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## Paying the Piper, But Who is Calling the Tune?

### *Class Counsel Fees in Class Actions*

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#### Introduction

The assessment and approval of class counsel fees is rife with potential conflict. The objectives of class counsel and the representative plaintiffs they represent typically diverge on this issue. Indeed, in many cases, class counsel compensation comes at the expense of class members’ compensation. For this reason, among others, class counsel fees are subject to court approval before they are enforceable.

However, class counsel fee approval motions are fraught with their own significant difficulties. The court, like class counsel, is placed in a compromised position. Fee approval motions are often unopposed, therefore requiring the court to step outside its traditional role of impartial adjudicator to undertake a role akin to adversary to class counsel. In addition, the principal methods of determining and measuring class counsel fees (the multiplier method and the percentage method) have been the subject of heavy criticism and are vulnerable to potential abuse. Notwithstanding the foregoing challenges, courts and counsel alike must work to ensure that class counsel fees are objectively fair and reasonable.

In the circumstances, the most recent (and perhaps most controversial) decision on class counsel fees in Ontario, *Smith et al. v. National Money Mart Company et al.* (“*Money Mart*”)<sup>1</sup>, provides a welcomed and much needed discussion regarding the difficulties faced by courts charged with assessing class counsel fees in an adversarial vacuum. This paper considers that decision, and proposes granting the defendants standing on fee approval motions in order to provide an adversarial forum within which to evaluate whether class counsel fees are objectively reasonable and fairly reflect counsel’s success in achieving the goal so often vaunted by class counsel as the fundamental purpose of class proceedings: providing greater access to justice.

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<sup>1</sup> 2011 ONCA 233, affirming, in part, 2010 ONSC 1334 [Money Mart].

## The Current Approach to Class Counsel Fees

### A. The Rationale Underlying Class Counsel Fees

Class counsel fees have been described as “the engine that drives” class proceedings.<sup>2</sup> The argument is that generously rewarding class counsel for the risks and costs they incur in litigating class actions provides “a suitable incentive to skilled lawyers to take on complex and expensive class proceedings.”<sup>3</sup> However, while class counsel’s entrepreneurial spirit may be praiseworthy, the risks taken by class counsel are not, in and of themselves, deserving of compensation. Rather, the value attributed to class counsel’s role in class action litigation is wholly derived from, and dependant upon, the perceived societal value of class actions.

The primary goals of class proceedings, namely, access to justice, judicial economy and behaviour modification, are well known and accepted as laudable social objectives. It is argued that it is class counsel’s role in providing greater access to justice that warrants reward. Of the three principal objectives of class actions, access to justice is arguably at the forefront. If achieved, judicial economy and behaviour modification will likely follow.

Greater access to justice is achieved, in part, when class counsel agrees to undertake class proceedings pursuant to a contingency fee arrangement which provides for payment to counsel only if the action is successful. Contingency fee arrangements shift the burden of funding the proceedings from the representative plaintiff and/or class members to class counsel. Class counsel accordingly bear a significant burden and risk in litigating such actions; there is always a possibility that the action will be unsuccessful, in which case class counsel will neither receive compensation for their time, nor recover their monetary investment in the action. However, in the event of success, class counsel is usually well rewarded. In addition to being compensated for their time and monetary investment in the action, class counsel typically receive a “premium” for their services, either through a share of the settlement or damages award, or a mark-up of their fees by way of multiplier.

While it may be deemed important to ensure that class counsel fees are sufficiently lucrative so as to provide a financial incentive to class counsel to assume the risks and costs of litigating complex and expensive class actions, class counsel compensation must accord with counsel’s success in achieving greater access to justice for class members. As held by Strathy J. in *Ainslie v Afexz Life Sciences Inc.*, “it is important to ask whether the work of class counsel has fulfilled the goals of the CPA by giving access to justice to claimants who might not otherwise obtain it and by promoting behaviour modification of wrongdoers.”<sup>4</sup>

In assessing and approving class counsel fees, courts must be careful not to allow the objective of incentivizing counsel to take precedence over the principal objective of rewarding the achievement of greater access to justice. The societal objective of promoting justice must not be comprised in favour of economic opportunism for entrepreneurial counsel. As further discussed below, there is already some evidence that class actions are not achieving their stated societal objectives but are devolving into purely capitalistic pursuits for plaintiff’s class counsel.

