Costs in Class Actions

Presentation for The Advocates' Society

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I. Introduction

Class actions are governed by the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 ("CPA"), a statute designed to enhance access to justice. However, one of the barriers to access to justice s an adverse costs award, which is particularly significant in class actions where an individual claimant's recovery will be very modest compared to the risk of an adverse costs award.[1]

While a "no-costs" regime would be the most direct way to address the economic barrier caused by an adverse costs award, Ontario's class proceedings legislation has adopted "ordinary" costs rules for class actions, with modest modifications provided under the CPA. Hence, a representative plaintiff runs the risk of being held solely responsible for the defendant's costs if the action failed. Some courts have raised concerns that the "loser pays" rule applicable to class actions in Ontario may frustrate the access to justice objective of the CPA. Justice Strathy, as he then was, has stated,

> One of the important goals of class proceedings is to provide access to justice to large groups of people who have claims that cannot be economically pursued individually. In Ontario, the costs rules applicable to ordinary actions apply to class proceedings -- the loser pays. The costs of losing can be astronomical -- well beyond the reach of all but the powerful and very wealthy -- not exactly the group the legislature had in mind when the CPA was enacted.[2]

One of the responses that have been developed to address the concern over costs associated with losing a class action is the creation of the Class Proceedings Fund ("CPF") through the *Law Society Amendment Act (Class Proceedings Funding),* 1992, S.O. 1992, c. 7.

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[1] *Bayens v. Kinross Gold Corporation,* 2013 ONSC 4974, 117 O.R. (3d) 150, at paras. 20-21.
[2] *Dugal v. Manulife Financial Corporation,* 2011 ONSC 1785, [2011] O.J. No. 1239, at para. 27.

The CPF covers disbursements and any adverse cost awards in cases it has approved for funding, and is intended to mitigate the disincentives of being a class representative and class counsel.[3] If class counsel is not prepared to accept the risk of an adverse costs award, then the plaintiff's options are to either abandon the class action or apply to the CPF.[4] There appears to be some general agreement that a sustainable public fund, such as the CPF, is required to achieve meaningful access to justice for litigants.[5]

Counsel fees are another barrier to access to justice. There are a number of ways that a fee agreement between class counsel and their client(s) can be structured, including providing for fees determined as a percentage of recovery, on the basis of a multiplier applied to the time spent multiplied by an hourly rate, or as a lump sum. As with ordinary actions, the fee must ultimately be fair and reasonable in all the circumstances of the class action. Class counsel typically bear the burden of satisfying the court that the fee is justified based on the "fair and reasonable" principle.[6]

An agreement in the context of a class action, whether based on contingent fees or not, between a lawyer and a representative party must be in writing and must a) state the terms under which fees and disbursements shall be paid, b) give an estimate of the expected fee, whether

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[3] Law Commission of Ontario, *Review of Class Actions in Ontario: Issues to be Considered* (November 2013), at 6.
[4] *Dugal v. Manulife Financial Corporation, supra* note 2, at para. 32.
[5] Law Commission of Ontario, *supra* note 3, at 6.
[6] *Lavier v. MyTravel Canada Holidays Inc.,* 2013 ONCA 92, 359 D.L.R. (4th) 713, at para. 22.

contingent on success or not, and c) state the method by which payment is to be made.[7] A retainer agreement for a class action must be approved by the court.[8]

II. Reasonableness of Legal Fees in Class Actions

The factors that must be considered by an assessment officer or a court to determine the reasonableness of legal fees, as enumerated by the Court of Appeal in *Cohen v. Kealey & Blaney*,[9] also apply to class actions. The court has also laid out factors specific to assessing the reasonableness of fees of class counsel in *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd*., [2005] O.J. No. 1117 (S.C.).[10] The chart below compares and contrasts the factors in general actions versus class actions:

