IADC COMMITTEE NEWSLETTER

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IN THIS ISSUE

Do recent developments in several North American jurisdictions suggest a collective shift in critical thinking by class action judges about awarding compensation to representative plaintiffs not enjoyed by the rest of the class?

Requests for Honoraria in Class Actions Face Rising Scrutiny and Resistance

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By design, class proceedings require representative plaintiffs to invest time and effort—and perhaps to accept the risk of adverse costs awards, depending on the jurisdiction and financial arrangement in place—on behalf of a broader, free-riding class. Class counsel are also subject to those risks, to varying degree, but can seek premium compensation, often representing a multiple of actual time docketed, which courts may allow if fair and reasonable to encourage lawyers to take on class actions. Sometimes, representative plaintiffs will also request special compensation for time and effort invested in the action (on top of their entitlement as a class member) in the form of an “honoraria” or “incentive” payment.

North American courts have, by and large, been willing to entertain requests for compensation by representative plaintiffs, especially if the actions resulted in monetary recovery for the class. But the judicial approach to determining if, and when, honoraria should be awarded has been uneven. Some judges have readily awarded modest sums (relative to settlement or judgment amounts) on the essentially restitutionary premise that service on behalf of the class should be compensated in some fashion, including to motivate representative plaintiffs in other actions to put in the work needed to achieve the best result possible. But representative plaintiffs have recently faced rising judicial skepticism about the propriety of awarding compensation not enjoyed by the rest of the class, and heightened scrutiny of the evidence showing why paying an honoraria is appropriate in a given situation. This trend, observable in multiple jurisdictions, may signal a collective shift in critical thinking on awarding honoraria, as some courts refocus on actual or perceived conflicts of interest arising from these payments.

Background: Representative Plaintiff Compensation

Representative plaintiffs play an important role in class actions, without which the system could not function. That role is often expressly addressed in class actions legislation. For example, the *Class Proceedings Act, 1992* (Ontario) provides that a proposed representative plaintiff must, as a condition of certifying the proceeding as a class action, “fairly and adequately represent the interests of the class” and “not have, on the common issues for the class, an interest in conflict with the interests of other class members”.[1]

Representative plaintiffs may invest dozens, or even hundreds, of hours into a class action, if it proceeds beyond the preliminary stages. As a result, after successfully resolving the litigation, representative plaintiffs may feel entitled to some monetary recognition of their efforts on behalf “absent” class members. Their contributions might have spanned investigating facts, reviewing pleadings, working with class counsel, going through the often-stressful process of examination by defence counsel, and considering settlement offers. In costs jurisdictions, subject to indemnity or funding arrangements that shift risk, representative

[1] *Class Proceedings Act, 1992*, SO 1992, c 6, s 5(1)(e)(i), (iii).

plaintiffs may also take on costs exposure, in addition to other expenses and risks.

Unlike class counsel, however, whose contributions are not only compensated but frequently rewarded by a court-sanctioned premium on time incurred based on a contingency fee agreement or appropriate multiple on a base fee to recognize the degree of success achieved and the risk of nonpayment and costs assumed, representative plaintiffs have little financial incentive to step forward from the class to prosecute the action, let alone to invest potentially hundreds of hours in the process. That dynamic, unique to class actions, led an Ontario court to identify in 1996 (the early days of class actions practice in the province) an "important distinction" between ordinary litigation and class actions. The "representative plaintiff undertakes the proceedings on behalf of a wider group and that wider group will, if the action is successful, benefit by virtue of the representative plaintiff's effort".[2] In the seminal case of *Windisman v Toronto College Park Ltd*, Justice Sharpe of the Ontario Court of Justice (General Division) at the time (later of the Court of Appeal for Ontario) reasoned that failing to compensate a representative plaintiff for time and effort invested would unjustly enrich the class, so *quantum meruit* compensation is appropriate if the representative plaintiff "rendered active and necessary assistance" and that assistance "result[ed] in monetary success for the class".[3]

Despite this restitutionary approach, Justice Sharpe still cautioned that awards of compensation of this type should "not be seen as routine".[4] While compensating representative plaintiffs for time and effort may appear to be a solution to a perceived incentives gap in the class actions system, those payments create a new problem. If representative plaintiffs stand to gain from class actions in ways that other class members do not, they could be influenced to accept settlement offers not in the best interests of the whole class. Most representative plaintiffs would no doubt act on better motives, but even an appearance of conflict risks tarnishing the reputation of class actions, and of the administration of justice.

