

CLASS ACTIONS: CONTINGENCY FEES
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INTRODUCTION

It has been observed that, in the final analysis, the volume of class proceedings will be determined by the economics of class litigation. This relates both to the risk/benefit to the representative Plaintiff (and the class) as well as the potential financial consequences to Class Counsel.¹ The admittedly embryonic jurisprudence in Ontario already indicates that our Courts are significantly concerned with these issues.

For Ontario practitioners, a (still) novel feature of the *Class Proceedings Act* is that it permits a lawyer to enter into a contingency fee agreement with a representative plaintiff. Such agreements must be in writing and approved by the Court. The Statute explicitly indicates that such agreements may permit Class Counsel to have their fees increased by a multiplier, also to be determined by the Court. However, it is already clear that the Courts regard the "multiplier" method of calculating legal fees as only one example of an acceptable procedure. Courts have also approved retainer agreements based upon percentages and block fees.

The relevant provisions of the *Class Proceedings Act, 1992* are as follows:

¹ The author wishes to thank Jennifer Norman for her kind assistance in the preparation of this paper.

¹ Ontario's New Class Proceedings Legislation-An Analysis, by Garry D. Watson, Q. C. in *Guide to Case Management and Class Proceedings*, Watson and McGowan Ontario Civil Practice 1995, p. 6

32. (1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,
- (a) state the terms under which fees and disbursements shall be paid;
 - (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
 - (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.
- (2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the Court, on the motion of the solicitor.
- (3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.
- (4) If an agreement is not approved by the Court, the Court may,
- (a) determine the amount owing to the solicitor in respect of fees and disbursements;
 - (b) direct a reference under the rules of Court to determine the amount owing; or
 - (c) direct that the amount owing be determined in any other manner.
33. (1) Despite the *Solicitors Act* and *An Act Respecting Champerty*, being Chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.
- (2) For the purposes of subsection (1), success in a class proceeding includes,
- (a) a judgment on common issues in favour of some or all class members; and
 - (b) a settlement that benefits one or more class members.
- (3) For the purposes of subsections (4) to (7),
"base fee" means the result of multiplying the total number of hours worked by an hourly rate;
"multiplier" means a multiple to be applied to a base fee.
- (4) 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.
- (5) A motion under subsection (4) shall be heard by a judge who has,
- (a) given judgement on common issues in favour of some or all class members; or
 - (b) approved a settlement that benefits any class member.
- (6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the Court for the purpose.
- (7) On the motion of a solicitor who has entered into an agreement under subsection (4), the Court,
- (a) shall determine the amount of the solicitor's base fee;
 - (b) may apply a multiplier to the base fee that results 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;

- and
- (c) shall determine the amount of disbursements to which the solicitor is entitled, including the interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement.
- (8) In making a determination under clause (7)(a), the Court shall allow only a reasonable fee.
 - (9) In making a determination under clause (7)(b), the Court may consider the manner in which the solicitor conducted the proceeding.²

THE RETAINER AGREEMENT ITSELF

The formal requirements of the Retainer Agreement are straightforward. It must state the terms under which fees and disbursements shall be paid, including whether their payment is contingent on success and the method by which payment is to be made "whether by lump sum, salary or otherwise". It would appear that the language of this section is sufficiently broad to give significant discretion to the judge approving the retainer agreement.

The requirement that the retainer agreement give an estimate of the expected fee, is often problematic at the commencement of the litigation. Accordingly, Class Counsel sometimes simply provide examples of what would be the expected fees under various possible outcomes. For example, one court approved retainer agreement gives examples of legal fees ranging between \$850,000.00 and \$5,500,000.00.³ Multiplier based retainer agreements have also been

² *Ontario Class Proceedings Act, 1992 S.O., c. 6 s. 32-33.*

³ For Example "6. The Consortium and the Clients acknowledge it is difficult to estimate what the expected fee will be however the following are examples:

- (a) If the class action results in a recovery of \$3 million for damages and interest and \$100,000 for party and party costs then the Consortium's fee shall be $(\$3,000,000 \times 25\%) + \$100,000 = \$850,000$; or
- (b) If the class action results in a recovery of \$20 million for damages and interest and \$500,000 for

approved in which the base fee was estimated on an annual basis.⁴

It would seem prudent for Class Counsel to seek approval of the retainer agreement early in the litigation process. It should not be forgotten that the agreement not only sets the terms according to which the representative plaintiff (and through it the class) is prepared to pay Class Counsel, it also sets the terms according to which Class Counsel is prepared to be retained. The obligations of Class Counsel are sufficiently onerous that if the retainer agreement is not approved, counsel may wish to revisit its willingness to proceed with the litigation on a class basis.

THE BASE FEE AND MULTIPLIER

American courts have used "lodestar" (comparable to the base fee/multiplier approach of the Ontario statute) as well as percentage based methods to calculate Class Counsel fees.⁵ *Johnson v. Georgia Highway Express* outlines 12 factors which are often referred to in calculating the Class Counsel Fee.

party and party costs then the Consortium's fee shall be $(\$20,000,000 \times 25\%) + \$500,000 = \$5,500,000$

Robert Anderson et al v. Ronald Wilson et al, unreported decision of The Honourable Mr. Justice Jenkins, September 11, 1996

⁴ *Serwaczek v. Medical Engineering Corporation and Bristol-Myers Squibb Company*, unreported decision of The Honourable Mr. Justice Winkler, September 10, 1996

⁵ *Johnson v. Georgia Highway Express Inc.*, 488 F2d 714 (USCA 5th Cir. 1974)

- 1) Time and labour required;
- 2) Novelty and difficulty of the questions;
- 3) Skill required to perform the legal service properly;
- 4) Preclusion of other employment by the attorney due to acceptance of the case;
- 5) Customary fee;
- 6) Whether the fee is fixed or contingent;
- 7) Time limitations imposed by the client or the circumstances;
- 8) Amount involved and the results obtained;
- 9) Experience, reputation, and ability of the attorneys;
- 10) Undesirability of the case;
- 11) Nature and length of the professional relationship with the client;
- 12) Awards in similar cases

See Appendix 1 for a sample listing of American cases in which multipliers have been applied.

Note that in complex litigation cases, often counsel from various firms collaborate on behalf of the plaintiff class. In some cases, different multipliers for various counsel who have been involved in different ways are used.

Before applying a multiplier, the Ontario Statute requires a court to set a base fee which is simply defined as the result of multiplying the total number of hours worked times an hourly rate.⁶

In determining the solicitor's base fee, the Court shall only allow a "reasonable" fee.⁷ Accordingly, Ontario Courts have scrutinized both the total hours docketed by lawyers and

⁶ *Class Proceedings Act, 1992*, S.O. 1993 c. 6, s. 33

⁷ *Class Proceedings Act, 1992*, S.O. 1993, c. 6 s. 8

paralegal staff involved in the litigation and the appropriateness of the hourly rates charged.⁸

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Regarding the multiplier, the statute only mandates that the multiplier should result in "fair and reasonable compensation" for the risk incurred in taking on the case on the contingent basis. The statute also indicates, somewhat generally, that the Court, in determining an appropriate multiplier, may consider the manner in which Class Counsel has conducted the proceedings.¹¹

Appendix 1 gives examples in which American Courts have awarded multipliers ranging from one (no multiplier) to five. In one case, a multiplier of 2.26 was referred to by the Court as appearing "to be at the lower end of the range of multipliers used in other large cases."¹²

Ontario courts have now awarded multipliers ranging from 1.5 to 3.0. In awarding a multiplier of 1.5 Mr. Justice Ground held that the two factors to consider were the degree of risk involved in accepting the retainer and the degree of success achieved by Class Counsel. In the case in question, although the solicitors did achieve a result for their clients, Mr. Justice Ground

⁸ *Serwaczek v. Medical Engineering Corporation and Bristol-Myers Squibb Company*, unreported decision of The Honourable Mr. Justice Winkler, September 10, 1996.

