

Additional Compensation to Representative Plaintiffs in Ontario: Conceptual, Empirical and Comparative Perspectives

*By Vince Morabito**

Class actions often require judges to address issues and requests that do not arise in traditional litigation. An increasingly important example is the honorarium payment: additional compensation made to the representative plaintiffs of a class action in the event of a successful outcome. The current Ontario class action regime does not expressly authorize honorarium payments despite the higher risks, and monetary and time commitments made by representative plaintiffs. As a result, the author argues that Ontario judges have dealt with these requests for honorarium payments in an inconsistent and overly restrictive manner.

This article attempts to explain some of these judicial inconsistencies through conceptual, empirical and comparative lenses. The author first reviews the honoraria jurisprudence and investigates how honorarium payments interact with the interests of the class members and the need for representative plaintiffs to provide adequate representation for the class. The author then decodes cross-jurisdictional data gained through independent research in an attempt to reconcile the number of honorarium payments that are granted, the quantum of the payments, and the judicial reasons for doing so with the relevant jurisprudence. Ultimately, the data reveals that there is far too much discrepancy in the issuance of honorarium payments, resulting in an unsatisfactory class action landscape in Ontario.

* Professor, Department of Business Law and Taxation, Monash Business School, Monash University (Melbourne). The research presented in this article was funded by an Australian Research Council Discovery Project grant (DP0984648). This article would not have been possible without the enormous assistance and patience of the following class action protagonists: Charles M Wright, Linda J Visser, Nicholas Baker, A Dimitri Lascaris, Anthony O'Brien, Daniel Bach, Kimberly N Knight, Sabrina Lombardi and Nicole Young; Mark W Mounteer; Kirk M Baert and Jody Brown; David Thompson, Matthew G Moloci, Ashlee White, Cindy Yates and Christine Hutton; Ward Branch and Luciana Brasil; Amanda Lo Cicero, Suzanne Chiodo and Alisha Athanasiou; Megan McPhee and Won Kim; Sylvie Rodrigue and John B Laskin; Paul F Morrison, Michael Rosenberg, John Brown and Christopher Hubbard; Sonia Bjorkquist; Douglas Lennox; Colin P Stevenson; Jessica Kimmel; Mary Thomson; Robert W Leurer, QC; David Sterns; Laura F Cooper; Katherine Kay; Margaret Waddell; David W Kent; Peter Griffin; John C Field; Jeffrey S Leon; JJ Camp, QC; James Sullivan and Robert J Torralbo; and Dr. Patricia Speight and Sharon Strosberg.

Introduction

I. Conceptual Insights

- A. *Conflict of Interest*
- B. *Adequate Representation*

II. Empirical and Comparative Evaluation

- A. *General Findings*
- B. *Applications for “Token” Honorarium Awards*
- C. *Inconsistent Judicial Approaches*
- D. *Source of Honorarium Payments*
- E. *Relevant Criteria*
- F. *Size of the Individual Claims of Applicants for Additional Compensation*
- G. *Role Played by Third Parties and Class Members in the Process of Reviewing Honorarium Applications*
- H. *Quantum of Honorarium Awards*

Conclusion

Introduction

Class action litigation frequently raises conflicting values and objectives, and requires trial judges to determine, without any legislative guidance, whether, and to what extent, the rules and practices that govern traditional litigation should be modified or abandoned when applied to this type of litigation. One dimension of the class action device that raises such an issue is the potential entitlement to additional compensation of representative plaintiffs. In the event that a successful outcome is secured on behalf of the class members by the representative plaintiffs, should these plaintiffs receive additional compensation because of the time and effort they devoted to the litigation and/or the financial and non-financial burdens they bore? And if so, to what extent? In non-class proceedings, no such entitlement exists.¹

This issue is germane because class members are entitled to receive a share of any monetary benefits produced by the litigation without being

1. See *Windisman v Toronto College Park Ltd* (1996), 3 CPC (4th) 369 at para 28, 65 ACWS (3d) 207 (Ont Ct J (Gen Div)) [*Windisman*]; *Petit v New Balance Athletic Shoe Inc*, 2013 QCCS 3569 at para 48, [2013] QJ No 8346 (QL) [*Petit*]; *Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited*, [2011] FCA 671 at para 149 (Austl). But see *Baker Estate v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105, 31 CPC (7th) 320 [*Baker Estate*]. The Court found “[a] private client will normally receive indirect compensation for such efforts out of the proceeds of settlement or judgment. A representative plaintiff normally will not.” *Ibid* at para 95.

exposed to an adverse award of costs or having any formal responsibility or role with respect to the conduct of the litigation. On the other hand, the representative plaintiff is “just as any civil litigant . . . bound by the rules of court and risks the potential burden of costs if unsuccessful”.² The unenviable position of representative plaintiffs, when compared with class members, was aptly depicted in 2002 by Winkler J (as he then was):

The common issue trial will determine the litigation for all class members. Nonetheless, the plaintiffs will be the only class members exposed to costs in the litigation, up to the conclusion of that trial. . . . [U]nder virtually any other procedure, they would be exposed to less costs individually. Notwithstanding this, they stand to gain no more from the class proceeding than any other class member on a proportionate basis or than they would in individual lawsuits.³

However, Ontario’s *Class Proceedings Act (CPA)*⁴ does not expressly authorize additional payments to representative plaintiffs.⁵ Nor do class action regimes in the United States,⁶ Australia⁷ or the other nine Canadian class action regimes.⁸

2. *Garland v Consumers’ Gas Co*, 96 ACWS (3d) 932, [2000] OJ No 1684 at para 9 (QL) (Sup Ct J).

3. 1176560 *Ontario Limited v Great Atlantic & Pacific Co of Canada Ltd*, 62 OR (3d) 535 at para 55, 28 CPC (5th) 135 (Sup Ct J) [A&P]; *Sorbara v Canada (Attorney General)*, [2009] GSTC 33, [2009] OJ No 657 (QL), (Sup Ct J) [cited to QL] (“by their very nature, in virtually every class action, the representative plaintiff will have little to gain as an individual and thus it becomes arguable that he or she is litigating altruistically and thus in the interest of others; namely a sector of the public” at para 14).

4. SO 1992, c 6.

5. *Windisman*, *supra* note 1 at para 27.

6. With respect to securities class actions, however, the *Private Securities Litigation Reform Act of 1995* restricts the ability of courts to authorize additional compensation to lead plaintiffs to “the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class”. 15 USC § 78u-4(a)(2)(A)(vi) (2006).

7. See Vince Morabito, “An Empirical and Comparative Study of Reimbursement Payments to Australia’s Class Representatives and Active Class Members” (2014) 33:2 CJQ 175 at 176 [Morabito, “Australia’s Class Representatives”].

8. See *Fakhri v Alfalfa Canada Inc*, 2005 BCSC 1123 at para 29, 47 BCLR (4th) 379 [Fakhri]; *Reid v Ford Motor Co*, 2006 BCSC 1454 at para 35, 152 ACWS (3d) 574; *Lavoie c Régie de l’assurance maladie du Québec*, 2013 QCCS 866 at para 45, [2013] JQ No 1799 (QL); *Petit*, *supra* note 1 at para 48; *Parsons v Coast Capital Savings Credit Union*, 2009 BCSC 330 at para 15, 177 ACWS (3d) 49 [Parsons SC].

This article argues that not awarding additional payments, referred to in Canada as honorarium payments,⁹ to representative plaintiffs is irreconcilable with basic notions of fairness. As explained by Sharpe J of the Ontario Court of Justice (as he then was) in Ontario's first published judicial pronouncement on these payments:

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.¹⁰

The denial of these additional payments is also "contrary to the policy underlying" class action regimes as it may result in no one with similar legal grievances stepping forward to represent the relevant class of claimants.¹¹ As succinctly noted by an appellate court in the United States, "a named plaintiff is an essential ingredient of any class action".¹²

However, potentially in opposition are the obligations imposed on representative plaintiffs by section 5(1) of the *CPA* to fairly and adequately represent the interests of the class members and to ensure that they do not

9. On occasion, Canadian courts have adopted the American term "incentive award". See *Wiggins v Mattel*, 2011 ONSC 2964 at para 31, 21 CPC (7th) 213; *Price v Mattel Canada Inc*, 2011 QCCS 2903 at para 8, [2011] QJ No 7088 (QL) [*Price*]. Canadian courts have also adopted the term "stipend". See *Donnelly v United Technologies Corp* (2008), 66 CPC (6th) 1 at para 12, 168 ACWS (3d) 290 (Ont Sup Ct J); *Glover v City of Toronto & HMQ*, 2014 ONSC 305 at para 32, 238 ACWS (3d) 850.

10. *Windisman*, *supra* note 1 at para 28. See also *Pysznyj v Orsu Metals Corp*, 2010 ONSC 1151 at para 31, [2010] OJ No 1994 (QL) [*Pysznyi*]; Richard A Nagareda, "Restitution, Rent Extraction, and Class Representatives: Implications of Incentive Awards" (2006) 53:6 UCLA L Rev 1483 at 1485; *Mackinnon v Vancouver City Savings Credit Union*, 2004 BCSC 1604 at para 8, 34 BCLR (4th) 322 [*Savings Credit Union*].

11. *Bodnar v Cash Store Inc*, 2010 BCSC 145 at para 43, 84 CPC (6th) 49 [*Bodnar*]. See also *Windisman*, *supra* note 1 at para 26.