As Justice Winkler (then of the Ontario Superior Court of Justice, later Chief Justice of Ontario) put the issue in 2002: "A class proceeding cannot be seen to be a method by which persons can seek to receive personal gain over and above any damages or other remedy to which they would otherwise be entitled on the merits of their claims."[5]

Although awarding honoraria has long been approached as an essentially discretionary decision, courts have sought to bring order to the process. In 2012, Justice Strathy (as he then was, now the Chief Justice of Ontario) identified six factors that judges should consider in exercising their discretion when faced with a request for representative

[2] *Windisman v Toronto College Park Ltd* (1996), 65 ACWS (3d) 207 at para 28 (Ont Gen Div) (***Windisman***).
[3] *Windisman* at para 28.
[4] *Windisman* at para 28.
[5] *Tesluk v Boots Pharmaceutical PLC* (2002), 113 ACWS (3d) 768 at para 22 (Ont Sup Ct).

plaintiff compensation. In *Robinson v Rochester Financial Limited*, Justice Strathy accepted that compensation "should be reserved to those cases where, considering all the circumstances, the contribution of the plaintiff has been exceptional", as potentially informed by:

(a) active involvement in the initiation of the litigation and retainer of counsel;

(b) exposure to a real risk of costs;

(c) significant personal hardship or inconvenience in connection with the prosecution of the litigation;

(d) time spent and activities undertaken in advancing the litigation;

(e) communication and interaction with other class members; and

(f) participation at various stages in the litigation, including discovery, settlement negotiations, and trial.[6]

Despite this framework of analysis, and other efforts to stimulate judicial scrutiny of honoraria requests and generate more predictability of outcomes, inconsistent results remained a reality, with some courts declining to award representative plaintiff compensation in many cases and others rubber-stamping small sums with minimal scrutiny, or awarding significant payments.[7]

Signs of Shifting Sentiments on Honoraria Payments (2019-2021)

Over the last few years, the pendulum may be starting to swing, in several jurisdictions in North America, away from an overriding concern about compensating representative plaintiffs for their time and effort in class proceedings, and towards an avoidance of actual or perceived conflicts of interest and heightened scrutiny of the evidence filed in support of honoraria payment requests.

In Ontario, since about early 2019, more class actions judges have been pushing back on the routine awarding of honoraria, often in very modest amounts, even absent compelling evidence of any special contribution by the representative plaintiff to the class proceeding or its outcome.

Justice Glustein, a dedicated class actions judge of the Ontario Superior Court of Justice, issued two decisions, in March 2019 and October 2020 respectively, arguably marking a shift in tone and approach to compensation requests:

1. In *Park v Nongshim Co, Ltd*, Justice Glustein was asked to award an honorarium of $500 in the context of a price-fixing class action settlement. He referenced Justice Strathy's comments in *Robinson*, and other cases in which honoraria were refused, and emphasized that, not only is evidence needed to support

[6] *Robinson v Rochester Financial Limited*, 2012 ONSC 911 at para 43. See also *Baker (Estate) v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105 at paras 93-95.

[7] For large sums, see *e.g.* (i) *Garland v Enbridge Gas Distribution Inc* (2006), 153 ACWS (3d) 785 at para 51 (Ont Sup Ct) ($25,000); (ii) *Cannon v Funds for Canada Foundation*, 2017 ONSC 2670 at paras 17-18 ($50,000); and (iii) *Toth v Canada*, 2019 FC 125 at paras 97-105 ($50,000).

the payment of any honorarium, but the evidence must show a truly "exceptional" contribution that exceeds what the court expects of those who accept the role of representative plaintiff (*i.e.* "well above and beyond the call of duty", quoting Justice Strathy). Justice Glustein thus denied the requested honorarium in *Park*. Interestingly, he did so even though a British Columbia judge had previously approved honoraria for plaintiffs in a companion case.[8]

2. Then, in *Makris v Endo International PLC*, Justice Glustein was asked to award a $15,000 honorarium in the context of a securities misrepresentation class action settlement. The plaintiff led evidence that she reviewed versions of the pleadings, read or was informed about expert reports, instructed counsel and helped draft material related to motion and settlement matters, and "took some time off" to meet with lawyers to discuss the action's progress. Citing his own analysis in *Park*, Justice Glustein denied the requested honorarium, finding that the evidence "did not establish any exceptional circumstances justifying an honorarium" or that the representative plaintiff had "engaged in exceptional effort". The plaintiff argued that the requested honorarium was justified because she had lost between $6,000 and $7,000 on the investment at issue in the proceeding. Justice Glustein rejected that argument, underscoring that representative plaintiffs should not, by virtue of their role, benefit in excess of other, "absent" members of the class.[9]

Other case law in Ontario since 2019 also appears to reflect increased concern about conflicts of interest and scrutiny of supporting evidence. Justice Glustein refused to award an honorarium in at least one other case, on essentially the same reasoning and his decisions in *Park* and *Makris*.[10] Justice Perell, another dedicated class actions judge, cited *Park* in the course of refusing to grant an honorarium in *Cappelli v Nobilis Health Corp*, stating that the exceptionality of awarding any compensation to representative plaintiffs is even more acute "in a *cy-près* settlement where there is no monetary success for the class".[11]

[8] *Park v Nongshim Co, Ltd*, 2019 ONSC 1997 at paras 1-6, 84-92.