Factors to Consider in Determining Reasonableness of Legal Fees

Non-Class Actions	Class Actions
• The time expended by the solicitor	• The opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement;
• The legal complexity of the matters	• The factual and legal complexities of the matters dealt with;
• The degree of responsibility assumed by the solicitor	• The degree of responsibility assumed by class counsel;
• The monetary value of the matters in issue;	• The monetary value of the matters in issue;
• The importance of the matter to the client;	• The importance of the matter to the class;
• The degree of skill and competence demonstrated by the solicitor;	• The degree of skill and competence demonstrated by class counsel;
• The results achieved;	• The results achieved;
• The ability of the client to pay; and	• The ability of the class to pay;

[7] *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s.32(1).
[8] *Ibid*, s.32(2).
[9] *Cohen v. Kealey & Blaney*, [1985] O.J. No. 160 (C.A.).
[10] *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.,* [2005] O.J. No. 1117 (Sup. Ct. J.), at para. 67.

- The client's expectation as to the amount of the fee.
- The expectations of the class as to the amount of the fees; and
- The risk undertaken, including the risk that the matter might not be certified.

It is apparent that many of the same factors apply to both ordinary actions and class actions in determining the fairness and reasonableness of the fee awarded. One significant factor that is relevant to class actions is the risk undertaken by the lawyer in assuming the role of class counsel, including the risk that the matter might not be certified. The court has stated that fair and reasonable compensation must be "sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well." As such, counsel should be entitled to a fair fee, which may include a premium for the risk undertaken and the result achieved, "but the fees must not bring about a settlement that is in the interests of the lawyers, but not in the best interests of the class members as a whole."[11]

The Court of Appeal has stated that risk is "the factor that most justifies the imposition of a multiplier or premium on counsel fees in class proceedings."[12] However, the court will take into account the principle of proportionality to ensure that fees are not "clearly excessive" or "unduly high" in the sense of having little relation to the risk undertaken or the result achieved."[13]

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[11] *Smith v. National Money Mart,* 2010 ONSC 1334, [2010] O.J. No. 873, at paras. 21-23.
[12] *Lavier v. MyTravel Canada Holidays Inc., supra* note 6, at para. 58.
[13] *Ibid*, at para. 32.

With respect to the expenditure of time by counsel as a factor in determining the reasonableness of costs, there is an opportunity cost to class counsel in the sense that they are not able to bill for their time as would be done in the normal course in respect of a fee paying client. [14]

Some factors may have a greater effect on the costs analysis in class actions than in ordinary actions due to the nature and complexity of class actions. For example, the responsibility assumed by the lawyer is often significantly greater in a class proceeding. While the lawyer is legally entitled to deal only with the representative plaintiff, the reality is that there are often numerous members in the plaintiff class. The court has stated that there is "little doubt but that managing a matter involving this added element of complexity increases the degree of responsibility assumed by the solicitors."[15]

With respect to the monetary value of the matters in issue, the court has stated that where a plaintiff class succeeds in obtaining judgment, even though the average amount for each member of the class may be small, the relevant value to consider with respect to costs is the total amount of the claim. Likewise, when considering the importance of the matter to the client, it is appropriate to look at the importance of the issues to the plaintiff class as a whole. [16]

The court, in exercising its discretion with respect to costs under s.131 of the *Courts of Justice Act*, may also consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.[17] While the *Class Proceedings Act* acknowledges

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[14] *Wilson v. Servier Canada Inc.,* [2005] O.J. No. 1039 (S.C.), at para. 75.
[15] *Windisman v. Toronto College Park Ltd*., [1996] O.J. No. 2897 (Gen. Div.), at para. 13.
[16] *Ibid*, at paras. 14-15.
[17] *Class Proceedings Act, supra* note 7, s.31(1).

that class actions are designed to be in the public interest and often raise novel issues, whether or not a particular case is in the public interest or raises a novel issue is to be determined at the judge's discretion.

