As well, a solicitation for funds may be perceived as a disincentive to participating in the class action. Maximizing the size of the class is best accomplished by asking little of class members.

The additional administrative burden of tracking and accounting for the funds contributed

by the various members lessens the attractiveness of class participation in financing. Further, the class member funding method has the classic “free rider” problem, in that the class action will by definition benefit all members of the class, whether they contribute to the funding of disbursements or not. In other words, there is a group incentive to contribute financing, but no such incentive exists individually.

2. Risk spreading with investors

Funding may also be sought from sources other than class members. It has been reported that, in *Nantais v. Telectronics Proprietary (Canada) Ltd.*, counsel for the plaintiff obtained loans for the representative plaintiffs under which the return of both principal and the interest were contingent on success of the class action.²⁰ There are certain ethical concerns with this type of financing in terms of champerty and maintenance issues, although obtaining judicial approval such as occurred in *Nantais* would presumably “cleanse” the arrangement.

3. Risk spreading among lawyers

Perhaps the most dominant trend in financing is the emergence of partnering arrangements among the plaintiffs’ class action bar. While the origins of partnering likely were found in the desire to bring the appropriate legal experience and intellectual capital to the case, the benefits of spreading the burden of the time and money invested in the

¹⁹ Ontario Act, s. 17(7); B.C. Act, s. 19(7)

²⁰ See “Private investors help finance class action lawsuit”, *Law Times*, December 15-21, 1997, p. 1 and

action quickly became apparent. In a single class action, our firm has associated as co-counsel with as many as five different law firms in B.C. Partnering is also occurring between lawyers in different provinces and with lawyers who have brought or who are bringing parallel proceedings in the United States.

Partnering arrangements vary with the circumstances. Some are simple arrangements where everyone agrees to contribute time and disbursements equally and to receive an equal percentage of the recovery. Others are weighted to reflect the different contributions that the law firms bring to the litigation. In some, one partner may simply receive an hourly rate for the value of the services rendered, although payment will depend on a successful outcome. In others, one partner may contribute more disbursements than the other depending on the financial wherewithal or commitment to the case of the various firms involved.

Usually, the complete arrangement will be settled at the outset, particularly as it relates to disbursements. However, sometimes it is difficult to know what the respective time commitments might be or where the real value in the litigation will come from. In these circumstances, it is not unusual for the partnering firms to agree that all or a portion of the fee arrangements will be decided at the end of the day based on *quantum meruit* principles.

One troubling issue relates to the uncertainty about fee sharing with other counsel involved in parallel litigation in other provinces in Canada or in the United States. The

“Investors betting lawsuits will bring big payoffs”, *Toronto Star*, February 22, 1998, p. A3

ethical rules on fee sharing may be out of step with the practical and economic reality of multi-jurisdictional class action litigation.

The case for cooperation with other legal counsel involved in parallel litigation is overwhelming. Multi-jurisdictional cooperation benefits Canadian plaintiffs, plaintiff lawyers, the courts, and, quite often, even the defendants, because it creates efficiencies and economies in the management of the litigation. The importance and value of “close co-operation and reciprocal assistance” between Canadian and US lawyers engaged in asbestos litigation was recognized in two judgments of the B.C. Court of Appeal, and in a recent decision in the diet pill class litigation in Ontario, allowing U.S. counsel to attend at an examination for discovery of the defendant.²¹

Furthermore, when it comes to multi-jurisdictional litigation, the playing field is not level without the ability to cooperate. Without fail, the defendant multinational corporation typically marshals a completely coordinated national and international defence team. There is full coordination and cooperation in the defence. Documents, transcripts, and intellectual capital flow freely throughout the defence team in all jurisdictions concerned. Fees for this defence effort, although enormous, are a non-issue from an ethical perspective.

In order to take advantage of the intelligence gained by other counsel in other jurisdictions, Canadian representative plaintiffs and class counsel may have to reach

²¹ *Hunt v. T&N, plc* [1993] B.C.J. No. 833, p. 2; *ibid.* [1994] B.C.J. No. 1412 page 6; *Wilson v. Servier* (November 6, 2001) 98-CV-158832 (Ont.S.C.), further proceedings [2001] O.J. 4717 (Div. Ct) (adjourning

some agreement with the other counsel to act as a co-counsel in, or as a consultant to, the litigation. Indeed, it is not an overstatement to say that many Canadian actions would not be commenced at all unless Canadian counsel were able to access the experience of the counsel in other jurisdictions who have blazed the trail.

To the extent that the walls restricting the mobility of Canadian lawyers are coming down, this is less of an issue within Canada. The lawyer from another province can obtain temporary call status relatively quickly and easily which will allow that person to function as co-counsel and to share fees in the litigation. The involvement of the foreign lawyer is more problematic since temporary call status is not readily available.