[9] *Makris v Endo International PLC*, 2020 ONSC 5709 at paras 37-46.

[10] *Robinson v Medtronic, Inc*, 2020 ONSC 168 at paras 96-100. But compare with: (i) *Charette v Trinity Capital Corporation*, 2019 ONSC 3153 at paras 88-97 ("the action likely would not have been commenced but for the active involvement of" the representative plaintiffs who both faced "exposure to a real risk of costs" and were sophisticated businesspeople who lent "considerable assistance" in organizing and reviewing documents and strategizing about the case); and (ii) *Walmsley v 2016169 Ontario Inc*, 2020 ONSC 1416 at paras 32, 48-49 (in which an honorarium was granted after Justice Glustein found that "the action would not have been brought without [the representative plaintiff's involvement", whose involvement reached "exceptional" status based on the evidence before the court).

[11] *Cappelli v Nobilis Health Corp*, 2019 ONSC 4521 at paras 37-40.

Recently, even when some compensation is found appropriate, courts appear to be expressing greater concern than in the past about awarding honoraria, and consider cutting requested sums to avoid the appearance of any conflict. In *Aps v Flight Centre Travel Group*, Justice Belobaba called the "growing practice of paying an honorarium" a "problem". His concern was that the "core obligation" to "act in the best interests of the class and advise counsel accordingly may be compromised" if representative plaintiffs are "tempted with the possibility of a substantial honorarium". But he concluded that evidence in that case showed that the representative plaintiff had "paid a personal price in job opportunities and foregone employment income simply because his was the lead name in the proposed class action", making a $10,000 honorarium "justified and easily approved" in the circumstances.[12] In April 2021, in *Casseres v Takeda Pharmaceutical Company*, Justice Belobaba was asked to award an honorarium of $3,000 to the representative plaintiffs in two pharmaceutical class actions that settled after nearly a decade of litigation.

While lengthy litigation has sometimes led judges to approve honoraria even without much, or any, evidence of an "extraordinary" contribution,[13] Justice Belobaba analyzed the evidentiary record, finding that there was "no evidence" of "truly extraordinary" effort. Thus, he cut the requested honoraria by 50 percent, approving a modest $1,500 award for each representative plaintiff to reflect "their involvement and commitment over almost ten years of litigation".[14]

In the only civil law province in Canada, Québec, article 593 of the *Code de procédure civile* provides that the court "may award the representative plaintiff an indemnity for disbursements", but makes no provision for any compensation to reflect time and effort devoted to the litigation.[15] The Court of Appeal of Québec confirmed in September 2020 (with leave to appeal to the Supreme Court of Canada later denied) that the courts of that province cannot award honoraria based on the wording of article 593, finding that any prior jurisprudence arguably favouring a broader interpretation of the "indemnity" language used in article 593 was not persuasive.[16]

In the United States, the Court of Appeals for the Eleventh Circuit (Alabama, Florida, and Georgia) in *Johnson v NPAS Solutions LLC* criticized awarding compensation, or "incentive", payments to representative plaintiffs in the context of class action settlements as an "error" that has "become commonplace in everyday class-action practice", contrary to "on-point Supreme Court precedent prohibiting such awards".[17] The Supreme Court case law in question is *Trustees v Greenough* and *Central Railroad &*

[12] *Aps v Flight Centre Travel Group*, 2020 ONSC 6779 at paras 5, 42-46.
[13] See *e.g. Rosen v BMO Nesbitt Burns Inc*, 2016 ONSC 4752 at paras 25-27 (*per* Belobaba, J). (The representative plaintiff "participated in every step of the six-year litigation", and a $10,000 honorarium was "appropriate and in line with other cases in which honoraria have been granted").
[14] *Casseres v Takeda Pharmaceutical Company*, 2021 ONSC 2846 at paras 10-12.
[15] *Code de procédure civile*, RLRQ c C-25.01, art 593.
[16] *Attar c Fonds d'aide aux actions collectives*, 2020 QCCA 1121 at paras 15-20, leave to appeal to SCC dismissed, 2021 CanLII 18042 (SCC).
[17] *Johnson v NPAS Solutions LLC*, Case No 18-12344 (September 17, 2020) (***Johnson*)**.