12. *Cook v Niedert*, 142 F (3d) 1004 at 1015 (7th Cir 1998) [*Cook*]. See also *Matter of Continental Illinois Securities Litigation*, 962 F (2d) 566 at 571 (7th Cir 1992); Hillary Jo Baker, "No Good Deed Goes Unpunished: Protecting Gender Discrimination Named Plaintiffs from Employer Attacks" (2008) 20:1 Hastings Women's LJ 83 at 83-84; *Espenscheid v Directsat USA, LLC*, 688 F (3d) 872 at 875 (7th Cir 2012); Nantiya Ruan, "An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions" (2006) 10:2 Employee Rts & Employment Pol'y J 395 at 412.

have, on the common issues, a conflict of interest with the class members. Representative plaintiffs are also under a fiduciary duty to protect the interests of class members.¹³ The potential inconsistency between honorarium awards and the existence of these important obligations and duties that are intended to protect the interests of the absent class members was explained in 2002 by Winkler J (as he then was):

Where a representative plaintiff benefits from the class proceeding to a greater extent than the class members, and such benefit is as a result of the extraneous compensation paid to the representative plaintiff rather than the damages suffered by him or her, there is an appearance of a conflict of interest between the representative plaintiff and the class members. 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.¹⁴

As explained by the British Columbia Court of Appeal, applications for additional compensation filed by successful representative plaintiffs pit “two principles against each other, the restitutionary principle that service on behalf of others is compensable and the principles eschewing potential conflict of interest situations”.¹⁵

The British Columbia Court of Appeal went on to note that in Canada and the US, “different jurisdictions have resolved the tension between these principles differently”.¹⁶ Similarly, the only time the Ontario Court of Appeal was asked to express its views in this area, it stated that “the most that can be said is that judges of the Superior Court have different approaches with respect to the payment of the representative plaintiff’s

13. See *Heron v Guidant Corp*, [2007] OJ No 3823 (QL) at para 10, 2007 CarswellOnt 9010 (WL Can) (Sup Ct J) [*Heron*]; *Hoffman v Monsanto Canada Inc*, 2005 SKQB 225 at para 337, [2005] 7 WWR 665; *Monsanto Canada Inc v Hoffman*, 2002 SKCA 120 at para 16, 220 DLR (4th) 542; *Schroeder v DJO Canada Inc*, 2010 SKQB 125 at paras 150–51, [2010] 10 WWR 324; *Lau v Bayview Landmark Inc* (2004), 71 OR (3d) 487 at para 19, 50 CPC (5th) 113 (Sup Ct J); *Lambert v Guidant Corp*, 72 CPC (6th) 120 at paras 136–38, [2009] OJ No 1910 (Sup Ct J); *Brooks v Canadian Pacific Railway Ltd*, 2007 SKQB 247 at para 192, 283 DLR (4th) 540.

14. *Tesluk v Boots Pharmaceutical PLC*, 21 CPC (5th) 196 at para 22, [2002] OTC 233 (Sup Ct J) [*Tesluk*].

15. *Parsons v Coast Capital Savings Credit Union*, 2010 BCCA 311 at para 9, 6 BCLR (5th) 261 [*Parsons CA*].

16. *Ibid* at para 10.

fees”.¹⁷ Despite the challenging and important nature of the issues raised by requests for honorarium payments and the lack of a uniform judicial approach within both Ontario and Canada,¹⁸ no critical analysis is found in the Canadian legal literature. The aim of this article is to address this void in the jurisprudence on Canadian class actions by providing a conceptual, empirical and comparative evaluation of the way Ontario trial judges have dealt with honorarium payment requests.

This article proceeds in three Parts. Part I addresses the way Ontario’s class action judges have grappled with the principles sketched above. Ontario’s approach is also contrasted with the approach implemented by class action judges in British Columbia, the US and Australia. Part II reveals the empirical data and findings that have emerged from efforts to identify all applications for honorarium awards filed in Ontario. This data is evaluated in a comparative context by contrasting it with similar data collected with respect to class actions in British Columbia, several empirical studies of incentive awards received by representative plaintiffs in the US and the published findings of an empirical study of requests for reimbursement payments filed in the Federal Court of Australia (Australian Study).¹⁹ The final Part summarizes the major findings.

I. Conceptual Insights

The first identified application for honorarium payments in Ontario was filed in 1996 in *Windisman v Toronto College Park Ltd.*²⁰ Here, Sharpe J explained that:

17. *Smith (Estate of) v National Money Mart Company*, 2011 ONCA 233 at para 134, 106 OR (3d) 37 [*Smith (Estate of)*].

18. See Michael Eizenga et al, *Class Actions Law and Practice*, 2nd ed (Markham: LexisNexis Canada Inc, 2009) at para 13.29. With respect to Quebec, contrast *Association de protection des épargnants et investisseurs du Québec c Ontario Public Service Employees’ Union Pension Plan Trust Fund*, 2008 QCCA 1132, 172 ACWS (3d) 299 with *Association des consommateurs pour la qualité dans la construction c Flamidor inc*, 2008 QCCS 4848, [2008] JQ No 10253 (QL) [*Flamidor*].

19. Morabito, “Australia’s Class Representatives”, *supra* note 7.

20. *Supra* note 1.

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. I agree with the American commentators that such awards should not be seen as routine.²¹

Justice Winkler, Ontario's recently retired Chief Justice, "has written many of the pioneering decisions on class proceedings",²² including those on honorarium payments. In his first published judgment on this issue, whilst apparently applying Sharpe J's suggested guidelines, Winkler J (as he then was) revealed his concerns that such awards may result in the appearance of a conflict of interest between the representative plaintiff and the class members. He held that such awards may not be judicially authorized where the outcome of the class action is a settlement that is entirely in the form of a *cy-près* distribution.²³ Justice Winkler also warned that "compensation for representative plaintiffs must be awarded sparingly".²⁴

In his next available analysis of these awards, Winkler J observed that "it is not generally appropriate for a representative plaintiff to receive a payment for fees or for time expended in the pursuit of the action".²⁵ The great influence these views have had in this area is apparent from the following comments made in December 2013 by Conway J of the Ontario Superior Court of Justice: "Honorarium payments are infrequently made. They are reserved for those cases where, considering all of the circumstances, the contribution of the plaintiff has been exceptional."²⁶

Two different, albeit related, strands may be detected in the reasoning that underpins this restrictive judicial response to successful representative plaintiffs receiving additional compensation for the role they played in

21. *Ibid* at para 28.

22. *Samos Investments Inc v Pattison*, 2001 BCSC 1790 at para 71, 22 BLR (3d) 46.

23. *Tesluk*, *supra* note 14 at para 21.

24. *Ibid* at para 22.

25. *McCarthy v Canadian Red Cross Society*, 158 ACWS (3d) 12, [2007] OJ No 2314 (QL) at para 20 (Sup Ct J) [*McCarthy*].

26. *Dolmage v Ontario*, 2013 ONSC 6686 at para 48, 235 ACWS (3d) 613 [*Dolmage*]. See also *Elliott v Boliden Ltd* (2006), 34 CPC (6th) 339 at para 42, 151 ACWS (3d) 1011 (Ont Sup Ct J); *Toronto Community Housing Corp v Thyssenkrupp Elevator (Canada) Ltd*, 2012 ONSC 6626 at para 52, 44 CPC (7th) 361 [*Thyssenkrupp*]; *Markson v MBNA Canada Bank*, 2012 ONSC 5891 at para 59, 42 CPC (7th) 202 [*Markson*];

the litigation. The first strand has already been noted: the belief that these awards may create the appearance of a conflict of interest between the representative plaintiffs and the class members.²⁷ The second line of reasoning, articulated by Winkler CJO, draws attention to the fact that one of the certification criteria mentioned above—that representative plaintiffs must adequately represent the class—already compels them to “vigorously and capably prosecute the interests of the class”.²⁸ Thus, they cannot receive a monetary reward for merely fulfilling their statutory duties to the class.²⁹

A. Conflict of Interest

Looking first at conflicts of interest, before one can conclude that a “representative plaintiff benefits from the class proceeding to a greater extent than the class members . . . [leading to] an appearance of a conflict of interest”,³⁰ one must compare and weigh all of the representative plaintiff’s burdens and benefits as a result of the litigation. The focus cannot be solely on the fact that if an additional award is granted to the representative plaintiff, she is likely to receive a greater monetary sum than most of the class members.

Representative plaintiffs are required to “generally act as any private client would in supervising his or her own litigation”.³¹ They may be

Bilodeau v Maple Leaf Food Inc, [2009] OJ No 1006 (QL) at para 94, 175 ACWS (3d) 333 (Sup Ct J) [*Bilodeau*]; *Helm v Toronto Hydro-Electric System Ltd*, 2012 ONSC 2602 at para 30, 40 CPC (7th) 310 [*Helm*]; *Robinson v Rochester Financial Ltd*, 2012 ONSC 911 at para 43, 212 ACWS (3d) 20 [*Robinson*]; *Baker Estate*, *supra* note 1 at paras 93, 95; *Bellaire v Daya* (2007), 49 CPC (6th) 110 at para 70, 162 ACWS (3d) 371 (Ont Sup Ct J) [*Bellaire*].

27. This approach adheres, to some extent, to what an American commentator has described as the “Fiduciary Model”. This model was described as placing emphasis “on the risk of collusion, the appearance of impropriety or fraud, and the need to downsize proposed incentive payments to make the awards between the named plaintiffs and absent class members equal”. Ruan, *supra* note 12 at 398.

28. *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 41, [2001] 2 SCR 534 [*Western Canadian*].

29. *McCarthy*, *supra* note 25 at para 20.

30. *Tesluk*, *supra* note 14 at para 22. See also *Markson*, *supra* note 26 at para 61; *Robertson v ProQuest Information & Learning*, 2011 ONSC 2629 at para 73, 18 CPC (7th) 406.

31. *Baker Estate*, *supra* note 1 at para 95.

required to reveal very personal circumstances,³² information³³ or “relive” painful or traumatic experiences in the courtroom and in the media.³⁴ They may face retaliation³⁵ where, for instance, the class action is brought by employees against their current or past employers or by franchisees against franchisors. A representative plaintiff must also be “prepared to have his name and professional reputation put under public scrutiny for the benefit of the class”.³⁶ Furthermore, as noted by the British Columbia Court of Appeal, “other intangible costs are also borne by such a plaintiff, including the sometimes not inconsiderable weight of being the leader of the claimants”.³⁷

Completion of these tasks comes at a financial cost. For example, out-of-pocket expenses³⁸ such as travel³⁹ and the costs stemming from

32. See e.g. *Hislop v Canada (Attorney General)*, 3 CPC (6th) 42 at para 11, [2004] OTC 392 (Sup Ct J).

33. See e.g. *Casavant v Cash Money Cheque Cashing Inc*, 2010 BCSC 148, 185 ACWS (3d) 834 [*Casavant*] (“the defendant’s application for production of her medical records was highly invasive and related solely to her role as representative plaintiff” at para 31); *Robinson*, *supra* note 26 (Factum of the Plaintiffs). In the *Robinson* factum, the plaintiffs argued that “serving as plaintiffs in this proceeding involved exposure of private, personal financial information including production of income tax returns Most individuals would be extremely reluctant to publicly share their personal financial information as Rick and Kathy did.” *Ibid* at para 99. See also *Mackinnon v National Money Mart Co*, 2010 BCSC 1008 at para 55, 191 ACWS (3d) 1056 [*National Money* 2010].

34. See *Dolmage*, *supra* note 26 at para 48; *Johnston v Sheila Morrison Schools*, 2013 ONSC 1528 at para 43, 37 CPC (7th) 417 [*Johnston*].