In B.C. the rule is quite simple:

A lawyer must not split, share or divide a client's fee with any person other than a member of the Law Society in good standing.²²

However, if a foreign lawyer refers a client, the B.C. lawyer may pay the foreign lawyer remuneration for the referral provided, at the commencement of the retainer, the lawyer fully discloses the remuneration to the client and the client consents in writing to its payment.²³ Often, US lawyers receive inquiries from Canadians in relation to US class actions. Where these inquiries lead to referrals, it is relatively easy to structure a referral fee. However, the referral rule does not assist the B.C. lawyer who already has a Canadian client and who seeks the assistance of the foreign lawyer to act as a consultant in the litigation.

discovery until order clarified).

²² LSBC, *Professional Conduct Handbook*, Chapter 9, Rule 6(1).

²³ *Ibid.*, Rule 6(3)

The situation in Ontario appears even narrower because there does not appear to be any recognition in the referral rule that the lawyer may be from outside the jurisdiction.²⁴

In Alberta, there appears to be some greater flexibility in the interpretation of the fee sharing rule²⁵ which reads as follows:

7. Provided that the client does not pay more as a result, a lawyer may divide a fee with the following:

(a) a firm member;

(b) a lawyer who is not a firm member, but only if the client is aware and approves of that lawyer's involvement, and the fee is divided in proportion to the work done and responsibilities assumed by each lawyer.

(c) a lawyer who is not a firm member who has referred a client, as compensation for the referral, but only if the client is aware and approves and the fee to the client is not thereby increased.

While the term “lawyer” is a defined term restricted to members of the Alberta Law Society, the commentary accompanying the rule states that a “fee may also be divided with a lawyer outside the firm (including a lawyer not authorized to practise law in Alberta), but only in accordance with paragraph (b) of Rule #7”. Accordingly, it appears that Alberta counsel may be able to enter into fee sharing agreements with foreign lawyers without any ethical difficulty.

Since the foreign lawyer is not able to practice law in the jurisdiction, it is important that the foreign lawyer's role be properly defined and understood as a consultant. The existence of the consulting arrangement should be disclosed in the retainer agreement with the representative plaintiff. Fortunately, in B.C., the Ethics Committee of the Law

²⁴ LSUC, *Rules of Professional Conduct*, Chapter 2, Rule 2.08(8).

Society recently provided some additional guidance to the profession on the use of consultants and, in particular, the sharing of fees with consultants in the context of class actions. This is discussed in the following section.

4. Risk spreading with consultants

In B.C., the representative plaintiff and class counsel may spread the risk with willing consultants, as long as the consultant will not be giving evidence in the proceeding.

In December 1999, the Ethics Committee provided an opinion on a request from a lawyer who contemplated bringing a class action on behalf of a class of people who suffered damages caused by failure of a residential construction product.²⁶ He wished to engage an engineering consultant to assist him with the action.

The consultant would not be a witness, but instead would act as an expert advisor and assistant in the prosecution of the action. The consultant's duties would include advising what experts to engage and advising on questions to be asked.

The lawyer wanted to negotiate arrangements on behalf of his clients to have the consultant paid a contingent fee based on the amount recovered in the action. The fees would vary according to the stage of the litigation completed. The fees ranged from 1.25% to 4% of the amount recovered depending on the stage the litigation reached.

²⁵ LSA, *Code of Professional Conduct*, Chapter 13, Rule 7

²⁶ *Benchers Bulletin*, 2000, No. 4, August September, "Ethics Committee Rulings" December, 1999

The purpose of the proposed contingent fee arrangement with the consultant was to reduce the risk to the litigants. The lawyer asked whether the arrangement he proposed was proper, given the prohibition on fee sharing in the *Professional Conduct Handbook*.²⁷

The Ethics Committee considered that the lawyer also was acting on a contingent fee basis and the fees he would ultimately be permitted to bill would be subject to court approval at the conclusion of the case. As well, it considered that the fees payable to the consultant would be disclosed to the court at the conclusion of the case. The Ethics Committee noted that while there was some potential for the amount of fees payable to the consultant to influence the fees the court ultimately approved for the lawyer, this was also true if the consultant was paid on a straight fee-for-service basis.

The Ethics Committee was of the opinion that no rules of professional conduct prohibited the lawyer from entering into the proposed arrangement, provided the consultant engaged by the lawyer would not be required to give evidence in the action.

This opinion is welcome although its usefulness may be limited insofar as it applies to the expert consultant. Usually, counsel will be reluctant to “double track” when it comes to expert advice, so it likely only has real value where there is a strong need for some type of technical coordinating function in the litigation.

Furthermore, while this opinion provides a basis for entering into partnering arrangements with foreign legal consultants, there are still problems to be addressed, particularly at the back end when the fees are calculated.

²⁷ Chapter 9, Rule 6 of the *Professional Conduct Handbook*

One problem with the Ethics Committee opinion is the mathematical calculation. On the facts in the opinion, it was a percentage of the amount recovered. Obviously, the amount of the consultant's fee will influence the lawyer's contingency fee. However, the precise manner in which the two will interact is quite unclear at this stage.

For example, does the court have the jurisdiction to review and approve the consultant's fee as well? What happens if the consultant's fee is on a percentage basis, but the court decides to apply a multiplier approach? If the court decides to apply a multiplier approach, can the time spent by the consultant be included in the calculation? All of these questions will need to be addressed as class actions evolve in Canada.