⁹ *Maxwell v. MLG Ventures Ltd.* (July 24, 1996), O. J. Number 2644 (unreported) General Division, Mr. Justice Ground

¹⁰ *Windisman v. Toronto College Park* (August 26, 1996) O.J. 2897 (unreported) Gen. Div. Mr. Justice Sharpe

¹¹ *Ontario Class Proceedings Act, 1992 S.O., c. 6, ss. 33(7)(8)(9)*

¹² *In re Warner Communications Securities Litigation*, 618 F.Supp. 735 (S.D.N.Y. 1985)

indicated that he was of the opinion that the result was largely attributable to a result in a companion action which had settled first. Accordingly, the Court applied a multiplier of 1.5.

In *Windisman v. Toronto College Park* (August 26, 1996) O.J. 2897 (unreported) General Division¹³, Mr. Justice Sharpe similarly emphasized the risk of the proceeding. Interestingly, he considered not only the risk at the commencement of the litigation (which did not appear high) but also the fact that the risk of continuing the action increased significantly throughout the litigation by virtue of a strenuous defence mounted by the defendant. Interestingly, Mr. Justice Sharpe indicated that he found the argument of the defendant to be without merit. But he went on to say that "it was hardly something the solicitors for the plaintiff could ignore. In my view, they are entitled to be compensated for the risk inherent in litigating the case against a recalcitrant defendant". Accordingly, the multiplier used was 2.5.

The recent settlement of breast implant litigation against Bristol-Myers Squibb in Ontario and Quebec¹⁴ resulted in a multiplier of 3.0. In making this award, Mr. Justice Winkler embraced the general reasoning of Mr. Justice Ground and Mr. Justice Sharpe in his review of the appropriateness of the base fee. Mr. Justice Winkler considered the high degree of legal complexity of the matters in question, the amount of time expended by Class Counsel, the considerable responsibility in bringing the matter to a successful conclusion, the significant monetary value of the matters in issue, the importance of the matter to the class, the degree of

¹³ *Windisman v. Toronto College Park* (August 26, 1996) O.J. 2897 (unreported) Gen. Div., Mr. Justice Sharpe

¹⁴ *Serwaczek v. Medical Engineering Corporation and Bristol-Myers Squibb Company*, unreported decision of The Honourable Mr. Justice Winkler, September 10, 1996

skill and competence demonstrated by the solicitors, the results achieved, the ability of the client to pay, as well as the representative plaintiff's expectation as to the amount of the fee. Mr. Justice Winkler also noted that plaintiff's counsel had voluntarily removed "incidental" docketed time and had rounded the total down by approximately \$22,000.00. The Court also pointed out that the fee, even once the multiplier had been applied, would amount only to some 20% of the total recovery¹⁵.

In awarding a multiplier of 3.0, the Court reiterated the comments of Mr. Justice Sharpe in *Windisman* that there is a strong public policy argument in favour of applying a multiplier.

One of the goals of the *Class Proceedings Act*, is to increase access to the courts, especially in cases where it would not be financially feasible to litigate the individual cases on their own. In the present case, had the individual class members been forced to litigation each claim separately, it would have been virtually impossible to proceed. The sheer volume of medical and scientific evidence alone would have rendered the option of an individual trial too expensive for all but the most seriously injured claimants¹⁶

In establishing the multiplier, the Court again emphasized the degree of risk and the degree of success. He noted that "they agreed to act on a pure contingent fee basis, with no contribution toward fees or disbursements from any source, including the class proceedings fund and the individual class members, at a time when the *Class Proceedings Act* was new legislation and none of the counsel involved had, at the outset, any experience in clearing the administrative

