

# A Clash Between Class Counsel and his Class Representative

August 02, 2019

Plaintiff-side class actions are often - but not always - lawyer driven. Class counsel are increasingly entrepreneurial in seeking out potential class action mandates and identifying putative class members, including a proposed representative plaintiff. But what happens to the class action when the relationship between class counsel and the representative plaintiff falls apart?

A recent Ontario decision, [Azar v. Strada Crush Limited](#), provides an illustration. This is a certified class action alleging unpaid overtime and holiday pay pursuant to Ontario's [Employment Standards Act, 2000](#). There are approximately 150 class members.

After a successful certification motion, the representative plaintiff and class counsel had a falling out. The representative plaintiff moved to appoint new class counsel; existing class counsel brought a cross-motion to disqualify the representative plaintiff and to grant class counsel time to find a new representative.

The Court approached the resolution of the issue by posing the following question: "what is in the best interests of the class?" In this case, an underlying business dispute between class counsel and a former colleague, Nunes (who had introduced the representative plaintiff to class counsel) appears to have been the catalyst behind the representative plaintiff's request to change class counsel. The new lawyer seeking to become class counsel was also representing Nunes in the business dispute against existing class counsel. The fact that the representative plaintiff was seeking to have this lawyer appointed as new class counsel against the backdrop of the business dispute was not, in the Court's assessment, in the best interests of other class members. Rather, it reflected the representative plaintiff putting "his own interest first in choosing [Nunes'] personal lawyer over the lawyer [i.e., class counsel] who has a proven track record in this very case".

Ultimately, the court gave class counsel 60 days to find a new representative plaintiff, and directed the representative plaintiff to provide class counsel with any names (and contact information) he had of other class members. The court commented that the class deserved to have a representative plaintiff who does not "hire[] and fire[] class counsel based on matters other than class counsel's conduct of the class action

litigation". If, within 60 days, a new representative had not been identified, the Court invited the defendant to bring a motion to de-certify the class action.

The outcome in Azar emphasizes the "representative" nature of the representative plaintiff's role. A representative plaintiff must fairly and adequately represent the class without conflict of interest. Similarly, a certified class action gives rise to an obligation for class counsel to act, more broadly, on behalf of the class as a whole rather than just the named plaintiff. Had this been an ordinary piece of litigation and not a class action, no motion would have been required: the plaintiff's lawyer would simply have been fired by the client and replaced, regardless of the reason. Azar is a reminder to class counsel to select their proposed class representative wisely.

By

[Ian C. Matthews](#)

Expertise

[Disputes](#), [Class Actions](#), [Banking Litigation](#)

---

## **BLG | Canada's Law Firm**

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

[blg.com](http://blg.com)

### **BLG Offices**

#### **Calgary**

Centennial Place, East Tower  
520 3rd Avenue S.W.  
Calgary, AB, Canada  
T2P 0R3

T 403.232.9500  
F 403.266.1395

#### **Ottawa**

World Exchange Plaza  
100 Queen Street  
Ottawa, ON, Canada  
K1P 1J9

T 613.237.5160  
F 613.230.8842

#### **Vancouver**

1200 Waterfront Centre  
200 Burrard Street  
Vancouver, BC, Canada  
V7X 1T2

T 604.687.5744  
F 604.687.1415

#### **Montréal**

1000 De La Gauchetière Street West  
Suite 900  
Montréal, QC, Canada  
H3B 5H4

T 514.954.2555  
F 514.879.9015

#### **Toronto**

Bay Adelaide Centre, East Tower  
22 Adelaide Street West  
Toronto, ON, Canada  
M5H 4E3

T 416.367.6000  
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing [unsubscribe@blg.com](mailto:unsubscribe@blg.com) or manage your subscription

preferences at [blg.com/MyPreferences](https://www.blg.com/MyPreferences). If you feel you have received this message in error please contact [communications@blg.com](mailto:communications@blg.com). BLG's privacy policy for publications may be found at [blg.com/en/privacy](https://www.blg.com/en/privacy).

© 2024 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.