The court has stated that there is an "I know it when I see it" quality to recognizing public interest litigation or novel legal points, and will not easily exercise its discretion in treating a case as being in the public interest or novel.[18] In *1146845 Ontario Inc. v. Pillar to Post Inc.*, 2015 ONSC 1115, the plaintiffs who are three franchisees, brought a proposed class action. The defendant relied on an arbitration clause in the franchise agreement and successfully brought a motion to stay the class action. The defendant stated that they are entitled to recover the costs of the stayed action as the successful party.[19] The plaintiffs argued that although costs normally follow the event, there should either be no costs or costs should be significantly reduced in recognition of the novel nature of the issues raised about the effect of the statutory right to associate under franchise legislation on an arbitration provision in a franchise agreement.[20]

The court disagreed that this was an appropriate case to invoke the discretionary factors under s.31 of the CPA, which allows the court to take into account whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest. It is relatively rare that the court will invoke its discretion to eliminate or reduce an unsuccessful litigant's exposure to costs because the party was litigating a novel point or was litigating in the public

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[18] *1146845 Ontario Inc. v. Pillar to Post Inc*, 2015 ONSC 1115, at para. 19.
[19] *Ibid*, at paras. 1 and 2.
[20] *Ibid*, at para. 5.

interest, because the prime motivation of the parties will not be altruistic in the majority of cases. The court stated that class actions are no different.[21]

The court recognizes that in many class actions, an unsuccessful party will submit after the outcome of the action that it should be relieved of costs because of the novelty or public interest value of the case. However, the party's expectation was that they would be successful and recover costs, and as such, the after-the-fact submission has to be taken "with more than a grain of salt."[22] Parties are encouraged to agree before the fact of the outcome as to whether the case classifies as novel or as public interest litigation.[23]

The court has stated that "the CPA uses the expression "matter of public interest" in s. 31(1) in the sense of a matter that involves "either issues of broad public importance or persons who are historically disadvantaged in society."[24] Justice Binnie from the Supreme Court of Canada has stated that general concerns about access to justice do not warrant a departure from the usual cost consequences, and class proceedings should not be invariably assumed to engage access to justice concerns to an extent sufficient to justify withholding costs from the successful defendant. The courts must be cautious as to not stereotype class proceedings.[25]

III. Legal Fee Arrangements

a) Contingency Fee Arrangements

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[21] *Ibid*, at paras. 14 -17.
[22] *Ibid*, at para. 18.
[23] *Ibid*, at para. 21.
[24] *Kerr v. Danier Leather Inc.,* 2007 SCC 44, [2007] 3 S.C.R. 331, at para. 67.
[25] *Ibid*, at para. 69.

The *Class Proceedings Act, 1992* expressly permits the use of contingency fee arrangements ("CFAs") for class actions. The purpose of class actions is to enhance access to the courts by individuals with claims that may be significant, but are not sufficient to warrant that individual to undertake civil proceedings on his or her own. Allowing the use of CFAs in class actions "provide access to justice by permitting the lawyer, not the client, to finance the litigation…. Effective class actions simply would not be possible without contingent fees. Contingent fee awards serve as an incentive to plaintiffs' counsel to take on difficult but important class action litigation."[26] Section 33 of the *Class Proceedings Act, 1992* provides as follows,

> **Agreements for payment only in the event of success**
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> 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. 1992, c. 6, s. 33 (1).
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> **Interpretation: success in a proceeding**
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> (2) For the purpose of subsection (1), success in a class proceeding includes,
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> (a) a judgment on common issues in favour of some or all class members; and
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> (b) a settlement that benefits one or more class members.

b) Application of a Multiplier to Legal Fees

The *Class Proceedings Act, 1992* also allows a lawyer to make a motion to the court to have his or her fees increased by a multiplier after the class proceeding has been concluded successfully. In considering such a motion, the court must determine the lawyer's base fee,

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[26] *Osmun v. Cadbury Adams Canada Inc.,* 2010 ONSC 2752, at para. 21.