¹⁵ Ibid

¹⁶ Ibid, p. 18

hurdles involved in conducting a class proceeding.¹⁷ Mr. Justice Winkler also referred to the complex and evolving scientific and legal issues associated with silicone breast implants as well as potential corporate structure defences. In conclusion, the Court stated: "In short the negotiation of the successful settlement in this litigation, which will benefit the class members in two provinces, is a commendable achievement. That such a settlement could be obtained was by no means apparent from the outset. In furtherance of the intent of the legislation-that counsel be encouraged to accept the risk associated with litigation of this type, and encouraged to pursue diligently in circumstances where they may never be remunerated for their efforts-it is necessary to reward the successful resolution with a reasonable multiplier of the base fee.¹⁸

It should also be noted that the statute requires the Court to approve Class Counsel's solicitor and client disbursements.¹⁹ The Act also indicates that Class Counsel is entitled to be paid interest on outstanding disbursements.²⁰

FIXED SUM PER CASE

*Nantais et al v. Telectronics Proprietary (Canada Limited) et al*²¹ establishes the proposition

¹⁷ Ibid.

¹⁸ Ibid. p. 20

¹⁹ Ibid. p. 21, 22.

²⁰ *Class Proceedings Act, 1992*, S.O. 1993, c. 6 s. 33(7)(c)

²¹ *Nantais et al. v. Telectronics Proprietary (Canada Limited) et al.* (1985) (not as yet reported) (Div. Ct.)

that the inapplicability of the *Solicitors Act* and the act respecting champerty²², indicates that "multipliers" are not the exclusive form of contingent fee arrangement permissible for class actions. Mr. Justice Brockenshire held:

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. I reject the contingent that the fee agreement is illegal, as not authorized under the Act.²³

Application for leave to appeal to the Court of Appeal for Ontario was dismissed²⁴.

In the *Nantais* case, Class Counsel entered into a fee agreement with the representative plaintiffs under which their counsel would receive (if successful) the fixed sum of \$5,000.00 per class member (the case involves a products liability claim against the manufacturer of heart pacemaker leads) plus all party and party costs awarded plus applicable taxes irrespective of the scale upon which the party and party costs are awarded, interest occurring on such costs, and any disbursements not recovered as party and party costs.

PERCENTAGE BASED FEE AGREEMENTS

Recently in the United States there has been growing criticism of the lodestar/multiplier method

²² Ibid. s.33

²³ *Nantais et al v. Telectronics Proprietary (Canada Limited) et al.* (1985) (not as yet reported) (Div. Ct.) p. 528.

²⁴ Ibid. p. 523.

in favour of the simpler percentage method.²⁵ One argument generally put forward is that the time consuming lodestar/multiplier method generally produces an amount equivalent to approximately 30% of the fund, which could be arrived at more efficiently by using a percentage method from the start. It has been argued that the use of a percentage calculation in determining a Class Counsel Fee, properly places the emphasis on the quality of representation, the complexity of the litigation and the benefit conferred on the class. It rewards "one imaginative, brilliant hour" rather than "one thousand plodding hours".²⁶ In short, even when the multiplier method is used, the quantum of the settlement or judgement becomes a significant factor in determining an appropriate multiplier.²⁷

One American Court has stated the matter strongly that, in addition to encouraging efficient and effective legal representation, percentage calculations avoid unnecessarily involving the Court in an accounting and administrative process. "Such an award is consistent with the new learning (old wine in a new bottle)... which new learning we believe will proceed from west to east and take us back to straight contingent fee awards bereft of largely judgmental and time wasting computations of lodestars and multipliers. These... computations, no matter how conscientious, often seem to take on the character of so much Mumbo Jumbo. They did not guarantee a more

²⁵ See: *In Re Chrysler Motors Corp. Overnight E.P. Lit*, 736 F.Supp. 1007 (E.D.Mo 1990) at 1009; and *In Re Activision Securities Litigation*, 723 F.Supp. 1373 (N.D. Cal 1989) at 1375.

²⁶ *In re Warner Communications Securities Litigation*, 618 F. Supp. 735 (U.S. District Court, S.D. New York).