35. See e.g. *In re First Jersey Securities, Inc Securities Litigation*, 1989 US Dist Lexis 7050 (ED Pa 1989) (“Spatola . . . maintained the suit in the face of public threats by defendants designed to intimidate him and to cause him to drop it, including a threat of a \$5 million countersuit” at 18).

36. *Markson*, *supra* note 26 at para 62. See also Elisabeth M Sperle, “Here Today, Possibly Gone Tomorrow: An Examination of Incentive Awards and Conflicts of Interest in Class Action Litigation” (2010) 23:3 Geo J Leg Ethics 873 (where reference is made to an American class action where the representative plaintiff and her family were “subjected to criticism and ridicule from their neighbors and from the media” at 881).

37. *Parsons CA*, *supra* note 15 at para 20.

38. See e.g. *Sheppard v Consolidated Edison Company of New York Inc*, 2002 US Dist Lexis 16314 (ED NY) [*Sheppard*] (“a powerful basis for separate awards to named plaintiffs in class action settlements is the need to reimburse them for specific expenses they have incurred, including out-of-pocket costs of asserting the litigation” at 19, n 9). See also *Thyssenkrupp*, *supra* note 26 at para 50; *Parsons SC*, *supra* note 8 at para 12.

39. See *Farkas v Sunnybrook & Women’s College Health Sciences Centre* (2009), 82

taking the representative plaintiff away from the activities that generate income for them whether as employees,⁴⁰ professionals⁴¹ or business people.⁴² Two leading American scholars, Ted Eisenberg and Geoff Miller, have drawn attention to the fact that “even ‘figurehead’ plaintiffs incur the costs of learning about the case, as they must display some familiarity with the case in order to satisfy the ‘adequacy’ requirement”.⁴³ Representative plaintiffs are still, however, entitled to receive a share of the settlement fund or awarded damages just like the other class members.⁴⁴ Sometimes these payments are sufficient to compensate representative plaintiffs for their pecuniary and non-pecuniary costs and burdens. Sometimes they are not. In this context, it must be borne in mind that the principal goal of the *CPA* regime is to enable similarly situated claimants to have access to courts where the values of their individual claims would not justify the commencement of individual proceedings.⁴⁵

CPC (6th) 222 at para 69, 179 ACWS (3d) 764 (Ont Sup Ct J) [*Farkas*]; *Parsons SC*, *supra* note 8 at para 12; *Baker Estate*, *supra* note 1 at para 92.

40. See e.g. *Bodnar*, *supra* note 11 (“they were examined for discovery on two occasions and, as a result, were required to take leave from their respective employment” at para 47); *Henderson v Eaton*, 2002 US Dist Lexis 274 at 17 (ED La); *National Money* 2010, *supra* note 33 at para 55.

41. See *Garland v Enbridge Gas Distribution Inc* (2006), 56 CPC (6th) 357, 153 ACWS (3d) 785 (Ont Sup Ct J) [*Enbridge* cited to CPC] (“if Mr Garland had billed out his time to the clients of his consulting practice, he would have earned an additional income of between \$102,960 and \$134,640” at para 47).

42. *578115 Ontario Inc v Sears Canada Inc*, 2010 ONSC 4571, 325 DLR (4th) 343 (Factum of the Plaintiffs) (“McKee’s and Naismith suffered personal hardship and inconvenience in taking time away from their respective businesses in connection with the prosecution of this litigation” at para 68).

43. Ted Eisenberg & Geoff P Miller, “Incentive Awards to Class Action Plaintiffs: An Empirical Study” (2006) 53:6 UCLA L Rev 1303 at 1305.

44. For rare examples of representative plaintiffs receiving no payments at all from the distribution of settlement funds, see *Romanchuk v Poyner Baxter LLP*, 2008 BCPC 188 at para 3, [2008] BCJ No 1190 (QL); *Hamilton v Toyota Motor Sales, USA, Inc*, 2014 ONSC 785 at para 11, 237 ACWS (3d) 587.

45. *Hollick v Toronto (City of)*, 2001 SCC 68, [2001] 3 SCR 158 (this goal was described as follows by the Supreme Court of Canada: “[B]y distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own” at para 15). See also *Western Canadian*, *supra* note 28 at para 28; Ontario Law Reform Commission, *Report on Class Actions* (Toronto: OLCRC, 1982) at 117–46; Manitoba Law Reform Commission, *Class Proceedings*, Report #100 (Winnipeg: MLRC, 1999) at 23–30.

In those circumstances, the representative plaintiff's share of the fruits of the litigation may not be sufficient to permit total or even substantial restitution.⁴⁶ A striking example of the disparity that can exist between the level of effort that is required of representative plaintiffs and the quantum of their individual claims is found in *Garland v Enbridge Gas Distribution Inc* (*Garland*), where the court authorized honorarium payments to the representative plaintiff.⁴⁷ Ward Branch described this class action as "the world's longest \$500 case".⁴⁸ It lasted more than twelve years⁴⁹ and the value of the representative plaintiff's individual claim was actually less than \$500; it was \$75.⁵⁰

The potential liability of representative plaintiffs for the costs of their opponents must also be taken into account.⁵¹ In 2008, Cullity J observed that, "[i]n [his] experience, it is almost unheard of in class proceedings in this jurisdiction for there to be no agreement, or understanding, between plaintiffs and class counsel in respect of the payment of costs if the action is unsuccessful."⁵² While it is true that cost indemnities are commonly

46. See *Petit*, *supra* note 1 ("the role of the representative is unique in class action proceedings. The very purpose of the class action is to provide a procedural vehicle so that justice may be rendered where the individual claim is so small as to not justify a person taking their own legal proceeding" at para 55).

47. *Supra* note 41. See also *Tesluk*, *supra* note 14 at para 14 (\$30-\$70); *Helm*, *supra* note 26 at para 28 (\$70); *Parsons SC*, *supra* note 8 at para 11 (\$1,000).

48. Ward Branch, "World's Longest \$500 Case Comes to an End" (15 February 2007), *Class Actions Blog* (blog), online: <www.branchmacmaster.com/class-actions-blog/2007/2/15/february-2007.html>.

49. For a concise summary of all the appeals that were filed in this case, see *Walker v Union Gas Ltd* (2009), 74 CPC (6th) 366 at para 17, 174 ACWS (3d) 947 (Ont Sup Ct J) [*Walker*].

50. *Garland v Consumers' Gas Co* (2000), 185 DLR (4th) 536 at para 1, 96 ACWS (3d) 547 (Sup Ct J).

51. *Dugal v Manulife Financial Corporation*, 2011 ONSC 1785, 18 CPC (7th) 105. The Court found, "[o]ne 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 C.P.A. was enacted." *Ibid* at para 27.

52. *Drady v Canada*, 164 ACWS (3d) 32, [2008] OJ No 238 (QL) at para 57 (Sup Ct J). See also *Holmes v London Life Insurance Co* (2007), 45 CCLI (4th) 70 at para 2, 40 CPC (6th) 167

provided by class counsel, commercial litigation funders⁵³ or by the Class Proceedings Fund,⁵⁴ as highlighted in Part II below, they are not provided to all representative plaintiffs.⁵⁵

In light of the scenario depicted above, it is reasonable to conclude that granting additional compensation to a representative plaintiff whose “performance” was unexceptional does not create a perception that she benefited from the litigation to a greater extent than the class members. Rather, conflict of interest issues, both actual and perceived, are more likely to arise once additional compensation is warranted and attention is turned to an appropriate quantum. This was recognised by Tysoe J of the Supreme Court of British Columbia (as he then was) in 2004 in the first published judgment in British Columbia on honorarium awards when he wrote: “I do not believe that the payment of nominal compensation of \$5,000 creates a conflict of interest which is worthy of any concern on the court’s behalf.”⁵⁶ However, in this context, what is more important is the “relative” quantum of the requested honorarium payment. This entails comparing the requested compensation with several matters including the risks and burdens borne by the applicant and the benefits generated for the class members by the class proceeding.

(Ont Sup Ct J); *McCracken v Canadian National Railway*, 2010 ONSC 6026 at para 9, 100 CPC (6th) 334; *Fantl v Transamerica Life Canada* (2008), 60 CPC (6th) 236 at para 52, 166 ACWS (3d) 1045 (Ont Sup Ct J) [*Fantl*].

53. See e.g. *Bayens v Kinross Gold Corporation*, 2013 ONSC 4974 at paras 33–34, 117 OR (3d) 150.

54. This fund was created in 1992 and covers approved disbursements and adverse cost awards. Up to the end of 2012, it received over 130 applications, 82 of which were approved for funding. Law Foundation of Ontario, “Class Proceedings Fund: 20 Years in Review” (2013) at 13, online: <www.lawfoundation.on.ca/wp-content/uploads/CPF-Brochure-2013.pdf>.

55. For judicial criticism of the failure on the part of class counsel to provide its client with an indemnity with respect to costs, see *Poulin v Ford Motor Co of Canada* (2007), 52 CPC (6th) 294 at para 70, 162 ACWS (3d) 567 (Ont Sup Ct J).

56. *Savings Credit Union*, *supra* note 10 at para 8. See also *Dominguez v Northland Properties Corp (cob Denny’s Restaurants)*, 2013 BCSC 468, [2013] BCJ No 527 (QL) [*Dominguez*] (“[t]he modest sum of \$2,500 sought is appropriate and will not give rise to any perception of conflict of interest on her part” at para 46); New York Bar Association’s Committee on Professional Responsibility, “Financial Arrangements in Class Actions, and the Code of Professional Responsibility” (1992) 20:4 *Fordham Urb LJ* 831 at 843.