which is based on the hours expended by the lawyer multiplied by the lawyer's hourly rate and must be reasonable. The court may then 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."[27]

The court has aptly stated that the selection of the precise multiplier is an art, not a science. The court must determine whether the risks undertaken by counsel acting in the class action were sufficient to warrant a multiplier. In considering the multiplier to be applied, the court may consider the manner in which the lawyer conducting the proceeding.[28] The courts in Ontario have awarded a multiplier ranging from slightly greater than 1 on the low end, to four or higher in the most deserving cases.[29] The Court of Appeal has provided three considerations to take into account in determining whether a particular multiplier is appropriate,

> In the end, three considerations must yield a multiplier that, in the words of s. 33(7)(b), results in fair and reasonable compensation to the solicitors. One yardstick by which this can be tested is the percentage of gross recovery that would be represented by the multiplied base fee. If the base fee as multiplied constitutes an excessive proportion of the total recovery, the multiplier might well be too high. A second way of testing whether the ultimate compensation is fair and reasonable is to see whether the multiplier is appropriately placed in a range that might run from slightly greater than one to three or four in the most deserving case. Thirdly, regard can be had to the retainer agreement in determining what is fair and reasonable. Finally, fair and reasonable compensation must be sufficient to provide a real economic incentive to solicitors in the future to take on this sort of ease and to do it well.[30]

c) Third Party Funding

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[27] *Class Proceedings Act, supra* note 7, ss. 33(7) and (8).
[28] *Ibid*, s.33(9).
[29] *Osmun v. Cadbury Adams Canada Inc., supra* note 26, at para. 31.
[30] *Gagne v. Silcorp Ltd.,* [1998] O.J. No. 4182 (C.A.).

Third party funding refers to a for-profit service provided by a commercial body, providing financial assistance to plaintiffs in class proceedings in exchange for a share of proceeds in the event of success in the class action. Such service may be described as providing indemnification for the representative plaintiff in class actions, disbursement or working capital financing for counsel, and financing of legal fees.[31]

The case of *Dugal v. Manulife*[32] is significant in that it opened the door to third-party funding of class actions in Ontario. Third party funding agreements, like all agreements respecting fees and disbursements between a solicitor and a representative party in a class proceeding, must be approved by the court.[33]

In *Dugal v. Manulife, supra,* the plaintiffs in the proposed class proceeding asked the court to approve a funding agreement under which a third party will indemnify the plaintiffs against their exposure to the defendants' costs, in return for a 7% share of the proceeds of any recovery in the litigation. The court was essentially being asked to approve an agreement made between a representative plaintiff and a third party. Justice Strathy approved the funding agreement, recognizing that the agreement has implications for the defendants, the proposed class counsel, and the potential class members.[34]

Justice Strathy stated that one of the important goals of class proceedings is to provide access to justice to large groups of people who have claims that cannot be economically pursued

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[31] BridgePoint Financial Services Inc*., Commercial & Class Action* (BridgePoint Financial Services, 2017), online: <http://bridgepointfinancial.ca/classaction/>.
[32] *Dugal v. Manulife Financial Corporation, supra* note 2.
[33] *Class Proceedings Act, supra* note 7, s.32(2).
[34] *Dugal v. Manulife Financial Corporation, supra* note 2, at paras. 1, 2 and 16.

individually. Justice Strathy pointed out two responses to the reality that no person would accept the role of a representative plaintiff if he or she were at risk of bearing the costs of the litigation: 1) indemnities given by class counsel, and 2) financial support for disbursements, and indemnity against costs, provided by the Class Proceedings Fund.[35] The court recognized that agreements providing for indemnities given by class counsel "impose onerous financial burdens on counsel and risk compromising the independence of counsel." As for the Class Proceedings fund, the court acknowledged that the Fund may not accept the application.[36]