Banking Co v Pettus, decisions released in 1882 and 1885 respectively.[18] Reviving those decisions which prohibit incentive payments in litigation, and applying them to the class actions context, the Eleventh Circuit focused on the danger, created by awarding honoraria, of creating a conflict of interest between the representative plaintiff and other class members. The court thus rejected the $6,000 honorarium approved by the lower court, calling the modern practice in class actions of awarding honoraria a product of "inertia and inattention, not adherence to law".[19]

It remains to be seen whether *Johnson* achieves any traction. A dissenting judge in *Johnson* cited a prior Eleventh Circuit decision as "binding" on the question of whether the court can award an incentive payment when it is "fair", and would have allowed the honorarium.[20] In addition, the plaintiff in *Johnson* has filed for *en banc* review. [21] The decision therefore could be reversed, either by the Eleventh Circuit or on appeal to the Supreme Court. More broadly, *Johnson* may encounter resistance among judges accustomed to awarding incentive payments to encourage representative plaintiffs to continue taking on the responsibilities associated with the role. As of early 2021, at least one district court has declined to follow *Johnson*, holding (in line with the dissenting judge) that substantial precedent supports awarding incentive payments when fair.[22]

Time will tell if *Johnson* marks the beginning of a trend in the United States away from awarding incentive payments, or whether it is simply a blip on the radar. For now, *Johnson* forms part of a wider trend across North American jurisdictions of greater concern about conflicts of interest and skepticism about the historical approach.

Conclusion

Recent developments in Ontario, Québec, and the United States reflect a notable, albeit nascent, departure from the routine approval of honoraria in class actions. But it is too early to determine whether those developments represent a turning-point in collective critical thinking on awarding honoraria or part of the same unevenness that has plagued the approach to such awards for years.
Not all jurisdictions are necessarily moving in the same direction. In British Columbia, the approach continues to be permissive. In *Parsons v Coast Capital Savings Credit Union*, the British Columbia Court of Appeal reviewed the Canadian and American authorities and concluded that it is "too narrow to say … that services of special significance beyond the usual responsibilities under the Act are required for a separate award to the representative

[18] *Trustees v Greenough*, 105 US 527 (1882); and *Railroad & Banking Co v Pettus*, 113 US 116 (1885).
[19] *Johnson* at p 27.
[20] *Johnson* at pp 37-38.
[21] *Petition for Rehearing En Banc* filed October 22, 2020, *Johnson v NPAS Solutions LLC* [PDF].
[22] *Somogyi v Freedom Mortgage Corp*, 2020495 F.Supp.3d 337 (US District Court, New Jersey) (October 20, 2020). ("[T]he Court respectfully declines to follow *Johnson*. There is substantial precedent from this Circuit supporting approval of incentive payments…")

plaintiff".[23] Consistent with "restitutionary principles and recognition of the principle of *quantum meruit*", the rule in British Columbia has therefore been that "competent service accompanied by positive results" is enough to justify an honorarium, with case-specific factors and conflicts of interest concerns mainly informing the amount.[24]

From a policy perspective, there is good reason to view a trend towards intensifying scrutiny of requests for compensation by representative plaintiffs as a positive development for the class actions system writ large. If courts are to retain, as they must, a meaningful gatekeeping role when it comes to payments that affect absent class members, and guard against potential fissures in interests between representative plaintiffs and the rest of the classes on behalf of which they are obliged to act, courts will need to deny requests for compensation at least some of the time.

Honoraria requests also tend to complicate the already multifaceted settlement-approval process, creating new dimensions of analysis that exacerbate the very real practical challenge of assessing often already deeply discounted settlements. Efforts to identify a brighter line that representative plaintiffs must pass, on compelling evidence, before they are entitled to honoraria payments may be welcomed by many class actions judges.

Ultimately, there is little evidence that class members will become unwilling to step forward and prosecute class actions without the promise of a sizeable honoraria payment at the end of the process. All litigants must weigh the importance of pressing forward with a claim against the inconveniences of litigation. Especially since personal financial advantage could drive a wedge, real or perceived, between representative plaintiffs and their classes, casting doubt on why they accepted settlement offers, erring against awarding compensation not enjoyed by the rest of the class, absent compelling evidence of an extraordinary contribution, may be the prudent course.

[23] *Parsons v Coast Capital Savings Credit Union*, 2010 BCCA 311 at para 20 (***Parsons***).

[24] *Parsons* at paras 20-21. In late 2020, potentially in contrast to *Park* and *Makris*, Justice Douglas of the Supreme Court of British Columbia reaffirmed *Parsons* in *Cardoso v Canada Dry Mott's Inc*, stating that honoraria should not be automatic, but a modest award is "appropriate where the representative plaintiff has provided necessary and active assistance leading to success on behalf of all class members". Justice Douglas awarded $1,500 honoraria for each representative plaintiff in *Cardoso* (after denying an initial request for $10,000 each, as out of proportion based on the modest settlement amount, honoraria awarded in other matters, and evidence before the court). See *Cardoso v Canada Dry Mott's Inc*, 2020 BCSC 1569 at paras 42-51.

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