### B. Types of Class Counsel Fees

Class counsel fees are typically awarded using one of two methods: a lodestar or multiplier method, and a percentage method. The multiplier method entitles class counsel to payment of their base fee (i.e. the number of hours billed multiplied by an hourly rate), plus a premium known as the multiplier. The multiplier is intended to reflect the degree of risk undertaken and the success achieved by class counsel. The second method, the percentage method, entitles class counsel to a fixed percentage of the damages or settlement award.

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<sup>2</sup> J.J. Camp, “Avoiding Pitfalls and Potential Conflicts in Negotiating Class Counsel Fees and Obtaining Court Approval” (2006) 3 Can. Class Action Rev. 227 at 277 [Avoiding Pitfalls], citing Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Santa Monica, CA: RAND Institute for Civil Justice, 2000) at 490.

<sup>3</sup> Money Mart *supra* note 1, para. 12.

<sup>4</sup> 2010 ONSC 4294 at paras. 40-44 [Ainslie].

The courts, the profession and academics have all been critical of both methods. The multiplier is said to encourage the unnecessary investment of time in the case and ultimately award inefficiency. By comparison, the percentage method is said to promote quick settlements and to over-reward class counsel with little, if any, regard to the time and effort actually spent by counsel.

### C. Money Mart Provides Much Needed Guidance on the Approval of Class Counsel Fees

In *Money Mart*, the plaintiffs alleged that they were charged a criminal rate of interest on small payday loans obtained from the defendants. Following a mid-trial mediation, the parties agreed to a settlement, pursuant to which the defendants would (i) make a cash payment of \$27.5 million to the settlement class, (ii) forgive the class members' indebtedness to them in the amount of approximately \$56 million, (iii) provide the class with \$30 million of fully transferable transactions credits valued at \$5 each so as to reduce the cost of using the defendants' services in the future, (iv) make a payment to the Class Proceedings Fund in the aggregate amount of \$3 million and (v) pay the costs of administering the settlement.

Class counsel initially sought to have their fees approved in the amount of \$27.5 million, which amount would have depleted the entirety of the cash settlement provided by the defendants for the benefit of the class members. The motion judge rejected the requests and lowered the fees awarded to \$14.5 million. On appeal, class counsel reduced the amount of fees sought for approval to \$20 million. Notwithstanding that reduction, the Court of Appeal for Ontario dismissed that aspect of the appeal and upheld the motion judge's determination that \$14.5 million was a fair and reasonable amount for class counsel fees.

There were three principle issues on appeal: (i) whether the quantum of fees sought by class counsel were fair and reasonable, (ii) whether contingency fee arrangements between class counsel and professional consultants are permitted under the CPA, and (iii) whether compensation to the representative plaintiff is properly payable out of the class settlement fund or class counsel fees.<sup>5</sup> The most important aspect of the judgment for purposes of this paper is not found in the Court's analysis of the principal legal issues but in its discussion of the difficulties of assessing class counsel fees in a non-adversarial forum.

The Court of Appeal voiced its concern and frustration over the non-traditional role the court is required to assume and the obvious conflict between class counsel's self-interest in respect of fees, and their professional obligations to the class. The Court of Appeal posits four potential solutions to problem, all of which involve the appointment and/or use of an independent and objective third party, including (i) *amicus curiae*, (ii) monitors, (iii) guardian *ad litem*s, and (iv) independent counsel.

Although the Court endorses the use of any of the foregoing independent parties as an improvement over the present situation, the Court clearly favours the appointment of an *amicus curiae*. The Court returns to this proposal at several points throughout the judgment and strongly encourages courts to "give serious consideration to the appointment of *amicus curiae* or a guardian of the settlement fund on the hearing of counsel's application for the approval of their fees."<sup>6</sup>