Justice Strathy then explained his reasons for approving the third party funding agreement, recognizing that third-party indemnity agreements help promote access to justice as one of the important goals of the CPA. The indemnification agreement also "leaves control of the litigation in the hands of the representative plaintiff -- it does not permit officious intermeddling in the conduct of the litigation by the funder, but allows it to receive appropriate information about the progress of the litigation, consistent with its need to manage its own financial affairs, such as posting reserves."[37] The court recognized that the commission payable, being 7%, is reasonable and consistent with the commission of 10% that would be payable to the only other available source, the Fund. The court continued to explain that the financial terms of the indemnification agreement are a fair reflection of risk and reward, that the plaintiffs are represented by experienced and highly reputable counsel who can be expected to discharge their

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[35] *Ibid*, at paras. 27-29.
[36] *Ibid*, at paras. 29 and 31.
[37] *Ibid*, at para. 32.

duties to the plaintiffs, the class and the court without being influenced by the funder, and that there will be court supervision of the parties to the agreement.[38]

Third party funding agreements are not champertous *per se.* The court has recognized that the conclusion held by the Court of Appeal in *McIntyre Estate v. Ontario (Attorney General)* that contingency agreements are not champertous *per se* similarly applies to third party funding agreements.[39] Rather, two crucial elements must be present for a third-party funding agreement to be champertous: 1) the involvement of the third-party must be spurred by some improper motive, and 2) the result of that involvement must enable the third-party to possibly acquire some gain following the disposition of the litigation.[40] "A court confronted with an issue of champerty must look at the conduct of the parties involved, together with the propriety of the motive of an alleged champertor in order to determine if the requirements for champerty are present."

The court has stated that third party funding agreement must be promptly disclosed to the court and the agreement cannot come into force without court approval. Further, third party funding of a class proceeding must be transparent and it must be reviewed in order to ensure that there are no abuses or interference with the administration of justice.[41] The court has recognized

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[38] *Ibid*.
[39] *Metzler Investment GMBH v. Gildan Activewear Inc.,* 2009 CanLII 41541 (Ont. Sup. Ct. J.), at para. 63.
[40] *Ibid*, at paras. 44 and 63, *McIntyre Estate v. Ontario (Attorney General),* [2002] O.J. No. 3417 (C.A.), at para. 75.
[41] *Fehr v. Sun Life Assurance Company of Canada,* 2012 ONSC 2715, [2012] O.J. No. 2029, at para. 89.

that "[t]here is a legitimate concern that if not regulated, third party funding might subvert the public policy purposes of class proceedings."[42]

d) Legal Fees as Part of the Settlement

The courts have jurisdiction to approve legal fees as part of its approval of a settlement agreement pertaining to the class action. This does not change the standard by which legal fees are assessed and the court must still apply the norms set out in the CPA. The particular fee arrangement must still be fair and reasonable, based on the risks assumed by class counsel and the results achieved for the class, in light of the objectives of class proceedings.[43]

In the case of *McCallum-Boxe v. Sony,*[44] the settlement agreement for the class action obliged the defendant to pay legal fees in an amount determined by the court. In determining the amount of legal fees, the court sought to consider the fee agreement between the plaintiff class and their counsel. The court was "somewhat shocked" to learn of, and strongly disapproved of, the settlement-driven legal fees arrangement that was in place. In the legal fee arrangement, there was "no written retainer, no contingency fee provision, simply an agreement with the class representative that [the plaintiff] would look to recover its legal fees from the defendant as part of the (hoped for) settlement agreement."[45] Justice Belobaba explained the problem as follows,

> 13 It must be obvious to anyone who gives this even a moment's thought, that this type of settlement-driven legal fees arrangement in class action litigation is

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[42] *Ibid*, at para. 90.
[43] *Lavier v. MyTravel Canada Holidays Inc., supra* note 6, at paras. 25-27; *McCallum-Boxe v. Sony,* 2015 ONSC 6896, at para. 9.
[44] *McCallum-Boxe v. Sony*, 2015 ONSC 6896.
[45] *Ibid*, at para. 12.

