CLASS ACTION SETTLEMENTS BEFORE CERTIFICATION: COUNSEL BEWARE!

By Brendan Brock

British Columbia is one of the only jurisdictions in Canada where court approval of class action settlements or discontinuances before certification is not mandated by class proceedings legislation.[1] The lack of this requirement—along with jurisprudence holding that, before certification, proposed class counsel is not in a solicitor-client relationship with putative class members[2]—may give the impression that an action commenced under B.C.'s *Class Proceedings Act*[3] (the "*CPA*") can be settled before certification without regard to the interests of putative class members, including at a premium to the proposed representative plaintiff's actual loss. Such a conclusion ignores principles underpinning class proceedings legislation and may expose proposed class counsel to civil liability to the proposed class.

The emphasis Canadian courts have placed on counsel's *sui generis* relationship with putative class members and their protection in the context of settlement has formed the substrate for a novel cause of action in negligence against counsel who commence a proceeding under class proceedings legislation only to settle it before certification without regard for the interests of putative class members. Until the *CPA* is amended to require court approval of pre-certification settlements—and it should be[4]—counsel must take care to ensure any settlement or discontinuance before certification of any proposed class action does not prejudice the claims of putative class members. Failing to do so risks exposing counsel to an action in negligence by absent putative class members for breach of a *sui generis* duty and a potentially large damages award, notwithstanding that court approval of pre-certification settlements is not strictly mandated in our province.

COURT APPROVAL OF CLASS ACTION SETTLEMENTS

A "class proceeding" in British Columbia may be settled, discontinued or abandoned only with approval of the B.C. Supreme Court. The court is guided by the principle that class action settlements must be "fair and reasonable and in the best interests of the class as a whole"[5] and must consider

whether notice should be given to absent class members to ameliorate potential prejudice arising from discontinuance of the proceeding.[6] A "class proceeding" under the *CPA* is defined as a proceeding that has been certified as such.[7] Thus, on the face of the *CPA*, court approval is not required for a pre-certification settlement or discontinuance in our province. This definition sets B.C. apart from the jurisdictions across Canada that require court approval of any settlement, discontinuance or abandonment of a class proceeding even before certification.[8]

The rationale for requiring court approval of class action settlements focuses on protecting the rights of absent class members and the integrity of the class action regime. The requirement both deters plaintiffs and class counsel from abusing the class action procedure with meritless claims and provides members of the class an opportunity to ameliorate any adverse effects from the discontinuance of the proceeding.[9] Court approval of settlements ensures the representative plaintiff is not settling for improper or inadequate reasons, such as "lucrative side deals or other considerations which might contribute to a representative plaintiff deciding to 'cash in the chips' and settle".[10]

There is no principled reason for hinging the requirement for court approval of class action settlements on the stage of proceedings reached. In most cases, whether the settlement is pre-certification or post-certification, the effect on class members is the same.[11] An action commenced under class proceedings legislation is not simply an individual action until certification is granted. Rather, "the proceeding changes from an intended class proceeding, which was commenced as such, to a 'certified' class proceeding which will then be conducted accordingly with respect to its continuation".[12]

In its 1982 *Report on Class Actions*, Ontario's Law Reform Commission specifically identified the need to apply court approval provisions to settlements before certification.[13] Restricting the application of those provisions to the post-certification stage was thought to foster the formulation of "secret settlements" and result in the parties placing an undue premium on early settlements as a means of avoiding the requirement for court approval and notice to absent class members.[14] The requirement for court approval of settlements is thought to address the concern that class proceedings may be used to extort unjust settlements from defendants or to "produce compromises unfair to class members, either because the representative plaintiff has settled with the defendant for a premium on his or her own claim, thereafter discontinuing the class action, or because the class lawyer has settled in a manner designed to maximize legal fees at the expense of the recovery … available to class members".[15]

Similarly, U.S. lawmakers implemented reforms to curtail the phenomenon of so-called "strike suits" commenced without merit where the nature of the claim is such that a sizable settlement can be extracted.[16] Enhancing the supervisory responsibilities of the courts was thought to address this form of "legalized blackmail" that became frequent among the "entrepreneurial sector of the legal profession [in the United States] known as the 'strike bar'", particularly with securities class actions.[17]