Another related matter that may raise conflict of interest issues relates to the purpose of the additional compensation award. The following explanation, provided by Richard Nagareda as to the ambit of the concept of incentive awards in the US, is quite useful in understanding this point:

[T]he term “incentive award” itself encompasses notions of both restitution and reward. Consider how the word “incentive” is used in ordinary parlance. An “incentive” for someone to do something for the benefit of others encompasses both the prospect of recompense for effort expended (restitution) and the prospect of benefit beyond what that person might gain simply by sitting back and remaining within the undifferentiated group (reward).⁵⁷

If the representative plaintiff seeks only the former level of compensation (restitutionary), an appearance or perception of a conflict of interest between class members and the representative plaintiff is not likely to arise once the practical realities of class action litigation are taken into consideration. It is the latter type of compensation, aiming to provide a reward to the representative plaintiff, that is likely to raise an appearance of conflict. Depending on the amount in question, one even risks moving into the realm of actual conflict. Whether incentive awards should seek to go beyond restitution and provide a reward, not unlike performance bonuses for workers, has been one of the reasons for conflicting rulings by American courts in this area.⁵⁸

The British Columbia Court of Appeal has recognised these considerations and enunciated prerequisites for entitlement to additional compensation that are more easily satisfied than Ontario’s requirements. At the same time, trial judges are required to comply with certain safeguards and to determine the appropriate quantum of this compensation only after balancing all relevant circumstances:

There is no doubt that a representative plaintiff could be tempted to act in self interest, contrary to the interests of class members, where the potential exists for substantial

57. Nagareda, *supra* note 10 at 1488.

58. See generally Sperle, *supra* note 36 at 874; Jocelyn D Larkin, “Incentive Awards to Class Representatives in Class Action Settlements”, online: Impact Fund <impactfund.org/downloads/Resources/IncentiveAwards.pdf>; *Re Chambers Development Securities Litigation*, 912 F Supp 852 at 863 (WD Pa 1995); *Re Southern Ohio Correctional Facility*, 175 FRD 270 at 276 (SD Ohio 1997) [*Re Southern*]; *Roberts v Texaco, Inc*, 979 F Supp 185 at 201–02 (SD NY 1997) [*Roberts*]; *Parsons CA*, *supra* note 15 at paras 10–12.

preferential treatment in the terms of settlement. Protecting against this, the approving court must require a representative plaintiff seeking a separate payment to establish that the settlement presented is in the interests of the class as a whole, and that the representative plaintiff has fulfilled all the duties assumed by taking on that special role in the litigation. The court, additionally, must ensure that the amount of any separate payment to the representative plaintiff is not disproportionate to the benefit derived by the class members, the effort of the representative plaintiff, and the risks assumed by the representative plaintiff.

With these cautions . . . 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 plaintiff. Where the representative plaintiff has fulfilled his or her duties . . . and where a monetary settlement in favour of the class members is achieved, a modest award in recognition of the effort expended on behalf of the class members is consistent with restitutionary principles and recognition of the principle of *quantum meruit*.⁵⁹

Australia's Federal Court has adopted a similar approach. Although, it has awarded compensation that is substantially greater than that received by representative plaintiffs in British Columbia.

Restrictive approaches to the award of additional compensation to representative plaintiffs tend to display a certain degree of judicial resistance to the abandonment or alteration in class actions of the practices that regulate ordinary litigation. This is apparent from the following observations made by Lederman J of the Ontario Superior Court of Justice in *Kerr v Daniel Leather Inc*:

In the instant case, the representative plaintiff had its own substantial personal financial interest in the outcome of the case. He purchased 220,600 shares in the IPO and he stands to recover (at \$2.35 per share) \$518,410 by way of damages. In this regard, he is just like any other plaintiff in a non-class action who might invest considerable time and effort in the litigation but not be entitled to compensation for this effort.⁶⁰

What renders Lederman J's comparison with orthodox litigation particularly unsatisfactory is that earlier in his judgment he acknowledged that the personal stake of the representative plaintiff in *Kerr* "when compared to the legal costs to finance such a complex and prolonged

59. *Parsons CA*, *supra* note 15 at paras 19–20.

60. (2005), 76 OR (3d) 60 at para 63, 17 CPC (6th) 356 (Sup Ct J).

lawsuit, was relatively modest. It would not justify his funding millions of dollars of legal fees in pursuit of damages for his personal loss.⁶¹

A discussion of conflicts of interest between representative plaintiffs and class members would not be complete without a reference to the 2006 indictment in the US of the leading plaintiff law firm, Milberg Weiss Bershad & Schulman LLP (Milberg Weiss) and some of its most senior partners. This indictment alleged that Milberg Weiss:

Orchestrated a secret conspiracy to pay several clients a substantial portion of the attorneys' fees awarded to Milberg Weiss as class counsel, a total of some \$11.3 million over a 21-year period. In exchange for a ten percent share of Milberg Weiss's fees, these clients and their family members agreed to participate as named plaintiffs in scores of securities class actions.⁶²

The problem that the Milberg Weiss saga highlighted was the phenomenon of so-called repeat or professional plaintiffs,⁶³ a phenomenon that has not been witnessed in Canada.⁶⁴ But this scandal does not undermine or contradict the reasoning developed above, as "these secret side-payments should be distinguished from the bonuses courts frequently [award] to named plaintiffs".⁶⁵

B. Adequate Representation

The proposition that rewarding representative plaintiffs for less than exceptional performance is inconsistent with the statutory duty of representative plaintiffs to fairly and adequately represent class members is unpersuasive. Denying meaningful restitution to representative plaintiffs

61. *Ibid* at para 57.

62. Lisa L Casey, "Class Action Criminality" (2008) 34:1 J Corp L 153 at 157.

63. See generally Jessica Erikson, "The New Professional Plaintiffs in Shareholder Litigation" (2013) 65:4 Fla L Rev 1089; Casey, *supra* note 62 at 165–66; John C Coffee Jr, "Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions" (1986) 86:4 Colum L Rev 669 at 682.

64. For a rare instance in Canada of a person acting in multiple and unrelated class actions as representative plaintiff in litigation run by the same law firm, see *Singer v Schering-Plough Canada Inc*, 2010 ONSC 42 at para 12, 87 CPC (6th) 276.

65. Michael A Perino, *The Milberg Weiss Prosecution: No Harm, No Foul?* (Washington, DC: AEI Legal Center for the Public Interest, 2008) at 14, n 45. See also Lonny Hoffman & Alan Steinberg, "The Ongoing Milberg Weiss Controversy" (2011) 30:2 Rev Litig 183;

who have discharged their responsibilities satisfactorily in class actions that have produced a positive outcome⁶⁶ actually undermines compliance with the adequate representation requirement.⁶⁷ An accurate understanding of the interaction between granting honorarium applications and adequate representation by the representative plaintiff requires an appreciation of the importance of this certification requirement and the practical dynamics of class action litigation. The former was explained as follows in 2011 by Strathy J of the Ontario Superior Court of Justice (as he then was):

[O]n certification motions, the Court is often concerned to ensure that the representative plaintiff is truly engaged in the litigation and is not a mere “bench-warmer” or a “straw man” recruited by class counsel. Courts have frequently commented on the need to have an active and involved plaintiff who will be familiar with the proceedings, instruct counsel, monitor settlement discussions and generally act as any private client would in supervising his or her own litigation.⁶⁸

This need for an active and involved representative plaintiff stems from the fact that in many class actions it is class counsel that has the

J Kelly Strader, “White Collar Crime and Punishment: Reflections on Michael, Martha and Milberg Weiss” (2007) 15:1 Geo Mason L Rev 45. Strader states:

Although the indictment [alleged] a conflict, it [did] not specifically articulate how this conflict reduced the recovery or otherwise negatively affected the unnamed plaintiffs. The indictment also [alleged] that the kickback arrangement led the firm to put the named plaintiffs’ interests over those of the unnamed plaintiffs, but does not explain whether or how this actually happened.

Ibid at 89–90.

66. As noted by an American court, approval for this type of compensation is not guaranteed. *Re Southern*, *supra* note 58 (“it is contingent upon the class securing a settlement or judgment for the benefit of the class” at 277). See also *Rodriguez v West Publishing Corp*, 563 F (3d) 948 at 959 (9th Cir 2009); *Radcliffe v Experian Info Solutions, Inc*, 715 F (3d) 1157 at 1162 (9th Cir 2013).

67. See e.g. *Allapattah Services, Inc v Exxon Corp*, 454 F Supp (2d) 1185 (SD Fla 2006) [*Allapattah*] (it is aptly pointed out that “where lawyers are rewarded for their risk and efforts on behalf of the class, but class representatives are not, there is little incentive for class representatives to serve as active client participants in the litigation, thus negating the ‘adequate representative’ safeguard . . . and transferring all decision-making responsibility to counsel” at 1221–22).

68. *Baker Estate*, *supra* note 1 at para 95. It is sadly ironic that after making these comments, Strathy J proceeded to apply the exceptional performance test.

biggest financial stake in the outcome of the litigation and, as a result, has the greatest incentive to make all the important decisions with respect to its conduct.⁶⁹ It is therefore crucial to provide representative plaintiffs with incentives to act “as a check and balance to the excesses of entrepreneurial law firms”.⁷⁰ A number of American courts have recognised that additional payments to representative plaintiffs “serve an important function”⁷¹ by ensuring that they are not “penalized for having agreed to take on the mantle of class representation”⁷² and providing them with financial incentives to be “vigilant, competent and independent class representatives who actively monitor class counsel and the conduct of the litigation”.⁷³ This line of reasoning appears to have been embraced by Judge J in her recent judgment in *Snelgrove v Cathay Forest Products Corp.*⁷⁴ Justice J observed that “a modest honorarium is entirely appropriate if for no other reason but to encourage plaintiffs to be involved in the litigation in a meaningful rather than notional way”.⁷⁵ Eisenberg and Miller have also drawn attention to the fact that the costs incurred by representative plaintiffs “can be significantly greater when the named plaintiff assumes a more active role in selecting or supervising counsel”.⁷⁶

It is also pertinent to note that a number of American courts have justified incentive awards to representative plaintiffs by employing the “common fund doctrine”. This is the doctrine that has provided the conceptual basis for awarding fees to class counsel from the monetary fund

69. See generally John C Coffee, “Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation” (2000) 100:2 Colum LJ 370; Jasminka Kalajdzic, “Self-Interest, Public Interest, and the Interests of the Absent Client: Legal Ethics and Class Action Praxis” (2011) 49:1 Osgoode Hall LJ 1.

70. *Fantl*, *supra* note 52 at para 63.

71. *Allapattah*, *supra* note 67 at 1218; *Sheppard*, *supra* note 38 at 16. See also *Denney v Jenkins & Gilchrist*, 230 FRD 317 at 354–55 (SD NY 2005).

72. *Luevano v Campbell*, 93 FRD 68 at 90 (DC 1981) [*Luevano*]. See also *Cullen v Whitman Medical Corp*, 197 FRD 136 at 145 (ED Pa 2000).

73. *Allapattah*, *supra* note 67 at 1221–22. See also New York Bar, *supra* note 56 (“it can create a proper incentive to render active assistance during the investigative stage and at trial, and thereby promote strong case preparation and increase the chances for the class action’s success” at 844).

74. 2013 ONSC 7282, 236 ACWS (3d) 25.

75. *Ibid* at para 24.