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<sup>5</sup> While not directly relevant to this paper's principal discussion, these latter two issues are novel and worthy of mention here. With respect to the second issue, the Court was asked to approve contingency fee arrangements between class counsel and certain professional consultants, including other counsel retained to perform discrete, specialized tasks. The contingency fee arrangements in issue, like the arrangements between the representative plaintiff and class counsel, provided for the payment of a premium (in the form of a multiplier) in the event of success, and payment out of the class fund rather than out of class counsel fees. The motions judge considered it unwise to decide the general issue of whether contingency fee arrangements with professional service providers are permitted under the CPA on an "essentially an *ex parte* motion." The motion judge accordingly declined to make a direct ruling on the issue and instead treated the professional fees as disbursements payable by class counsel. While the Court of Appeal expressed appreciation for the motions judge's concern over answering such a fundamental question in the absence of submissions from those that may be affected by such a ruling, it determined that the answer to this particular question was sufficiently straightforward that such submissions were unnecessary in this case: "the CPA does not contemplate contingency fee arrangements with persons other than class counsel and does not give the court the jurisdiction to allow a service provider a premium on its fees." (see *Money Mart*, para. 109). Class counsel also sought to compensate the representative plaintiff for its contribution to the class action, which "exceeded that which is normally expected of a representative plaintiff," out of the class fund rather than out of class counsel fees. On this issue, the Court of Appeal overturned the motions judge's ruling, holding that "as a general matter the representative plaintiff's fee should be paid out of the settlement fund and not out of class counsel fees," which are "predicated on the work that class counsel have done for the class." In so holding, the Court expressed concern over rising the "spectre of fee splitting" were the representative plaintiff to share in class counsel fees. (see *Money Mart*, para. 135).

<sup>6</sup> *Money Mart supra note 1*, para. 6.

As further noted by the Court, the appointment of an *amicus* has received positive support from commentators. The Court cites articles by Professor Gary Watson, and Winkler, C.J.O. and Sharon D. Matthews, both of which endorse the use of an *amicus* to “precipitate an adversarial hearing” and “assist the courts in understanding the merits of the settlement generally and as it relates to fees in particular.”<sup>7</sup> Notwithstanding such support, the only Canadian court to consider the appointment of an *amicus* in the context of a class counsel fee approval motion cautioned against doing so too quickly, citing concerns regarding increasing complexity and expense as reasons not to engage an *amicus* absent special reasons.<sup>8</sup>

#### D. Assessing Class Counsel Fees

Fees arrangements between the representative plaintiff and class counsel are not enforceable unless they are approved by the court.<sup>9</sup> The court’s principal objective on a fee approval motion is to ensure that the fees are fair and reasonable *vis-à-vis* the representative plaintiff and absent class members. Where the court determines that class counsel fees are not fair or reasonable, the court may set a reasonable amount.<sup>10</sup>

As currently configured, the fee approval motion is loaded with difficulty and tension. In *McCarthy v. Canadian Red Cross Society (2001)*, Justice Winkler (as he then was) compared uncontested fee approval motions to *ex parte* proceedings, noting that such proceedings are “fraught with potential injustice and abuse of the Court’s powers.”<sup>11</sup> The Court of Appeal for Ontario in *Money Mart* endorsed Justice Winkler’s view and expressly acknowledged the conflicting positions in which both class counsel and the courts are placed on unopposed fees motions.

Class counsel is expected to maintain its role as zealous advocate for the class, notwithstanding its significant personal interest in the outcome of the motion. The Court of Appeal described class counsel’s predicament as follows:

“An uncontested motion for fees also places counsel in an awkward position. Lawyers are expected to be zealous but personally disinterested advocates of their clients’ positions. On an uncontested motion for fees, the lawyer represents the class whose interest is in maintaining the maximum settlement amount possible for distribution among class members. The lawyer, on the other hand, seeks fees that will diminish the amount of the settlement available for distribution. The lawyer’s interests appear to be pitted against those of the client.”<sup>12</sup>

The court’s challenge stems from the *ex parte* nature of fee approval motions. On a fee approval motion, there is often no dissenting voice, largely due to the prevailing view that it ought to be no business of defendants’ counsel what the plaintiffs counsel’s fees are. The court is, therefore, forced to assume the role of adversary and adjudicator at the same time, both testing the case before it, while also impartially adjudicating on its merits.<sup>13</sup> This arrangement constitutes a marked departure from the basic tenet of our justice system, is that:

“the court will be able to reach the most informed, considered, impartial and wise decision after presiding over the confrontation between opposing parties, in which each side can identify issues, lead evidence, cite law, discuss policy considerations, and seek to undermine the position of the other.”<sup>14</sup>

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<sup>7</sup> *Ibid*, paras. 23-24.

<sup>8</sup> *Ibid*, para. 25.