> fundamentally and profoundly unacceptable. It provides all the wrong incentives. The MLG arrangement discourages maximum commitment on behalf of the class because even if class counsel should win at trial, they will not be entitled to any compensation, whether from the recovery (no such agreement is in place) or via the plaintiff's claim for costs (no costs can be awarded because the representative plaintiff has no liability to pay legal expenses). The MLG arrangement encourages only a minimal commitment on behalf of the class leading to sub-optimal settlements negotiated by class counsel who are primarily interested in recovering a generous legal fees payment.
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> 14 The MLG arrangement will no doubt work for the defendant who is shrewd enough to negotiate a small settlement amount coupled with an attractive legal fees payment to class counsel, and still come out ahead. It most decidedly does not work for the members of the class. It is obviously not in their best interests. Their legal counsel is not only motivated to negotiate a settlement in almost any amount, his or her very involvement in the negotiation with the defendant creates a glaring conflict of interest because every dollar that can be deducted from the class members' settlement amount is a dollar that can potentially be added to class counsel's legal fees amount.

As a general rule, courts should approve legal fee arrangements that "incentivize class counsel to press for the highest possible recovery for the class and should reject arrangements such as this that encourage premature, sub-optimal settlements negotiated by class counsel trying to extract an almost risk-free payment for themselves."[46]

IV. Compensation for the Representative Plaintiff

While the general rule is that an individual litigant is not entitled to be compensated for the time that he or she devoted to the litigation, an exception applies to class actions. Such compensation is to be awarded "only where the representative's contribution is greater than that which would normally be expected of a representative party in the circumstances of the case," and should not be routine. Such contribution must have been necessary for the preparation or

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[46] *Ibid*, at para. 15.

presentation of the case, and is often indicated by "an extraordinary commitment of time and effort or the application of special expertise."[47] The court has explained the reasoning behind this exception as such,

> … 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. If the representative plaintiff is not compensated in some way for time and effort, the plaintiff class would be enriched at the expense of the representative plaintiff to the extent of that time and effort. In my view, where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated on a quantum meruit basis for the time spent. …[48]

A number of factors may be considered in determining whether the circumstances are exceptional, including:[49]

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

There is a general consensus by the courts that compensation for a representative plaintiff should not be routine and should be awarded only in exceptional cases. It is rarely done, and any proposed payment should be closely examined because it will result in the representative

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[47] *Garland v. Enbridge Gas Distribution Inc*., [2006] O.J. No. 4907 (Sup. Ct. J.), at para. 43.
[48] *Windisman v. Toronto College Park Ltd., supra* note 15, at para. 28.
[49] *Lozanski v. The Home Depot, Inc.,* 2016 ONSC 5447 (Sup. Ct. J.), at para. 81.

plaintiff receiving an amount that is in excess of what will be received by any other member of the class he or she represents.[50]

V. Conclusion

Class actions are designed to promote access to justice to individuals with relatively small, but legitimate, claims. Due to the loser-pays regime in Ontario, which is applicable to class actions as well as ordinary actions, an individual may be deterred from becoming a representative plaintiff as his or her recovery will be very modest compared to the risk of an adverse costs award if the class action does not succeed. However, there are various approaches undertaken by the courts in order to address the issue of adverse costs awards and the extensive legal fees that both representative plaintiffs and class counsel face in order to address this barrier to access to justice.

In making costs submissions in the context of a class proceeding, it is important to be mindful of the overarching principle that legal fees must ultimately be fair and reasonable in all the circumstances of the class action. Counsel are entitled to a fair fee; that is, a fee that is sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well.

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[50] *Baker (Estate) v. Sony BMG Music (Canada) Inc.,* 2011 ONSC 7105, [2011] O.J. No. 5781, at para. 93; *Lozanski v. The Home Depot, Inc., supra* note 49, at para. 81.