76. Eisenberg & Miller, *supra* note 43 at 1305.

generated by the successful outcome of the class action.⁷⁷ As explained by the US Court of Appeals for the Sixth Circuit in 2003:

Incentive awards are usually viewed as extensions of the common-fund doctrine, a doctrine that holds that a litigant who recovers a common fund for the benefit of persons other than himself is entitled to recover some of the litigation expenses from the fund as a whole Thus, when a class-action litigation has created a communal pool of funds to be distributed to the class members, courts have approved incentive awards to be drawn out of that common pool.⁷⁸

The decision to become a representative plaintiff⁷⁹ is, for the reasons outlined above, a very difficult decision.⁸⁰ That it is unlikely representative plaintiffs will receive any meaningful compensation with respect to the time and effort they devote to the litigation, even where a successful outcome has been secured, does not render the decision any easier. As noted in a factum filed by class counsel in *Robinson v Rochester Financial Ltd*:

[T]he representative plaintiffs should not benefit from serving, however, they should not be worse-off either. If representative plaintiffs are financially disadvantaged as a result of agreeing to act in a class proceeding, that will significantly impact upon access to justice in a very negative way.⁸¹

The tension between the goals of class action devices and an extremely restrictive judicial approach to extra payments is apparent from the

77. This doctrine rests on the belief that individuals who profit from a lawsuit “without contributing to its costs are unjustly enriched at the successful litigant’s expense”. *Boeing Co v Van Gemert*, 444 US 472 at 478 (1980).

78. *Hadix v Johnson*, 322 F (3d) 895 at 898 (6th Cir 2003).

79. For empirical studies (conducted in the US and Australia) with respect to the main reasons that have prompted some representative plaintiffs to assume that role see, respectively, Stephen Meili, “Collective Justice or Personal Gain?: An Empirical Analysis of Consumer Class Action Lawyers and Named Plaintiffs” (2011) 44:1 Akron L Rev 67; Jane Caruana & Vince Morabito, “Turning the Spotlight on Class Representatives: Empirical Insights from Down Under” (2012) 30:2 Windsor YB Access Just 1.

80. I am not suggesting that there are no benefits at all in being a representative plaintiff. As indicated by one of the lawyers consulted for this study, “as a class member you have very little or no say in how the case is run or settled”. See also Eisenberg & Miller, *supra* note 43 at 1305.

81. *Supra* note 26 (Factum of the Plaintiffs) at para 105.

following comments made by Strathy J in *Helm v Toronto Hydro-Electric System Ltd*, where additional compensation was denied:

Mr Helm can take some satisfaction from the fact that this case, his case, . . . has accomplished the goals of the *Class Proceedings Act*, 1992—it has brought access to justice to thousands of Toronto Hydro customers; it has actually achieved behaviour modification by causing Toronto Hydro to change its invoices; and it has resulted in judicial economy. The settlement puts real money into the hands of many Toronto Hydro customers and the *cy pres* award will bring assistance to others in need. Mr Helm can be justly proud of these accomplishments and he should be commended for them.⁸²

This restrictive approach is extremely unfortunate. As this Part has shown, additional compensation for representative plaintiffs is something that is not only dictated by fairness but something that is also needed to encourage representative plaintiffs to step forward. Fortunately, not all judges agree with this restrictive approach. Justice Perell of the Ontario Superior Court of Justice recently wrote that “[t]he honorarium is . . . a recognition that the representative plaintiffs meaningfully contributed to the class members’ pursuit of access to justice.”⁸³ It is with this in mind that we move into the empirical section of the article.

II. Empirical and Comparative Evaluation

A. General Findings

To better understand the use of honorarium payments in Ontario, a comparative study between Ontario and other jurisdictions is in order. To complete this comparison, this article uses original data collected on Ontario and British Columbia cases, along with data on the Federal Court of Australia and findings that have emerged from similar American studies. All dollar amounts referred to are in the respective country’s currency.

82. *Supra* note 26 at para 31. See also *Baker Estate*, where honorarium payments were denied despite the fact that the trial court was of the view that the representative plaintiffs in question “have acted as exemplary representatives. They can be proud of their contributions to the prosecution and resolution of this matter and they have earned the gratitude of the class. The Court could ask no more of them.” *Supra* note 1 at para 96. See also *Markson*, *supra* note 26 at para 71; *Robinson*, *supra* note 26 at para 43.

83. *Johnston*, *supra* note 34 at para 43.

A well-known problem with undertaking empirical studies of class action litigation in Canada⁸⁴ and other places⁸⁵ is that most court documents are not electronically available. In this study, this problem was overcome by (a) seeking the assistance of leading class action lawyers in Ontario and British Columbia;⁸⁶ and (b) searching the internet for any information or document that might lead to identifying requests for additional compensation to representative plaintiffs filed in both provinces.

This research led to the identification of 126 applications for honorarium awards filed by representative plaintiffs in 64 Ontario class actions between January 1996 and December 2013.⁸⁷ Approximately 90% of these applicants were individuals while the remaining 10% were corporate entities.⁸⁸ Sixty-one of these proceedings resulted in settlement while the remaining 3 class actions were resolved by post-trial judicial rulings on the merits. In British Columbia, honorarium applications filed by a total of 23 representative plaintiffs in 20 class actions were identified. These applicants were all natural persons. All of these class actions were resolved through judicially approved settlements. This “dominance” of settlements in class actions that have resulted in honorarium applications

84. See e.g. Jasminka Kalajdzic, “Class Actions and Settlement Culture in Canada” in Christopher Hodges & Astrid Stadler, eds, *Resolving Mass Disputes: ADR and Settlement of Mass Claims* (Cheltenham, UK: Edward Elgar, 2013) 132 (“statistical data is still very difficult in a jurisdiction where court documents are not electronically available” at 133).

85. See e.g. Vince Morabito, “Class Action Facts and Figures: First Report—An Empirical Study of Australia’s Class Action Regimes” (December 2009) at 10, online: <www.globalclassactions.stanford.edu/site/default/files/documents/Australia_Empirical_Morabito_2009_Dec.pdf>.

86. Approximately 70% of the lawyers contacted replied. They are listed in the biographical footnote at the beginning of this article.

87. These figures would have been slightly higher if, in the database created for this article, honorarium awards recalled by class action lawyers were included. However, no relevant orders, endorsements or any other documents that would prove the making of these awards were provided.

88. Similarly, in the US, a district court has noted “cases cited . . . involve awards to individuals who took significant risks . . . not to corporations”. *Re Synthroid Marketing Litigation*, 264 F (3d) 712 at 722 (7th Cir 2001). Conversely, in Australia 56% of the recipients of additional compensation were corporate entities. See Morabito, “Australia’s Class Representatives”, *supra* note 7 at 191.

is not surprising given that the Law Commission of Ontario recently noted that “the vast majority of class actions resolve by way of settlement rather than contested common issues trials. In Ontario, out of hundreds of class actions that have been commenced, only 17 have led to common issues trials.”⁸⁹

Before considering this data in more detail, it is useful to consider the frequency of these applications. For this purpose, data provided by Ward Branch for the period up to September 2011 (Branch period) will be employed. Branch identified settlements in 149 cases in Ontario and in 58 cases in British Columbia.⁹⁰ Additional compensation applications were filed in 37 and 16 of these class actions, respectively. Thus, during the Branch period, additional compensation applications were filed in 24% of all settled cases in Ontario and in 27.5% of all settled cases in British Columbia. Given the less restrictive judicial approach implemented in British Columbia, the higher frequency of honorarium applications is not surprising, although greater disparity in these percentages would have been expected.

What is more surprising is that honorarium applications have been more frequent in Ontario and British Columbia than in the Federal Court of Australia. In Australia, reimbursement payments were requested in only 14.4% of all settled class actions.⁹¹ This is surprising in light of the fairly generous compensation generally awarded by Australia’s federal judges.

In terms of success, honorarium payments were authorized for at least one representative plaintiff in 32 of these 149 Ontario class actions settled during the Branch period. Thus, authorization of additional payments to representative plaintiffs was witnessed in 21.4% of all the Ontario class actions that were settled during the Branch period. This is a lower figure than the corresponding data, set out below, from empirical studies of US incentive awards.

In 2006, Eisenberg and Miller published the findings of their study of class action settlements from 1993 to 2002 in the US. They found that

89. Law Commission of Ontario, *Review of Class Actions in Ontario: Issues to be Considered* (November 2013) at 12, online: < www.lco-cdo.org/en/class-actions-project-scope > .

90. Ward Branch, *Class Actions in Canada* (Toronto: Canada Law Book, 2000) (loose-leaf revision 36) at paras 22.20, 22.30.

91. Morabito, “Australia’s Class Representatives”, *supra* note 7 at 184.

incentive awards were granted in about 28% of the settled cases they studied.⁹² Howard M. Downs, who studied class actions resolved in the Northern District of California from 1985 to 1993, found evidence of incentive awards to representative plaintiffs in 37% of cases.⁹³ A 1996 study of all class actions terminated in four federal districts between July 1, 1992 and June 30, 1994 discovered that incentive awards were granted in 26%, 37%, 40% and 46% of the cases terminated in each of the four districts.⁹⁴

The data from British Columbia, Australia and the US clearly shows that adopting a generous approach towards the entitlement of representative plaintiffs to honorarium payments does not result in such requests being filed in most settled class actions.⁹⁵ Further, despite their restrictive approach, Ontario courts do not appear to have succeeded in discouraging these requests. This is underscored by the data set out in Table 1 below. It shows a steady increase in both the number of class actions where these requests were made as well as the number of representative plaintiffs who filed these requests.⁹⁶ Nevertheless, it is important to note that the rate of increase in Period 3 was less significant than the growth witnessed in Period 2.

Given that the first application for these awards was not filed until 1996, it is useful to present this data with respect to three identical periods of 6 years over an overall period of 18 years, starting from January 1, 1996 and ending on December 31, 2013. Data collected with respect to

92. Eisenberg & Miller, *supra* note 43 at 1307.

93. Howard M Downs, "Federal Class Actions: Diminished Protection for the Class and the Case for Reform" (1994) 73:3 Neb L Rev 646 at 692-93.

94. Thomas E Willging, Laural L Hooper & Robert J Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (Washington, DC: Federal Judicial Center, 1996) at 26.

95. *McCutcheon v Cash Store Inc*, 174 ACWS (3d) 90, [2008] OJ No 5241 (QL) (Sup Ct J) [McCutcheon cited to QL] (Justice Cullity referred to "the risk of engendering expectations that such payments will be approved as a matter of course" at para 14). See also *Mortillaro v Unicash Franchising Inc*, 2011 ONSC 923 at para 27, 16 CPC (7th) 352 [Unicash]; *Mortillaro v Cash Money Cheque Cashing Inc*, 73 CPC (6th) 369 at para 25, 179 ACWS (3d) 275 (Ont Sup Ct J) [Cash Money].