<sup>9</sup> *Class Proceedings Act*, S.O. 1992, C.6, s. 32 – 33 [CPA]; *Lawrence et al. v. Atlas Cold Storage et al.*, 2009 ONCA 690 at para. 36, cited with approval in *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 4324 (S.C.J.) [Fantl]; see also *Money Mart* for a detailed and instructive discussion on the proper interpretation of sections 32 and 33 of the CPA. Regardless of whether they provide for payment only in the event of success (a contingency fee arrangement) and are based on a percentage of the settlement or award obtained or a multiplier of counsel’s base fee.

<sup>10</sup> CPA, s. 32 - 33.

<sup>11</sup> *Money Mart supra note 1*, para. 17.

<sup>12</sup> *Ibid*, para. 21.

<sup>13</sup> *Ibid*, para. 19.

<sup>14</sup> *Ibid*, para. 15.

While the representative plaintiff and class members have standing to object to class counsel fees, they are unlikely to do so. As posited by Professor Alaire in his paper “Rethinking the Approval of Class Counsel’s Fees in Ontario Class Actions”, the representative plaintiff typically lacks “the incentive (financial or otherwise) and the ability (expertise and information) to ensure class counsel looks out for the best interests of all the class members.”<sup>15</sup> Although Professor Alaire’s discussion on this point extends beyond the fee approval motion, it is equally applicable in this context. Without the incentive or ability to actively monitor and assess class counsel throughout the proceeding, the representative plaintiff likely has little to add to the assessment of whether class counsel fees are reasonable in the circumstances. As further noted by Professor Alarie, “absent class members (that is, those not directly involved as representative plaintiffs) with current claims and, a *fortiori*, future claimants, are even less well-positioned to monitor class counsel.”<sup>16</sup>

The Court of Appeal in *Money Mart* readily acknowledged that the “adversarial void” increases the difficulty of determining appropriate class counsel fees and affects both the presentation of the case and the court’s determination of the same. With respect to the case put forward on appeal, the Court stated:

“The appellant decides what issues will be raised on appeal and what material will be included in the Appeal Book. There is no respondent to raise additional issue or to focus the courts’ attention on different material in the exhibit books. In crafting the appeal, the appellant is able to attack some findings of the court below and leave others undisturbed. For example, here the motion for approval of the settlement and the determination of counsel fees were brought before the court in one motion; the motion judge dealt with both matters at one hearing, and he rendered one set of intertwined reasons. In those intertwined reasons, he expressly stated that his approval of counsel fees in the amount of \$14.5 million was one of the factors on which his approval of the settlement was based. Yet, this appeal seeks to modify the motion judge’s order only in respect of fees divorced from his approval of the settlement.”<sup>17</sup>

## The Need for an Adversarial Forum

### A. Recent Class Counsel Fee Approval Motions

A review of a random sample of 2010 and 2011 settlement and fee approval motions decisions suggests that the absence of an adversarial voice on such motions may be having a necessary impact on the decisions rendered by the courts.<sup>18</sup>

It is well accepted that the following factors are relevant to, and ought to inform the court’s assessment of, class counsel fees: (a) the factual and legal complexities of the matters dealt with, (b) the risk undertaken, including the risk that the matter might not be certified, (c) the degree of responsibility assumed by class counsel, (d) the monetary value of the matters in issue, (e) the importance of the matter to the class, (g) the results achieved, (h) the ability of the class to pay, (i) the expectations of the class as to the amount of the fees, and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of litigation and settlement.<sup>19</sup>

However, a review of fee approval decisions reveals that the above-noted factors often receive only a cursory treatment by the courts and are not generally subjected to a detailed and considered analysis of the kind one would expect on a fee approval motion, having regard to the inherent conflicts and tensions on such a motion.<sup>20</sup> Other cases demonstrate that the courts may be overly reliant on whether the proposed fees are

<sup>15</sup> Benjamin Alaire, “Rethinking the Approval of Class Counsel’s Fees in Ontario Class Actions” (2007) 4 Can. Class Action Rev. 15 at 19 [Alaire]; see also *Money Mart*, para. 15 where the Court acknowledges that individual class members often have too small a stake to be compelled to participate in fee approval motions.

<sup>16</sup> Alaire, p. 19-20.

<sup>17</sup> *Money Mart supra note 1*, para. 39.

<sup>18</sup> Please refer to Schedule “A”.

<sup>19</sup> *Money Mart supra note 1*, paras. 80-81; see also *Fantl supra note 9*, para. 81 for list of cases approving of factors.