Although the courts are beginning to recognize that in order to level the playing field, class counsel in Canada must be able to work closely with foreign lawyers engaged in parallel litigation, the next step in the judicial evolution is to recognize the imperative that Canadian representative plaintiffs and class counsel must be able to share the financing risk with these foreign consultants. On the defence side, the benefits of cooperation flow freely. However, on the side of the representative plaintiff and class counsel, the Canadian system will not be able to take the benefit of the foreign experience and resources unless a way can be found to pay for that benefit.

One way to facilitate the financing of class actions is to recognize that the multiplier approach seriously hinders the ability to share risk, since it is not known whose hours can be included in the calculation, or how work done for the benefit of Canadians through parallel U.S. litigation can be considered. This problem is magnified by the suggestion that there is a cap on the multiplier that will be paid even in the context of a fee that is

approved on some other basis.²⁸ Sharing risk will be facilitated if the Canadian counsel can have some confidence that a contingency fee approach will be adopted and that a percentage of whatever fee is allowed may be paid to the foreign legal consultant.

5. Risk spreading with an insurer

There was at least one company in Canada offering “Plaintiffs’ Cost Indemnity” insurance.²⁹ This insurance is designed to provide comfort to the lender who will finance the lawsuit. The insurance is not specifically designed for class actions, but the marketing information claims that the concept is a solution for class representatives.

This insurance reimburses the legal costs of a plaintiff in the event that the case is lost or the legal costs exceed the award or settlement. Legal costs are broadly defined in the policy to include legal fees, experts’ fees, disbursements, and the cost of the insurance premium. The legal costs must be paid by the insured or by a lending institution on behalf of the insured.

The indemnity provided by the insurer is intended to guarantee the lender to the class representative or to the class counsel that there will be funds to repay the loan made to defray the legal costs in the event the case is lost or the legal costs exceed the recovery.

²⁸ *Gagne v. Silcorp Ltd.* (unreported, April 17, 1997, 97-CU-120941, Ont. Ct. (Gen. Div.) (certification and settlement approval); (1997), 14 C.P.C. (4th) 269, 35 O.R. 501 (Gen. Div.) (fee approval), revd 167 D.L.R. 325, 41 O.R. (3d) 417, 113 O.A.C. 299 (C.A.); (unreported, December 15, 1998, S.C.) (final counsel fee approval); *Endean v. Canadian Red Cross Society*, [2000] 8 W.W.R. 294, 78 B.C.L.R. (3d) 28, 45 C.P.C. (4th) 39 (S.C.), appeal struck for lack of standing 82 B.C.L.R. (3d) 287, 2000 BCCA 638

²⁹ Parapet Underwriters Inc. offering policies underwritten by Temple Insurance Company, a subsidiary of

The insurance is not available unless the insurer determines that there is an excellent chance of success and the claim must have a significant value. The application for insurance must be supported by a \$5000 non-refundable review fee.

When we met with representatives of the company in 1999, the premium for the insurance was substantial. As well, the concept only gave the lender security for the loan to be negotiated. The class representative and/or class counsel still had to deal with a lender to finance the action. In our view, if the class representative or class counsel could afford the premium, you likely could afford to finance the class action.

Conclusion

If our Canadian legal system is to achieve the class action goals of increasing access to justice, improving judicial economy, and obtaining behaviour modification, Canadian class representatives and class counsel must be able to finance the class action litigation. Presently, this is a daunting task that is beyond the means of the vast majority of law firms in Canada who would be interested in representing plaintiffs in this type of litigation.

The public funding program in Ontario appears to be a failure. Although the Quebec program appears to be relatively successful, none of the other provinces with class action legislation have adopted it. Since class actions appear to be here to stay, there likely

should be further public debate on the extent to which, if any, public funding should support class actions. If so, then there should be some attempt to obtain uniformity in the funding approach across the country.

The class itself is rarely a viable financing alternative. Trading in litigation futures is likely unpalatable. Insurance only protects “Uncle Pete”, assuming you can find him.

Class action legislation is a response to certain weaknesses that existed in our legal system. Aggregating claims should allow lawyers to solve the problem of uneconomic claims thereby allowing the legal system to serve the aforementioned goals. However, as stated at the outset, aggregating claims does not make it easier to finance the litigation. Huge financial risks are being undertaken by class counsel.

The class action system can and should pay for itself. The “winners” have to help finance the “losers”. In jurisdictions with contingency fees, this principle has long been recognized as a valid approach to delivering access to justice. As class actions evolve and more cases reach the stage of fee approval, it is imperative that the courts recognize that successful cases, and, in particular, the fees earned by class counsel is one of the best ways to facilitate the financing of other class actions. The multiplier cap and the uncertainty as to which hours may be included hinders more than it helps in this regard.

Finally, the ethical rules governing lawyers need to be “tweaked” to facilitate the multi-jurisdictional cooperation and risk sharing that is required in many class actions.

Needless to say, even if we facilitate the financing of class actions, there will still be many who risk suffering through experiences similar to those of Jan Schlichtmann. To those, all we can say is be careful, don't be greedy, don't let your pride fog your judgment, and always have an exit strategy.