96. See also *Robinson*, *supra* note 26 (where Strathy J lamented that applications by representative plaintiffs for additional compensation were "becoming routine" at para 43). One of the class action lawyers contacted also expressed the view that honorarium applications were becoming more frequent.

honorarium applications filed in British Columbia is presented in the same manner in Table 2.

Table 1: General Data for Ontario⁹⁷

Periods of Assessment	Class Actions with Honorarium Applications	Total Applicants for Honorarium Payments	Totally (and Partially) Successful Applicants	Unsuccessful Applicants
Period 1 (January 1996–December 2001)	4	4	3 & (1)	-
Period 2 (January 2002–December 2007)	17	45	30 & (3)	12
Period 3 (January 2008–December 2013)	43	77	63 & (6)	8
Total	64	126	96 & (10)	20

Table 2: General Data for British Columbia

Periods of Assessment	Class Actions with Honorarium Applications	Total Applicants for Honorarium Payments	Totally (and Partially) Successful Applicants	Unsuccessful Applicants
Period 1 (January 1996–December 2001)	1	1	1	-
Period 2 (January 2002–December 2007)	3	3	3	-
Period 3 (January 2008–December 2013)	16	19	15 & (4)	-
Total	20	23	19 & (4)	-

Table 1 reveals that 76% of the applications filed by representative plaintiffs in Ontario were judicially approved in full, 7.9% of the applications were approved but smaller sums than what had been requested were awarded, and the remaining 15.8% of the applications were totally rejected.

The applications filed by representative plaintiffs in British Columbia and in Australia's Federal Court have enjoyed a greater level of success. Table 2 reveals that each of the 23 applicants for honoraria in British

97. In both tables, the figures in parentheses in the column titled "Totally (and Partially) Successful Applicants" refer to the number of partially successful applicants.

Columbia received some compensation and 82.6% of them had their requests granted in full. In Australia, 91% of these applications (some of which were filed by class members) were judicially approved in full, while the remaining 9% of the applicants received awards that were less than what they had requested.⁹⁸ Looking only at the applications filed by Australian representative plaintiffs, 16.6% of them received less than what they had asked for.⁹⁹

In addition to the increasing frequency of honorarium applications over time, what is interesting about the data in Table 1 is the increasing percentage of applicants who received something. In Period 3 the percentage of applicants who received no additional payments was 10.6% as opposed to 26.6% in the preceding period. Thus, the “exceptional performance” test has not only failed to discourage honorarium applications, it has also not led to an increase in the rejection rate of these applications. These findings prompt two obvious questions. The first is whether lawyers acting for representative plaintiffs in Ontario have devised strategies that have allowed them to overcome the exceptional performance barrier. The second is whether the exceptional performance test has, in fact, been applied by all trial judges. Attention is now turned to these two important issues.

B. Applications for “Token” Honorarium Awards

In September 2007, a request was made in *Currie v McDonald’s Restaurants of Canada Ltd* by the representative plaintiff for an additional payment of one thousand dollars.¹⁰⁰ Justice Cullity reiterated that representative plaintiffs should be awarded additional compensation for

98. Morabito, “Australia’s Class Representatives”, *supra* note 7 at 185. The author is aware of only one judicial authorization in Ontario of additional payments to class members. See *Fraser v Falconbridge Ltd* (2002), 24 CPC (5th) 396, 33 CCPB 60 (Ont Sup Ct J) [cited to CPC]. The Court stated that “[t]he remaining \$50,000 will go to the members of the AFTER committee to reimburse them for out of pocket expenses. If they were not re-paid the non-contributing members of the class would benefit unduly.” *Ibid* at para 17. For an unsuccessful application for honorarium payments by a class member with respect to his efforts in opposing the judicial approval of a proposed settlement, see *Bilodeau*, *supra* note 26 at paras 94–97.

99. Morabito, “Australia’s Class Representatives”, *supra* note 7 at 187.

100. (2007), 51 CPC (6th) 99, 160 ACWS (3d) 409 (Ont Sup Ct J) [*Currie*].

their contribution to the litigation only in exceptional circumstances, but then held:

The amounts requested in this case are, however, small and I view them as constituting a token honorarium rather than as *quantum meruit* compensation for the considerable time and effort Mr Currie has devoted to advancing the claims of the class in the litigation. As such, I have no objection to their payment as proposed.¹⁰¹

Thus, it seems that if the compensation sought by representative plaintiffs in Ontario does not exceed one thousand dollars it is not necessary to satisfy the court that the applicant's contribution to the advancement of the litigation was exceptional. This development did not go unnoticed by plaintiff lawyers; just over 32% of all applications for additional compensation filed since *Currie* have sought sums equal to one thousand dollars or less. All but one of these applications for token awards were successful. To render matters more confusing, the only rejected application for a token award occurred because the trial judge applied the exceptional performance prerequisite.¹⁰² These post-*Currie* applications for one thousand dollars or less have been a reason for the higher success rate enjoyed by Ontario representative plaintiffs over the last six years.

As was shown in Part I, the question of whether representative plaintiffs should be rewarded for the role they played in the litigation is separate from, and precedes the question of, the quantum of the award. The courts of British Columbia and the Federal Court of Australia have not applied different tests or conceptual approaches depending on the amounts that they have been asked to award. Only one token application has been filed in each of these two jurisdictions.¹⁰³ The token application in British Columbia was filed in one of a number of class actions filed across Canada, and the same amount was requested on behalf of each of the representative plaintiffs in the different jurisdictions pursuant to the one settlement agreement.¹⁰⁴ The only token application identified

101. *Ibid* at para 35. See also *Unicash*, *supra* note 95 ("the proposed payment is not intended to be compensation or a *quantum meruit* payment but is a token recognition of his efforts" at para 27).

102. See *Thyssenkrupp*, *supra* note 26 at para 52.

103. For judgments with respect to applications for token honoraria in Quebec, see *Price*, *supra* note 9 at para 15; *Petit*, *supra* note 1 at para 54; *Chagnon v Crayola Properties Inc*, 2013 QCCS 4694 at para 15, [2013] QJ No 12819 (QL) [*Chagnon*].

104. See *Price*, *supra* note 9 at para 15.

by the Australian Study was not a symbolic award, as it was based on the judicial approval of the hourly rate applied by the representative plaintiff to the very limited time that she devoted to the litigation.¹⁰⁵ The award of token payments is of symbolic value only and does not seek to provide restitution with respect to the burdens and risks borne by representative plaintiffs.

C. Inconsistent Judicial Approaches

The outcomes of the requests for compensation filed by representative plaintiffs in Ontario that sought more than one thousand dollars provide extremely useful data. Approximately 73% of these representative plaintiffs received what they requested, 8% came away with less than what they had requested, and 19% received no honorarium payment at all. Just over 80% of representative plaintiffs satisfied the court that they deserved non-token compensation. Again, this suggests that the test of exceptional performance has either not been applied in all cases or has been applied on some occasions in a rather generous manner. A review of the reasons that Ontario trial judges have provided for authorizing honorarium payments to representative plaintiffs confirms this.

Before exploring this lack of judicial uniformity, attention needs to be drawn to an unsatisfactory feature of Ontario's (and, to a lesser extent, British Columbia's) class action landscape. This is the frequency of both unreported honorarium awards¹⁰⁶ and unexplained honorarium awards.¹⁰⁷ The former term is being used here to refer to two circumstances. The first is where there is a failure to write and/or release reasons for the judicial approval of the relevant settlement agreement. The second is where reasons for the settlement approval have been released publicly but contain no references to the additional compensation awarded to the representative plaintiffs.¹⁰⁸

105. Morabito, "Australia's Class Representatives", *supra* note 7 at 186.

106. In Australia, only 2% of the awards were unreported. *Ibid* at 183.

107. For American and Australian examples of unexplained awards see, respectively, *In re Immunex Securities Litigation*, 864 F Supp 142 at 145 (WD Wash 1994); *Hadchiti v Nufarm Ltd*, [2012] FCA 1524.

108. The author has also found unreported honorarium awards in Saskatchewan, Alberta, Nova Scotia and Quebec.

The term “unexplained honorarium awards” refers to published judgments that reveal the authorization of additional compensation to one of the representative plaintiffs but not the reasons that prompted the authorization.¹⁰⁹ With respect to British Columbia, just over 30% of honorarium awards were unreported but no unexplained awards were found. In Ontario, 29% of honorarium payments matched the description of unreported awards while another 14% matched the description of unexplained awards. Thus, close to half of Ontario’s honorarium awards were either not available publicly or the reasons that prompted the court to grant them were not revealed. What this means is that looking solely at published decisions provides a rather incomplete, and therefore inaccurate, picture of this area of class action litigation. Without the data collected from leading class action lawyers, the results as to the frequency and success rates of honorarium applications, and the median and mean honorarium awards, would have been quite different. More important, however, is that this state of affairs does not facilitate or encourage uniformity in the judicial approach to these applications.

There are three examples of non-token honorarium awards in Ontario where, judged purely from the description provided by the court, the representative plaintiffs in question did not appear to have provided service to the class that may objectively be characterised as extraordinary. The first is *Farkas* where “Mr. Farkas has carried out his responsibilities as representative plaintiff in a diligent and responsible way and it is appropriate that he receive the suggested honorarium.”¹¹⁰ The second is *Goodridge v Pfizer Canada Inc* where the representative plaintiffs “carried out their responsibilities in a diligent and responsible manner, providing assistance in the litigation that has led to the settlement agreement”.¹¹¹ Finally, *Glube v Pella*, where it was held that Pella was to “pay each of the two plaintiffs an honorarium of \$5,000 based on their important

109. The most unsatisfactory “sub-category” of unexplained honorarium awards is where there is also a failure to reveal both the quantum and the source of the awards in question. See e.g. *Sorenson v Easyhome Ltd*, 2013 ONSC 4017, 49 CPC (7th) 305 (the judicial discussion of the honorarium award was limited to the following phrase: “I approve the settlement, the counsel fee, and the modest honorarium for Mr. Sorenson” at para 2).

110. *Supra* note 39 at para 70.

111. 2013 ONSC 2686 at para 47, 49 CPC (7th) 342.

assistance in the investigation of the case and their roles in shepherding it forward”,¹¹²

The divergent approaches adopted by Ontario trial judges with respect to the entitlement to additional compensation of representative plaintiffs are brought to the fore by comparing *Robertson v Thomson Canada Ltd*¹¹³ with *Robertson v ProQuest Information and Learning LLC*.¹¹⁴ In both of these cases the representative plaintiff sought additional compensation equal to five thousand dollars. It was granted in the former case but denied in the latter.¹¹⁵ And yet both cases dealt with similar claims, were run by the same lawyers, and the same person assumed the role of representative plaintiff. More importantly, the documents filed in both cases in support of the honorarium applications were very similar and demonstrated that there were no differences in the role played by Ms. Robertson in both proceedings. The only relevant difference between the two *Robertson* cases was the judge.