<sup>20</sup> See e.g.: *Mortillaro v. Unicash Franchising Inc.*, 2011 ONSC 923; *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962; *Lavier v. MyTravel Canada Holidays Inc.*, 2011 ONSC 1222; *Zopf v. Burger*, 2010 ONSC 30000; *Ford v. Degussa-Huls AG*, 2010 ONSC 2787 [Ford]; *Toronto District School Board v. Field*, 2010 ONSC 3865 [Toronto District]; *Henault v. Bear Lake Gold Ltd.*, 2010 ONSC 4474 [Henault]; *Waterston v. Canadian Broadcasting Corp.*, 2010 ONSC 4319; *O’Neil v. SunOpta, Inc.*, 2010 ONSC 2735 [O’Neil]; *Maggisano v. Skyservice Airlines Inc.*, 2010 ONSC 7169; and *OMERS Administration Corp. v. CP Ships Ltd.*, 2010 ONSC 817.

consistent with the retainer agreement with the representative plaintiff and represent a reasonable percentage of the settlement amount.<sup>21</sup> For example, the Court in *Pichette v. Toronto Hydro* approved class counsel fees in the amount requested primarily on the basis that the fees were consistent with the retainer agreement, which provided for a contingency fee of 25%, plus partial indemnity costs.<sup>22</sup> The decision is particularly problematic, since the amount of fees approved were equal to a multiplier of approximately 4.42, meaning that counsel “earned” a return on their investment of approximately 342%, in addition to any revenue mark-up included in counsel’s base fee.<sup>23</sup> Relying on *Cassano v. Toronto Dominion Bank*, the Court determined that the equivalent multiplier is not a “major factor” where the retainer agreement provides for contingency fee that is based on a percentage of the settlement.<sup>24</sup> While the Court’s decision was premised principally on the foregoing factors, it did refer to class counsel’s experience and the length and complexity of the action.

The foregoing approach is wholly insufficient in the circumstances. First, as previously discussed herein, the representative plaintiff is often not motivated, nor equipped, to effectively monitor class counsel and accordingly, is unlikely to assume a meaningful role on a fee approval motion. Similarly, the representative plaintiff’s dependence on class counsel and the inherent imbalance in the client-counsel relationship must be borne in mind when assessing the retainer agreement. For instance, it could be said that for plaintiffs who cannot, or would not otherwise, pursue legal action against the defendants, a retainer agreement that provides a 30% share to class counsel represents a significantly better outcome than the plaintiff might otherwise obtain. In addition, as discussed below, there is good reason to believe that many plaintiffs are not interested in pursuing class proceedings. Those plaintiffs are even less likely to engage in meaningful negotiations with respect to the retainer agreement. In the circumstances, courts must be cautious not to place undue weight on the fact that the fees sought by class counsel are consistent with the parties’ retainer agreement.

Second, as discussed above, the percentage method may significantly over-compensate class counsel, even where due regard is had to the risks undertaken by them. Indeed, it is difficult to assess the reasonableness of class counsel fees calculated as a percentage of the settlement, without any objective criteria against which to measure the proposed amount. While 15 or 25% may result in what appears to be a reasonable amount of fees, if that amount represents a significant “premium” above and beyond counsel’s base fee, such amount might actually result in an unjustified windfall to class counsel.

Furthermore, neither of these criteria reflects, nor provides any objective measure as to, counsel’s success in achieving the so-called fundamental objective of securing improved access to justice. This is particularly troubling in light of the fact that class counsel fees, as a percentage of the settlement award, appear to be increasing and there is new evidence that less than 50% of eligible class members actually participate in class action settlements. It raises the obvious question: who has accessed the justice system?

## B. Increasing Class Counsel Fees, Low Take-Up Rates

A review of a random sample of 2010 and 2011 settlement and class counsel fee approval motions suggests that class counsel fees are increasing, at least in terms of the percentage of the settlement award they represent. Of the 19 cases reviewed, 9 considered the percentage method when calculating class counsel fees. Of those 9 cases, class counsel fees representing 15% to 30% of the settlement achieved were approved. The average percentage approved was approximately 25%. 8 of the cases relied on the multiplier to either determine fees or to assess whether the percentage sought represented a fair and reasonable amount. The average multiplier in those cases was 2.