Amendments have been made in recent years to class proceedings legislation in other Canadian jurisdictions to require court approval of settlements and discontinuances before certification. For instance, amendments to Alberta's *Class Proceedings Act*[18] came into force in March 2011 that expanded the requirement for court approval of settlements and discontinuances to "a proceeding that is the subject of an application for certification".[19] Even before that amendment, the Alberta Court of Queen's Bench expressed its view that it is "prudent for the parties to have any discontinuance of a proposed class action reviewed by the Court".[20] The Saskatchewan Court of Queen's Bench similarly noted that "[c]ounsel out of abundant caution … have been requesting court approval for pre-certification settlements and discontinuances. The court has addressed such pre-certification settlement or discontinuance applications pursuant to its inherent jurisdiction".[21]

Amendments to the *CPA* came into force in 2018 that switched B.C. from an "opt in" jurisdiction to an "opt out" jurisdiction and established a framework for the certification of multi-jurisdictional class proceedings.[22] While the definition of "class proceeding" was amended to include a "multi-jurisdictional class proceeding", no change was made to effect a requirement for court approval of pre-certification settlements and discontinuances, despite an aim of those amendments being to achieve greater consistency across Canada.[23] To date, there remains no requirement in the CPA to apply for court approval of pre-certification settlements or discontinuances, despite there being no principled reason for their exclusion.

INTERESTS OF PUTATIVE CLASS MEMBERS

While not directly parties to a proposed class action before certification, putative class members are not strangers to the litigation and have rights that are at stake and worthy of protection.[24] When the settlement of an uncertified class action is being considered, it is clear that the interests of absent class members who are not getting the benefit of any settlement may be affected.[25] Courts have inherent jurisdiction to protect the interests of putative class members from the outset of litigation commenced under

class proceedings legislation.[26] In exercising this jurisdiction, courts carefully scrutinize a representative plaintiff's reasons for discontinuing a proposed class action, especially where such discontinuance is sought for the purpose of settling the representative plaintiff's own individual claim.[27]

One source of prejudice to putative class members that may arise in the context of settlement comes from the operation of s. 39 of the *CPA* (and parallel provisions in other provinces), which suspends any limitation period applicable to a cause of action brought on behalf of putative class members from the date the proposed class proceeding is commenced until, *inter alia*, the proceeding is dismissed without an adjudication on the merits or is otherwise settled, discontinued or abandoned. In *Canadian Imperial Bank of Commerce v. Green*, the Supreme Court of Canada described the purpose of a similar provision in Ontario's *Class Proceedings Act*[28] as being to protect putative class members from the expiry of limitation periods before the viability of a proposed class action is established, thereby negating the need for each class member to commence an individual action in order to preserve their rights.[29]

The settlement of an uncertified class proceeding with a representative plaintiff alone that includes a standard consent dismissal order would end the tolling of applicable limitation periods under s. 39 of the *CPA* and may create a serious risk of prejudice to the claims of putative class members. Often on motions to approve the discontinuance of a class action, courts will order that notice of the proposed discontinuance be provided to putative class members so that they may take steps to prevent prejudice arising to them as a result of the discontinuance. In *Chen v. Memorial University of Newfoundland and Labrador*, the Supreme Court of Newfoundland and Labrador underscored the significance of providing notice to absent putative class members of a proposed discontinuance as a means of ameliorating prejudice arising from the recommencement of the running of limitation periods.[30]

The court in *Chen* ordered that notice of the motion for discontinuance of an uncertified class proceeding be given to putative class members under ss. 35(1) and (5) of that province's *Class Actions Act*.[31] Yet, those provisions—like their counterparts in British Columbia—apply only to *certified* class proceedings,[32] demonstrating that in the absence of express provisions requiring court approval of settlements, courts may take steps to protect the rights and interests of absent putative class members.