²⁷ See *Serwaczek v. Medical Engineering Corporation and Bristol-Myers Squibb Company*, unreported decision of The Honourable Mr. Justice Winkler, September 10, 1996, p.16

fair result or a more expeditious disposition of litigation.²⁸

With the American background and the *Nantais* decision, courts have recently approved percentage based contingent fee agreements. For example, the relevant provision in *Anderson et al v. Wilson* which was approved on September 11, 1996, is as follows:

5. The Consortium's fee shall be:

- (a) 25% of the amounts recovered by the class under any judgment(s), order(s) or settlement(s) (including damages and interest but excluding party and party costs); plus
- (b) all party and party costs recovered (except any party and party costs relating to work done by non-Consortium lawyers regarding a class member's individual claim).

Some American courts have determined that a sliding scale percentage is most appropriate. For example, Class Counsel could receive a fee of 33% on the first 10 million recovered, 20% on the next 10 million, and 10% on all amounts thereafter.

CONCLUSION

Despite a certain measure of notoriety that this litigation has already achieved, class actions have not really opened the flood gates of litigation. The economics of class litigation have not yet been clearly established. In the two cases in which moderately high multipliers are awarded,

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In re Union Carbide Corp. Consumer Products Business Securities Litigation, 724 F. Supp. 160, 170 (S.D.N.Y. 1989).

the risk was thought to be considerable and even (in one case) "extraordinary".²⁹ It should also be noted that, although significant fee awards are the subject of judicial comment, write-off of time and disbursements will take place much more quietly when no successful result has been achieved.

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Serwaczek v. Medical Engineering Corporation and Bristol-Myers Squibb Company, unreported decision of The Honourable Mr. Justice Winkler, September 10, 1996, p. 19

APPENDIX 1

Cases:

In the Matter of Superior Beverage/Glass Container, 133 F.R.D. 119 (N.D.Ill.1990)

- Multiplier - Range from 1.5 to 2.5
- Key Factors Considered: risk incurred where compensation was contingent on success; recognition of extraordinary performance by particular counsel; desire to encourage filing of meritorious claims

Kronfeld v. Transworld Airlines, Inc. 129 F.R.D. 598 (S.D.N.Y.1990)

- Multiplier - 1.25
- Key factors considered: risk and contingency

Rievman v. Burlington Northern R. Co., 118 F.R.D. 29 (S.D.N.Y. 1987)

- Multiplier - 3.26
- Key Factors Considered: Complex and risky litigation; benefits obtained for class were substantial; fee of award represented only 7% of total class recovery

In Re Beverly Hills Fire Litigation, 639 F.Supp. 915 (E.D.Ky. 1986)

- Multiplier - Range from 1.0 to 5.0

- Key Factors Considered: Complex issues of law; recovery questionable; lengthy trial; high skill level required

In Re Warner Communications Securities Litigation, 618 F.Supp 735 (S.D.N.Y. 1985)

- Multiplier - 2.26
- Key Factors Considered: Time and labour expended; magnitude and complexity of the litigation; risk of the litigation; quality of representation; requested fee in relation to the settlement; public policy considerations
- Note: This case lists 9 other cases in which the multipliers range from 2.8 to 4.5

Municipal Authority of the Town of Bloomsburg v. Com'th of Pennsylvania, 527 F.Supp. 982 (M.D. Pa 1981)

- Multiplier - 4.5
- Key Factors Considered: litigation was extremely complex; threshold improbability of success at trial
- Note: Case settled without trial

In Re: Cenco, Inc. Securities Litigation, 519 F.Supp. 322 (N.D. Ill. 1981)

- Multiplier - 4 for the firm that had handled 75% of the work
2 for the other firms
- Key Factors Considered: settlement would not have occurred without the painstaking

trial preparation; counsel had been faced with a case of enormous magnitude and complexity; substantial barriers to recovery; new and unsettled questions of law

Arenson v. Board of Trade of the City of Chicago, 372 F. Supp. 1349 (N.D. Ill.1974)

- Multiplier - 4
- Key Factors considered: numerous unsettled questions of law; remote chance for a favourable recovery; extensive trial preparation.