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<sup>21</sup> See e.g.: *Pichette v. Toronto Hydro*, 2010 ONSC 4060 [Pichette]; *Ford* supra note 20; *Toronto District* supra note 20; *Henault* supra note 20; *West Coast Soft Wear Ltd. v. 1000128 Alberta Ltd.*, 2010 ONSC 6388; *O’Neil* supra note 20; and *Pysznyj v. Orsu metals Corp.*, 2010 ONSC 1151.

<sup>22</sup> *Pichette* supra note 21, para. 30-33.

<sup>23</sup> *Ibid.*, para. 29.

<sup>24</sup> *Ibid.*, para. 31, citing *Cassano v. Toronto Dominion Bank* (2009), 79 C.P.C. (6th) 110 (Ont. S.C.J.) at paras. 59-63.

By comparison, an analysis of 27 reported Ontario class action decisions conducted by Professor Benjamin Alarie in 2007 revealed that Ontario courts previously tended to approve class counsel fees in amounts representing an average of 14.85% of the value of the settlement and a multiplier of 2.48.<sup>25</sup>

The apparent increase in class counsel fees (as an overall percentage of the settlement award) is inconsistent with recent evidence as to plaintiffs' actual participation in class actions. Recently collected data suggests that the majority of qualified class members in Canadian class actions fail to participate in settlements.<sup>26</sup> In fact, multiple surveys of Canadian law firms indicate that the average settlement take-up rate is below 50% and generally ranges from 2%-40%.<sup>27</sup>

According to "Missing in Action: An Analysis of Plaintiff Participation in Canadian Class Actions", authored by Paul Morrison and Michael Rosenberg, many class actions are initiated with little interest from potential plaintiffs. In fact, recent data suggests that in excess of 75% of class actions are devised and initiated by counsel as opposed to wronged plaintiffs.<sup>28</sup> In light of these statistics, the authors caution against assuming that all potential plaintiffs are litigious and wish to pursue their claim in court. On the contrary, many potential plaintiffs do not wish to litigate for various reasons, including the belief that the damages they can expect to receive are going to be *de minimis*, they disagree with class counsel and the representative plaintiff with respect to whether a wrong was actually committed, or they fear litigation would prejudice an ongoing relationship with the defendant.<sup>29</sup> While Morrison and Rosenberg do not doubt that structural and case specific factors have a significant impact on take-up rates, the disinterested plaintiff problem is of principal concern.<sup>30</sup>

The question, then, is whether such actions are actually providing desired access to justice.<sup>31</sup> When take up rates are low, class action proceedings effectively turn civil courts into regulatory bodies that punish wrongful conduct but fail to provide meaningful compensation to those that were wronged.<sup>32</sup> Morrison and Rosenberg propose that courts subject class counsel to increased scrutiny at the certification stage when the eligible class is large or the claim is complex and will require substantial resources. This increased scrutiny would require evidence that a commensurate portion of the class is actively seeking to litigate.<sup>33</sup> We support this contention and, while beyond the scope of this paper, further propose increased scrutiny on fee approval motions to ensure that class counsel compensation is commensurate with their success in providing increased access to justice, as measured by estimated case specific take-up rates.

## Is there a Role for Defendants on Fee Approval Motions?

The Court's overarching concern in *Money Mart* was the lack of an adversarial forum in which to assess and determine reasonable class counsel fees. Although the Court seems to favour the use of an *amicus*, it is clear that the Court's principal objective is to encourage the lower courts to enlist the services of an independent third party to oppose the position put forward by class counsel. While the alternatives put forward by the

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<sup>25</sup> Alarie *supra* note 15, p. 29.

<sup>26</sup> Drew Hasselback, *Selling Investors on Class Action Settlements*, Financial Post, April 6, 2011. [*selling investors*]

<sup>27</sup> F. Paul Morrison and H. Michael Rosenberg, *Missing in Action: An Analysis of Plaintiff Participation in Canadian Class Actions* (Toronto, Ont.: McCarthy Tétrault LLP, 2011) at 9 [Missing in Action].

<sup>28</sup> *Ibid.*, p. 16: Certain firms have dedicated staff members who conduct research with the goal of generating cases.