COUNSEL'S DUTIES TO PUTATIVE CLASS MEMBERS

Jurisprudence demonstrates that counsel owe certain duties to putative class members before certification that are especially engaged in the con-

text of settlement. Those duties are ill-defined but at a minimum include the obligation to take steps to ameliorate any prejudice arising from a proposed settlement or discontinuance of an uncertified class action, including by providing notice to absent putative class members.

While it is well established that counsel for a representative plaintiff in an uncertified class action is not in a solicitor-client relationship with putative class members, courts have recognized that proposed class counsel is in a "*sui generis* relationship" with absent putative class members that imposes certain responsibilities on counsel. These responsibilities are created from the outset of a proceeding brought under class action legislation and are particularly triggered in the context of settlement:

> Having commenced the class proceeding, the proposed representative plaintiff and his counsel have assumed significant responsibilities to all members of the putative class. It is inconsistent with such responsibilities to negotiate a settlement of the claims of only some members of the class and abandon the class proceeding.[33]

The nature and extent of counsel's *sui generis* duty to non-client putative class members of an uncertified class action remain ill-defined. While courts have cryptically described the duty as imposing "at least some responsibilities" on proposed class counsel,[34] it has also been observed that "it is hardly fair or even feasible before certification to impose the full complement of tort, contract and fiduciary responsibilities on a lawyer".[35]

The recent Ontario case of *Singh v. RBC Insurance Agency Ltd.* provides some assistance and demonstrates that counsel's *sui generis* duty to putative class members at a minimum includes a duty of commitment in the context of settlement (i.e., "the ability of counsel to zealously advocate for the class members").[36] In *Singh*, a motion to disqualify proposed class counsel (before certification) for a conflict of interest was granted where counsel had commenced both an individual action and a class action for the same plaintiff against the same employer related to similar claims. The Ontario Superior Court found that counsel's *sui generis* duty to putative class members put her in a conflict of interest in that she would not be able to simultaneously fulfill a duty of commitment to both the putative class and the plaintiff in the individual action in the context of settlement.

In *Singh*, the court noted that in all class proceedings proposed class counsel must be conscious of the conflicts that may arise between the representative plaintiff and other class members, or between his or her own interests and the interests of the class members. The court has inherent jurisdiction to ensure that the interests of class members are not subordinated to the interests of either the representative plaintiff or class counsel, and to ensure that class counsel complies with the *sui generis* duty of com-

mitment owed to putative class members.[37] Counsel must be mindful of the duty of commitment described in *Singh* and take care not to negotiate a settlement for a proposed representative plaintiff that prejudices other members of the putative class.[38]

POTENTIAL LIABILITY TO PUTATIVE CLASS MEMBERS

The fact that court approval of settlements and discontinuances is not mandated by the *CPA* until after certification may create the false impression that counsel in British Columbia may assist representative plaintiffs in entering into out-of-court pre-certification settlements without running afoul of duties to the putative class, including for settlements at a premium to the representative plaintiff's actual loss. Yet the policy rationale for requiring court approval of settlements is equally applicable to class proceedings in British Columbia, and there is no principled reason to determine that the rights of putative class members are not engaged in a proceeding filed under the *CPA* before certification. Judicial opinions on counsel's *sui generis* duty to putative class members and the courts' emphasis on protecting the interests of absent class members make it eminently conceivable that our courts would recognize a novel cause of action in negligence for breach of counsel's *sui generis* duty by orchestrating a settlement to the prejudice of the putative class.[39] Effecting settlement before certification without court approval or notice to putative class members could further be seen as exploiting an oversight by the B.C. legislature to the detriment of putative class members.