The lack of consistency in the way Ontario trial judges have dealt with applications for additional compensation is again vividly highlighted by cases where no cash payments were provided to class members. Lack of payments to class members may result from a variety of reasons, including the judicially-approved settlement being entirely in the form of a *cy-près* distribution, or class members being entitled to receive only coupons or vouchers that are not redeemable in cash. Recall that in *Tesluk v Boots Pharmaceutical PLC*, Winkler J enunciated the general proposition that no entitlement to additional payments can arise on the part of representative plaintiffs where “not a single penny [finds] its way into the hands of a class member”.¹¹⁶ However, in several post-*Tesluk* Ontario class actions, honorarium payments were authorized in precisely those circumstances.¹¹⁷

112. 2013 ONSC 6164 at para 8, 233 ACWS (3d) 16. See also *Walker*, *supra* note 49 at para 37; *Pysznyj*, *supra* note 10 at para 31.

113. (2009), 80 CPC (6th) 77, 178 ACWS (3d) 721 (Ont Sup Ct J).

114. 2011 ONSC 2629, 18 CPC (7th) 406.

115. *Ibid* at paras 78–79.

116. *Supra* note 14 at para 22.

117. See e.g. *Unicash*, *supra* note 95; *Cash Money*, *supra* note 95; *Walker*, *supra* note 49; *Currie*, *supra* note 100; *McCutcheon*, *supra* note 95; *Fischer v IG Investment Management Ltd*, 2010 ONSC 7147, 9 CPC (7th) 444.

The most interesting of these cases is *Garland*.¹¹⁸ Here Cullity J sought to distinguish *Tesluk* on two grounds. The first was that “the compensation [was] for the direct benefit Mr Garland ha[d] obtained for the class by his special contribution”.¹¹⁹ The second distinguishing feature was that Cullity J had “approved, as fair and reasonable compensation to class counsel, the amount from which Mr Garland’s compensation [was] to be paid”.¹²⁰ Justice Cullity’s first ground is devoid of any factual merit. No “direct benefit” ensued to the class members in *Garland*. As subsequently explained by Cumming J in a related class action, “the cost of the *Garland* case was ultimately borne by ratepayers, with no direct compensation to class members, and the settlement funds in large part went to lawyers and for costs”.¹²¹ With respect to the second ground relied on in *Garland*, Winkler J’s “no single penny to class members” concern was not and could not possibly be addressed by changing the source of the additional payments to the representative plaintiff. This judicial reliance in granting honorarium payments on the fact that the money will come from the class counsel’s fees has not been limited to *Garland*. This circumstance leads to an analysis of another aspect of the law in Ontario on honorarium payments that has not been free of inconsistencies and problems, namely, the question of where these extra payments are to come from.

D. Source of Honorarium Payments

Generally, additional compensation received by representative plaintiffs comes from settlement funds. In Australia, all additional compensation received by representative plaintiffs and class members in federal class actions has come from settlement funds.¹²² Settlement funds are also the most common source of incentive awards to US lead plaintiffs.¹²³ The data from British Columbia concerning honorarium

118. *Supra* note 41.

119. *Ibid* at para 52.

120. *Ibid*.

121. *Walker*, *supra* note 49 at para 24. See also Law Commission of Ontario, *supra* note 89 (“Enbridge . . . ultimately filed for a price hike before the Ontario Energy Board (which was approved) to help it absorb the costs of the *Garland* settlement, effectively downloading the cost of the lawsuit to existing customers” at 13).

122. Morabito, “Australia’s Class Representatives”, *supra* note 7 at 184.

123. See *Karraker v Rent-A-Center*, 492 F (3d) 896 at 910 (7th Cir 2007).

payments revealed that 65% of the recipients of these payments were paid from the settlement funds,¹²⁴ 26% of the representative plaintiffs received their awards from class counsel's fees,¹²⁵ and the remaining additional payments were made by the defendants.¹²⁶ However, in Ontario only 48% of the recipients of additional compensation awards were paid from settlement funds, 24% received their awards from additional payments by defendants, 22% from class counsel's fees, and 6% from awarded damages.

In June 2010, the British Columbia Court of Appeal held that honorarium payments "should be paid as a disbursement consistent with the restitutionary principle that the beneficiaries should pay the compensation to the person who has created their benefit".¹²⁷ Similarly, in March 2011, the Ontario Court of Appeal indicated that, "as a general matter, the representative plaintiff's fee should be paid out of the settlement fund and not out of class counsel fees".¹²⁸ However, this conclusion was based on the ground that allocating to the representative plaintiff part of the fees awarded to class counsel "raises the spectre of fee splitting".¹²⁹

124. Included in this category is the payment granted in *Richard v British Columbia*, which involved a slightly more complex scheme than a settlement fund. 2010 BCSC 733 at para 48, [2010] BCJ No 1363 (QL). In fact, in that case the settlement agreement approved by the court created a process of contested mini-trials to assess individual compensation to class members. Each successful class member was required to pay a levy of 2% towards disbursements incurred with respect to the common issues. The honorarium payment was to be paid from the funds collected from this levy. See *ibid* (7 July 2010), BCSC (order) at paras 8(a), 12 [on file with author].

125. See e.g. *Reid v Ford Motor Co*, 2006 BCSC 1454 at para 35, 152 ACWS (3d) 574; *Bodnar*, *supra* note 11 at para 13. For US examples of incentive awards coming out of the fees awarded to class counsel, see *Lane v Page*, 862 F Supp (2d) 1182 at 1259 (D NM 2012); *Re Southern*, *supra* note 58 at 277; *Staton v Boeing Co*, 327 F (3d) 938 at 977 (9th Cir 2003).

126. See e.g. *Fakhri*, *supra* note 8 at para 31. Several reported honorarium awards granted by courts in Quebec have been satisfied through additional payments made by the defendant. See *Richard c Volkswagen Group Canada Inc*, 2012 QCCS 5534 at para 59, [2012] JQ No 12172 (QL); *Price*, *supra* note 9 at para 15; *Chagnon*, *supra* note 103 at para 15. See also Sofia C Hubscher, "Making it Worth the Plaintiffs' While: Extra Incentive Awards to Named Plaintiffs in Class Action Employment Discrimination Lawsuits" (1992) 23:2 Colum HRLR 463 at 485, n 142.

127. *Parsons CA*, *supra* note 15 at para 26. See also Hubscher, *supra* note 126 at 485, n 142.

128. *Smith (Estate of)*, *supra* note 17 at para 135.

129. *Ibid*.

The way Ontario trial judges have responded to the Court of Appeal's directive not to authorize the deduction of honorarium payments from class counsel's fees is symbolic of the current state of the law on honorarium payments in Ontario. 12% of honorarium payments authorized after the Court of Appeal's decision were taken from class counsel's fees.¹³⁰ Conversely, no awards of honorarium payments deducted from class counsel's fees were granted by British Columbia's trial judges after their Court of Appeal pronouncement.

The possibility of fee splitting is not the problem generated by the use of class counsel's fees to pay for honorarium awards. The real problem is the apparent use of a different standard in determining the entitlement of representative plaintiffs to additional payments. In fact, on several occasions, Ontario courts have indicated that they did not object to representative plaintiffs receiving additional payments from class counsel's fees even though they did not appear to be satisfied that additional compensation was deserved.¹³¹ On other occasions, honorarium award requests were rejected, at least in part, because they would reduce the proceeds available for distribution to the class members.¹³²

The entitlement of representative plaintiffs to additional payments should be neither dependent on nor influenced by the answer to the following question: where will the money come from? The practical effect of an order that honorarium payments be satisfied from a settlement fund or awarded damages is that these payments are usually made "ahead of the distribution to group members of a sum which has been calculated by reference to the estimated loss and damage suffered by the latter. The sensitivity of the position in which the claimants find themselves

130. Similarly, trial judges in Alberta and the Federal Court of Canada do not appear to share the concerns expressed by the British Columbia and Ontario Courts of Appeal given that they have recently authorized the deduction of honorarium payments from class counsel's fees. See e.g. *R v Manuge*, 2013 FC 341 at para 53, 430 FTR 125 [*Manuge*]; *Efthimiou v Cash Money Cheque Cashing Inc* (23 January 2012), Alta QB (order) at para 14 [on file with author].

131. See e.g. *Wilson v Servier Canada Inc* (2005), 252 DLR (4th) 472 at para 95, 9 CPC (6th) 83 (Ont Sup Ct J); *Roveredo v Bard Canada*, 2013 ONSC 6979 at para 18, 234 ACWS (3d) 845.

132. See e.g. *Bellaire*, *supra* note 26 at para 70; *McCutcheon*, *supra* note 95 at para 14.

in these circumstances is obvious.”¹³³ But this should not lead to a more onerous standard for determining entitlement to additional payments where those payments are sought from settlement funds or awarded damages and, conversely, a lower standard for those applicants who seek an alternative source for these payments. The appropriate quantum and source of honorarium payments are two important issues that need to be considered very closely but only after it has been judicially determined that the representative plaintiff is entitled to additional compensation.

Finally, in light of the preference of some Ontario trial judges to take honorarium awards from class counsel’s fees, as opposed to reducing the compensation available for distribution to class members, one would intuitively expect the mean and median honorarium payments deducted from such fees to be higher than the mean and median compensation deducted from settlement funds or awarded damages. This is the position in British Columbia.¹³⁴ However, in Ontario, the mean and median honorarium payments per representative plaintiff deducted from settlement funds and awarded damages exceeded honorarium awards that were deducted from class counsel’s fees.¹³⁵

E. Relevant Criteria

The only time that a list of relevant criteria concerning honorarium payments has been provided by an Ontario court was in *Robinson v Rochester Financial Ltd* in February 2012.¹³⁶ Justice Strathy (as he then was) of the Superior Court of Justice provided a non-exhaustive list of

133. *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)*, [2006] FCA 1388 at para 75 [*Darwalla*]. See also *Fakhri*, *supra* note 8 at para 31; *Pysznyj*, *supra* note 10 at para 31. But see *Dolmage*, *supra* note 26. Honorarium payments need not be satisfied before the settlement fund is distributed to class members. In *Dolmage*, it was ordered that the \$15,000 honorarium payment was “to come from the Settlement Fund remaining after all claims of class members have been paid”. *Ibid* at para 51.