<sup>29</sup> *Ibid.*, p. 13: Structural factors include ineffective notice to eligible class members that a case has begun or settlement and the complexity of completing the claim forms required to establish entitlement to a portion of the settlement.<sup>29</sup> Case specific factors include such factors as the number of eligible class members in a particular class action. Evidence indicates that class actions involving fewer plaintiffs tend to have a higher take-up rates, possibly as a result of increased contact with counsel and greater awareness of injury and causation. Members of a smaller class are also more likely to have larger claims *per capita*, which is itself an independent incentive.

<sup>30</sup> *Ibid.*: In support of those propositions as to plaintiffs' unwilling to litigate, the authors refer to following examples: A class action brought by franchisees in which several potential plaintiffs refused to participate on the basis such participation would negatively impact their long-term relationship with the franchisor. It is also suggested that potential plaintiffs may be dissuaded from participating in a class action on the belief that it will ultimately be the plaintiff class that will bear the cost of the proceeding. The concern is not without merit if recent examples in Ontario are any indication. As referenced in Morrison and Rosenberg's paper, the Ontario Energy Board has, on two occasions in the past five years, approved applications to increase energy prices brought forward by energy providers in order to recoup the cost of class action settlements with their customers.

<sup>31</sup> *Ibid.*, p. 2, referencing the Ontario Law Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982), vol. I at 120.

<sup>32</sup> *Ibid.*, p. 6.

<sup>33</sup> *Ibid.*, p. 21.

Court of Appeal are certainly worthy of further consideration, there is another alternative that may be even more suitable – the defendants.

The defendants' role in fee approval motions is not well settled in Ontario.<sup>34</sup> As noted by J.J. Camp in "Avoiding Pitfalls and Potential Conflicts in Negotiating Class Counsel Fees and Obtaining Court Approval", some courts have held that defendants have no standing on fee approval motions as they have no interest in and are unaffected by the outcome.<sup>35</sup> Where, however, the defendants have a direct interest in class counsel fees, such as where they agree to pay class counsel fees as part of the settlement over and above their agreement to provide a settlement fund for the class, defendants have been granted standing on the motion.<sup>36</sup> In addition, the trial judge in *Parsons v. Canadian Red Cross Society* appears to have thought that the defendants had standing on the fee approval motion. Although Camp takes the position that defendants have "no business being involved in the class counsel fee approval process," he notes that "judges have indicated that the defendants are justifiably well-positioned to shed light on many of the factors that must be taken into account in assessing the class counsel fees."<sup>37</sup>

Defendants may well serve a valuable role on a fee approval motion. They will certainly have significant insight into relevant case-specific factors such as the legal complexity of the issues, the amount of money in issue, the risks undertaken by class counsel *vis-à-vis* the likelihood of success, and the value of the settlement, both to the class and in terms of the degree of success achieved by class counsel.

In addition to creating an adversarial forum for the determination of class counsel fees and providing a necessary balance to the conflict faced by class counsel, granting defendants standing will be less costly than appointing an *amicus* or other wholly independent third party who is neither familiar with nor interested in the case. While the defendants do not often have a direct interest in the case, they do have a general interest in that they (or their insurers) are effectively funding the class action fees. In the circumstances it would not be unfair to permit defendants a voice on class counsel fee approval motions.

## Conclusion

It is clear that the approval process for class counsel fees in class actions is in need of a major overhaul. Quite apart from, and in addition to, the concerns voiced by the Court of Appeal in *Money Mart*, a review of recent fee approval decisions, coupled with the reality of low class member take-up rates, and an ever-lower certification bar, begs the question: who is really benefiting from class actions? It is doubtful that many class members are benefitting (financially or otherwise), and class actions are no benefit to the judicial system, since they simply add (significantly) to the court case loads. Without a doubt, though, plaintiffs' class counsel benefit through huge financial gain; the risk-reward assessment may also be in need of re-examination.

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<sup>34</sup> Avoiding Pitfalls *supra* note 2, p. 279.

<sup>35</sup> *Ibid.*, citing *Hislop v. Canada* (2004), 3 C.P.C. (6th) 42 (Ont. S.C.J.) and *Wilson v. Servier Canada Inc.* (2005), 252 D.L.R. (4th) 742 (Ont. S.C.J.).

<sup>36</sup> Fantl, *supra* note 9.