In a 2010 paper, Ward K. Branch, Q.C. (prior to his appointment to the B.C. Supreme Court) and Luciana Brasil described the "range of tactical and ethical quandaries" that can arise when counsel for a representative plaintiff in an uncertified class action receives settlement offers and warned that "both defendant's and plaintiff's counsel would be well advised to ensure that absent members of the inchoate class will not otherwise be prejudiced by discontinuance of the action, and, in particular, that plaintiff's counsel have not privately benefited at the expense or to the exclusion of the class".[40]

In considering the tactical and ethical quandaries of pre-certification settlements, counsel should be aware of British Columbia's unique legislation respecting class action settlements and ensure a proposed settlement complies with counsel's *sui generis* duty to putative class members. Counsel should consider applying to the B.C. Supreme Court under its inherent jurisdiction to approve a settlement and/or providing notice of the proposed settlement to absent putative class members. Failing to do so risks exposing counsel to liability in negligence for breach of their *sui generis* duty

to putative class members, despite the absence of a formal requirement for court approval of pre-certification settlements in the province.

ENDNOTES

1. Of the Canadian jurisdictions with class proceedings legislation, Manitoba and Newfoundland and Labrador are the only other provinces aside from British Columbia that lack the requirement for court approval of settlements before certification. See *Class Proceedings Act*, CCSM c C130, ss 1 (*sub verbo* "class proceeding"), 35; *Class Actions Act*, SNL 2001, c C-18.1, ss 2 (*sub verbo* "class action"), 35.
2. *Fantl v Transamerica Life Canada*, 2008 CanLII 17304 at para 76 (Ont SC) [*Fantl*], aff'd 2008 CanLII 63563 (Ont Div Ct), aff'd 2009 ONCA 377; *Lundy v VIA Rail Canada Inc*, 2012 ONSC 4152 at para 31 [*Lundy*].
3. RSBC 1996, c 50 [*CPA*].
4. Amending the *CPA* to require court approval of pre-certification settlements and discontinuances would improve consistency in class proceedings jurisprudence across Canada, increase protection for absent putative class members and protect the integrity of the class proceedings regime in this province, as further discussed in this article.
5. *Watt v Health Sciences Association of British Columbia*, 2020 BCSC 280 at para 20, citing *Wilson v Depuy International Ltd*, 2018 BCSC 1192 at para 58, Branch J, quoting *Cardozo v Becton, Dickinson and Company*, 2005 BCSC 1612 at para. 16.
6. *CPA*, *supra* note 3, s 35.
7. *Ibid*, s 1.
8. See e.g. s 29(1) of Ontario's *Class Proceedings Act*, 1992, SO 1992, c 6, which provides that "[a] *proceeding under this Act* may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate" [emphasis added]; and s 1(2) of that Act, which defines a "proceeding" as including a proceeding commenced under the Act "regardless of whether it has been certified as a class proceeding". See also ss 35(1)–(2) of Alberta's *Class Proceedings Act*, SA 2003, c C-16.5, which provide that "a proceeding that is the subject of an application for certification" may be settled, discontinued or abandoned only with the approval of the court.
9. *Gradja v Barrick Gold Corp*, 2019 ONSC 4869 at paras 14–15.
10. *Epstein v First Marathon Inc*, 2000 CanLII 22797 at para 31 (Ont SC) [*Epstein*], quoting Michael Cochrane, *Class Actions: A Guide to the Class Proceedings Act, 1992* (Aurora: Canada Law Book, 1992).
11. *Driediger v Ashley Furniture Industries Inc*, 2010 SKQB 437 at para 10 [*Driediger*].
12. *Logan v Canada (Minister of Health)*, 2003 CanLII 20308 at paras 11–13 (Ont SC) [*Logan*].
13. Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ontario Ministry of Attorney General, 1982) at 806 [*Report on Class Actions*], online: <digitalcommons.osgoode.yorku.ca/library_olrc/110/>.
14. *Epstein*, *supra* note 10 at para 38, citing the *Report on Class Actions*, *supra* note 13 at 806.
15. *Epstein*, *supra* note 10 at para 32, citing the *Report on Class Actions*, *supra* note 13 at 146.
16. See *Epstein*, *supra* note 10 at paras 41–52 for a discussion of the American experience with "strike suits", particularly as it relates to securities class actions.
17. *Epstein*, *supra* note 10 at para 42, quoting Steven Sharpe & James Reid, "Aspects of Class Action Securities Litigation in the United States" (1997) 28 Can Bus LJ 348 at 353–54.
18. *Supra* note 8.
19. *Class Proceedings Amendment Act, 2010*, SA 2010, c 15 (assented to December 2, 2010).
20. *Davey v Canadian National Railway Co*, 2006 ABQB 704 at para 5.
21. *Driediger*, *supra* note 11 at para 8.
22. *Class Proceedings Amendment Act, 2018*, SBC 2018, c 16 (assented to May 17, 2018).
23. British Columbia, *Official Report of Debates* (*Hansard*), 41st Parl, 3rd Sess, No 126 (26 April 2018) at 4283 (Hon D Eby), online: <https://www.leg.bc.ca/content/hansard/41st3rd/20180426am-Hansard-n126.pdf>.
24. *Warner v Google LLC*, 2020 BCSC 1108 at para 108, quoting *Fantl*, *supra* note 2 at para 78, quoting *Heron v Guidant Corp*, [2007] OJ No 3823 at para 10 (SCJ) [*Heron*], leave to appeal to ref'd 2008 CanLII 204 (Ont Div Ct); *Rooke v Canada (Health)*, 2019 FC 765 at para 18.
25. *Smith v Crown Life Insurance Co*, 2002 CarswellOnt 8437 at paras 17–18 (SCJ) [*Smith*].
26. *Singh v RBC Insurance Agency Ltd*, 2020 ONSC 5368 at para 41 [*Singh*], citing *Fantl*, *supra* note 2 at para 59. See also *Driediger*, *supra* note 11 at para 8. The courts' inherent jurisdiction extends to making rules of practice and procedure respecting class proceedings in the absence of comprehensive legislation: *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 34.
27. *Logan*, *supra* note 12 at para 7.
28. *Supra* note 8.
29. 2015 SCC 60 at paras 60–61, Côté J.
30. 2019 NLSC 193 at paras 8–10.
31. *Supra* note 1.
32. *Ibid*, ss 2 (*sub verbo* "class action"), 35.
33. *Smith*, *supra* note 25 at para 29, cited in *Baxter v Lloydminster (City)*, 2010 SKQB 452 at para 8.
34. *Fantl*, *supra* note 2 at para 78. See also *de Muelenaere v Great Gulf Homes Limited*, 2015 ONSC 7442 at para 30, citing *Heron*, *supra* note 24 at para 10.

