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ARTICLE

Ontario and BC Courts confirm class counsel owe “certain duties” to proposed class members

The Ontario Superior Court of Justice and the British Columbia Supreme Court recently had the opportunity to consider the nature of the relationship between class counsel and proposed class members at the pre-certification stage of class actions.

The plaintiff in *Singh v. RBC Insurance Agency Ltd* commenced a class action in the Ontario Superior Court of Justice against the defendants on behalf of all commissioned employees who worked as insurance advisors for the defendants. The claim alleges that the defendants wrongfully paid the proposed class members vacation pay on their base salaries alone, rather than on their total income.

About two weeks after commencing the class action, Mr. Singh commenced a separate wrongful dismissal action against the defendants. Monkhouse Law served as counsel for Mr. Singh in both actions.

One of the defendants brought a motion to remove Monkhouse as counsel from both the class action and the individual action on the basis of conflict of interest. The Court agreed and ordered that Monkhouse Law be removed as counsel.

The Court surveyed the jurisprudence on the relationship between class counsel and class members. It recognized that, upon certification, class counsel is in a lawyer-client relationship with both the representative plaintiff and the class members. Prior to certification, however, counsel is in a *sui generis* relationship with the proposed class members that places “at least some responsibilities” on counsel toward the class. The Court held that this *sui generis* relationship requires counsel to avoid potential conflicts of interest when representing the proposed class.

The Court found that Monkhouse Law's concurrent representation in the class action and the individual action would create a conflict of interest engaging the firm's duty of commitment to both the class members and Singh as its clients. Class counsel argued that the two actions were unrelated since certain issues were excluded from the individual action. The Court disagreed. Issues relating to whether the defendants were common employers and whether the commissions they paid included holiday and vacation pay would need to be decided in both actions. On the facts of the case, it was foreseeable that counsel would be put in a position where tactical decisions made in the individual action would work to the disadvantage of the proposed class members in the other action. As such, it would be impossible for counsel to fulfill its duty of commitment to the class and to Singh simultaneously.

In the case *Warner v Google LLC*, the plaintiff retained counsel and commenced a proposed class action in the British Columbia Supreme Court. A potential settlement with the defendant included a cy-près payment. The representative plaintiff could not agree with his counsel on the organization that should receive the cy-près distribution. As a result, the plaintiff brought an application for an order to replace his counsel of record with another lawyer and his counsel of record brought an application for an order substituting a new individual for the named plaintiff.

The plaintiff asserted that, at the pre-certification stage, class counsel owes a duty of loyalty to the representative plaintiff but not to proposed class members. Accordingly, counsel's attempt to substitute a new plaintiff who, in counsel's opinion, would better represent the class members' interests, amounted to sacrificing Mr. Warner's interests for those of the proposed class.

The Court dismissed the named plaintiff's application.

The Court confirmed that class counsel does have a *sui generis* relationship with, and does owe certain duties to, potential class members. As a result, class counsel's duty of loyalty to a representative plaintiff does not apply “without adjustment.” Rather, counsel's duty of loyalty to the plaintiff is qualified by the existence of concurrent duties to proposed class members. Moreover, the obligations to proposed class members that flow from this *sui generis* relationship exist notwithstanding any retainer agreement between class counsel and the named plaintiff.

Takeaway

The decision in *Warner* confirms that courts in British Columbia, as in Ontario, will be mindful of the duties owed by class counsel to proposed class members at the pre-certification stage. While the relationship is not a solicitor-client relationship in the strict sense, it does impose upon class counsel duties that extend beyond the representative plaintiff and restrict the ability of class counsel to act solely in accordance with the representative plaintiff's instructions. Moreover, class counsel cannot “contract out of” their duty to members of the proposed class through the terms of their retainer agreement with the representative plaintiff. Many aspects of the “*sui generis*” relationship between class counsel and members of a proposed class remain unclear and this area is likely to continue to generate further litigation and jurisprudence.


The author wishes to acknowledge the contribution of Matthew Gruchey, articling student.

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