<sup>37</sup> *Ibid.*

**Schedule “A”**  
**Class Action Settlement Amounts**

<b>Case</b>	<b>Approved counsel fees</b>	<b>Total award/settlement</b>	<b>% of total award/settlement (if discussed)</b>	<b>Multiplier (if discussed)</b>
Smith Estate v. National Money Mart, 2011 ONCA 233 affirming, in part, 2010 ONSC 1334	\$14.5 million.	\$120 million (combination of cash, coupons and releases, with a cash component of \$27.5 million).	12% of total settlement, 52.7% of cash component (not discussed).	1.4x fees.
Abdulrahim v. Air France, 2011 ONSC 512	\$6,225,000 plus disbursements and taxes.	\$20,750,000	30% of the settlement’s value.	Actual time docketed amounted to \$4,717,155.02. (Noted by the court, but not the basis of the court’s decision.)
Mortillaro v. Unicash Franchising Inc., 2011 ONSC 923	\$78,147 (\$55,000 plus \$23,147 for disbursements) exclusive of taxes.	-	-	-
Sayers v. Shaw Cablesystems Ltd., 2011 ONSC 962	\$151,340 (\$101,340 plus \$50,000 for disbursements and taxes).	\$337,800.	30% of settlement’s value (excluding all disbursements and taxes).	-
Serham Estate v. Johnson & Johnson, 2011 ONSC 128	\$1.5 million inclusive of disbursements and taxes.	\$4 million.	37.5% (not discussed)	-
Ainslie v. Afexa Life Sciences Inc., 2010 ONSC 4294	\$1,541,900 inclusive of disbursements and taxes.	\$7.1 million.	21.7% (not discussed)	-
Pichette v. Toronto Hydro, 2010 ONSC 4060	\$4,862,500 inclusive of disbursements.	\$17,037,500	28.5%	4.42x fees. (Noted by the court, but not the basis of the court’s decision.)
Lavier v. MyTravel Canada Holidays Inc., 2011 ONSC 1222	\$600,000 inclusive of disbursements and taxes.	\$2,250,000.	26.7% of the settlement’s value (inclusive of disbursements and taxes).	-
Osmun v. Cadbury Adams Canada Inc., 2010 ONSC 2752	\$1,487,195.76	\$5,795,695.60 and pay costs of notice that exceed \$250,000.	25.6% of the settlement’s value.	2x fees.
Zopf v. Burger, 2010 ONSC 30000	\$1,837,500 (\$1.75 million inclusive of disbursements plus taxes).	\$11 million.	16.7% of the settlement’s value (including all disbursements and taxes).	2.5x fees.

Case	Approved counsel fees	Total award/settlement	% of total award/settlement (if discussed)	Multiplier (if discussed)
Toronto District School Board v. Field, 2010 ONSC 3865	281,310.80 plus disbursements.	\$2.7 million.	10.4% (not discussed)	2x fees.
Henault v. Bear Lake Gold Ltd., 2010 ONSC 4474	\$250,000 plus disbursements and taxes.	\$1,305,000.	19.2% (not discussed)	1.38x fees.
Ford v. Degussa-Huls AG, 2010 ONSC 2787	\$376,211.50 (\$338,883.75 plus \$19,412.92 for disbursements and \$17,914.83 for taxes).	Approx. \$2,260,000.	15% of the settlement's value (excluding disbursements and taxes).	1.78x fees.
Waterston v. Canadian Broadcasting Corp., 2010 ONSC 4319	\$340,870.47 (\$325,590.40 plus \$15,280.07 for disbursements).	-	-	-
West Coast Soft Wear Ltd. v. 1000128 Alberta Ltd., 2010 ONSC 6388	\$2,587,153.81 (\$2,486,156.48 plus disbursements and taxes of \$101,017.33).	\$10,020,000.	25% of <i>net</i> settlement value (excluding all disbursements and taxes).	-
O'Neil v. SunOpta, Inc., 2010 ONSC 2735	US\$2,812,500 plus disbursements and taxes.	US\$11.25 million.	25% of settlement's value (excluding disbursements and taxes).	-
Maggisano v. Skyservice Airlines Inc., 2010 ONSC 7169	\$200,000	\$600,000 minimum.	33% (not discussed)	-
OMERS Administration Corp. v. CP Ships Ltd., 2010 ONSC 817	\$2.24 million (\$1,993,173.47 plus disbursements and taxes).	12.8 million.	15.6% (not discussed)	2.17x fees.
Pysznyj v. Orsu metals Corp., 2010 ONSC 1151	\$550,000 plus disbursements and taxes.	\$2.2 million.	25% (not discussed)	2.11x fees.

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