35. *Lundy*, *supra* note 2 at paras 29–31.
36. *Singh*, *supra* note 26 at para 47.
37. *Ibid* at paras 42–43.
38. An ethical dilemma may arise when a client representative plaintiff instructs counsel to accept a desirable settlement offer that may represent a windfall for the client in exchange for abandoning the proposed class action before certification. In that circumstance, counsel will be unable to fulfill the duty of commitment to both the client and the other putative class members. In most instances, the terms of the lawyer's retainer agreements should specifically address this situation and circumscribe counsel's retention to advancing a class proceeding only. Nonetheless, where the lawyer's duties to putative class members and the terms of their retainer conflict with the instructions of the representative plaintiff client, ethical obligations may be engaged that require the lawyer to cease acting. Counsel should also be mindful of r 3.2-10 of the *Code of Professional Conduct for British Columbia*, which prevents a lawyer from agreeing as part of a settlement not to advance the class action with other representative plaintiffs.
39. The requirement for court approval of settlements in most jurisdictions in Canada may account for the dearth of reported decisions on negligence claims by putative class members against proposed class counsel for breaches of a *sui generis* duty.
40. Ward K Branch & Luciana Brasil, "Settling a Class Action (or How to Wrestle an Octopus)" (September 2010) at 7, online: <static1.1.sqspcdn.com/static/f/299713/8969512/1287100231710/Updated+Octopus+Settlement+Paper+-+Sept+2010.pdf?token=%2Fd%2BXCCz3B7p7cJ5MZYR%2FeH%2FChvk%3D>, citing Herbert B Newberg & Alba Conte, *Newberg on Class Actions*, 3rd ed (Colorado Springs: McGraw-Hill, 1992) at §11.13.