134. The mean award per representative plaintiff: from counsel’s fees (\$7,200) and from settlement funds (\$5,200). The median award per representative plaintiff: from counsel’s fees (\$7,500) and from settlement funds (\$3,500).

135. The mean award per representative plaintiff: from counsel’s fees (\$4,997), from awarded damages (\$8,166) and from settlement funds (\$8,865). The median award per representative plaintiff: from counsel’s fees (\$6,000), from awarded damages (\$7,500) and from settlement funds (\$13,888).

136. *Supra* note 26.

factors to use in considering applications by representative plaintiffs for additional payments:

- (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.¹³⁷

This represents an accurate list of most of the major factors that Ontario trial judges have considered when faced with applications for additional compensation. Unfortunately, they have not been applied in a consistent manner. For instance, the fact that the representative plaintiff would have been personally liable for an adverse cost order in the event of a victory for the defendant has been advanced in several judicial pronouncements as a significant reason for granting the honorarium applications.¹³⁸ Similarly, the refusal to authorize additional payments has been justified, on several occasions, on the ground that someone other than the representative plaintiff was actually responsible for costs.¹³⁹ This tends to suggest that securing extra payments is a significant challenge where an indemnity for costs is extended to representative plaintiffs. However, at least¹⁴⁰ 36% of the Ontario representative plaintiffs who secured judicial authorization for additional compensation faced, in practice, no liability for costs.¹⁴¹ This was because class counsel, commercial litigation funders and/or the Class Proceedings Fund had assumed responsibility for costs.

137. *Ibid* at para 43.

138. See e.g. *Windisman*, *supra* note 1 at para 28; *McCutcheon*, *supra* note 95 at para 14; *Thyssenkrupp*, *supra* note 26 at para 47.

139. See e.g. *Robinson*, *supra* note 26 at para 43; *Thyssenkrupp*, *supra* note 26 at para 52; *Markson*, *supra* note 26 at para 70.

140. The phrase “at least” is used because information on this issue was not available with respect to all the successful applicants for honoraria.

141. The costs referred to here are the costs incurred by class counsel in running the class action and the portion of the costs incurred by their opponents that would be recoverable by them from the representative plaintiffs in the event of a loss.

The time spent factor, criterion (d), has also been inconsistently applied. For instance, representative plaintiffs who devoted over 70¹⁴² and 100¹⁴³ hours to the litigation were granted honorarium payments equal to \$5,000 and \$4,000, respectively. In two other Ontario class actions, a time commitment to the litigation of over 100¹⁴⁴ and 300¹⁴⁵ hours was not regarded as sufficient to justify any additional payments.¹⁴⁶

Eisenberg and Miller have noted that “the older the case, the more time and effort the representative plaintiff will have presumably expended in monitoring it”.¹⁴⁷ The Australian Study discovered that the federal class actions where additional compensation was awarded to some of the representative plaintiffs lasted, on average, almost twice as long as all the other settled federal class actions.¹⁴⁸ In two Ontario class actions, some judicial reliance was placed on the lengthy duration of the litigation in authorizing additional payments to the representative plaintiffs.¹⁴⁹ However, the Ontario class actions “headed” by representative plaintiffs whose applications for honoraria were totally rejected actually lasted, on average, longer than those where additional payments to at least one of the representative plaintiffs were awarded: 5 years and 3 months versus 4 years and 7 months.¹⁵⁰

In the factum filed by class counsel in the *Dolmage v Ontario* class action, the following was relied on in support of the request for honorarium payments to the two representative plaintiffs:

Unlike many class action settlements, most of which settle long before trial and in many cases, even prior certification, this action settled on the first day of a lengthy common issues

142. *Walker*, *supra* note 49 at para 37.

143. *Windisman*, *supra* note 1 at para 25.

144. *Tesluk*, *supra* note 14 at para 19.

145. *Robinson*, *supra* note 26 (Factum of the Plaintiffs) at para 100.

146. In Australian federal class actions, the average and median hours devoted to the litigation by successful applicants for additional compensation were 250 and 100, respectively. See Morabito, “Australia’s Class Representatives,” *supra* note 7 at 190.

147. Eisenberg & Miller, *supra* note 43 at 1316.

148. Morabito, “Australia’s Class Representatives,” *supra* note 7 at 189.

149. See *Enbridge*, *supra* note 41 at paras 48, 51; *Goodridge v Pfizer Canada Inc*, 2013 ONSC 2686 at para 47, 49 CPC (7th) 342.

150. The difference is even more significant when comparing the median duration of class actions with successful honorarium applications (4 years and 4 months) with the median duration of class actions with no successful honorarium applications (5 years and 3 months).

trial. As such, [the representative plaintiffs] were involved through pleadings, certification, examination for discovery, preparation for trial, including their own testimony, mediations and commencement of trial.¹⁵¹

The circumstances faced by the representative plaintiffs in *Dolmage* are similar to those faced by a majority of recipients of additional payments in Australia, to the extent that settlement agreements were not executed until the commencement, substantial completion or completion of the trial.¹⁵² The data collected reveals the existence of a vastly different scenario in Ontario and British Columbia. Half of the class actions settled in Ontario where honorarium awards were granted were settled prior to certification; thus, certification of the proceeding as a class proceeding and judicial approval of the proposed settlement were sought at the same time ("settlement classes"). The proportion of settlement classes among honorarium cases was even higher in British Columbia at 60%.

The reference in Strathy J's criterion (f) to participation in settlement negotiations highlights the importance of demonstrating, for the purposes of an application for honorarium payments, that the representative plaintiffs took an active role in the settlement process. Given the safe assumption that the vast majority of representative plaintiffs do not have legal qualifications,¹⁵³ it is difficult to think of stronger evidence of representative plaintiffs taking a proactive stance in the settlement process than seeking independent advice from lawyers not involved in the class action. This is precisely the step taken by one of the representative plaintiffs in *Baker Estate v Sony BMG Music (Canada) Inc* to determine whether the settlement agreement was in the interests of the class.¹⁵⁴ Yet no reference was made to this initiative

151. *Dolmage*, *supra* note 26 (Factum of the Plaintiffs) at para 92. See also Sperle, *supra* note 36 ("post-trial incentive awards likely would increase relative to the amount of work expended on the part of the named plaintiffs" at 886–87).

152. See Morabito, "Australia's Class Representatives," *supra* note 7 at 189–90. See also *Allapattah*, *supra* note 67 at 1218–22 (where the class action was tried twice and incentive awards to each representative plaintiff of over \$1.7 million were approved).

153. For empirical evidence of this state of affairs (in the context of Australia's federal class actions), see Vince Morabito, "An Empirical Study of Australia's Class Action Regimes: Second Report—Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives" (September 2010) at 47–48, online: <globalclassactions.stanford.edu/empirical>.

154. *Baker Estate*, *supra* note 1 (Affidavit of Craig Northey) at para 19.

by Strathy J in his short description of the activities undertaken by the representative plaintiffs;¹⁵⁵ efforts that, in his view, did not warrant additional compensation.¹⁵⁶ Conversely, in *Garland*, Cullity J's decision to authorize an extra payment of \$25,000 to the representative plaintiff was partly justified on the basis that the plaintiff in question had retained another lawyer partly for the purpose of receiving independent advice in relation to an important aspect of the proposed settlement agreement.¹⁵⁷ Ironically, the other major task requested of this independent lawyer was to seek additional compensation for the representative plaintiff.¹⁵⁸

F. Size of the Individual Claims of Applicants for Additional Compensation

The British Columbia Court of Appeal has drawn attention to the need to compare "the quantum of personal benefit achieved by the representative plaintiff with the overall benefit achieved for the class".¹⁵⁹ Similarly, one of the factors that some American courts have applied when faced with applications for incentive awards is "the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation".¹⁶⁰ Where the amount that the representative plaintiff is entitled to, as a member of the class, is "relatively small"¹⁶¹ or "at the low end of the range",¹⁶² then incentive award applications were more likely to be successful. Thus, it is not surprising that Eisenberg and Miller discovered a high rate of incentive awards in consumer credit class actions in the US, which, in their view, could be interpreted "as reflecting courts' wish to ensure that class representatives with small damages do not incur a net loss from the litigation due to their service to the class".¹⁶³

155. *Baker Estate*, *supra* note 1 at para 92.

156. *Ibid* at para 96.

157. *Supra* note 41 at para 14.

158. *Ibid*.

159. *Parsons CA*, *supra* note 15 at para 21.

160. *Van Vranken v Atlantic Richfield Company*, 910 F Supp 294 at 299 (ND Cal 1995). See also *Re Southern*, *supra* note 58 at 276; *Goodshall v Franklin Mint Co*, 2004 US Dist Lexis 23976 at 20 (ED Pa 2004).

161. *Allapattah*, *supra* note 67 at 1222.

162. *Roberts*, *supra* note 58 at 203.

163. *Eisenberg & Miller*, *supra* note 43 at 1308.

In light of the guidance provided by the Court of Appeal, it is equally unsurprising that a majority of the class actions in British Columbia where honorarium payments were authorized were the so-called “payday loan” class actions. As explained by Griffin J in *Bartolome v Nationwide Payday Advance Inc*, these class actions were “brought against businesses that advanced short term loans, known as payday loans, to BC residents. The underlying theory of the claims is that the payday loan businesses charged various fees that amounted to criminal interest, contrary to section 347(1) of the *Criminal Code*.”¹⁶⁴ The claims in payday loan class actions have been very small and thus individually non-recoverable.¹⁶⁵

The size of the individual claims of the applicants for honorarium payments is not among the factors that Ontario judges have expressly placed reliance on when faced with honorarium applications. Yet, the substantive claims that featured most prominently in the Ontario class actions where honorarium payments were awarded relied on the proposition that “criminal” rates in contravention of section 347(1) of the *Criminal Code*¹⁶⁶ had been imposed; some of these cases were filed against providers of payday loans.

G. Role Played by Third Parties and Class Members in the Process of Reviewing Honorarium Applications

The settlement of class action litigation potentially poses the greatest risk to the interests of absent class members. As explained in March 2013 by Perell J:

Settlement approval is the most important and difficult task for a judge under all class action regimes Since most class actions settle, the integrity and the legitimacy of class actions as a means to secure access to justice largely depend upon the court properly exercising its role in the settlement approval process. In scrutinizing a settlement, the court is called on to protect the interests of the class members who are to be bound by the outcome and

164. 2010 BCSC 1433 at para 1, 193 ACWS (3d) 1097. In *Mackinnon v National Money Mart Co*, it was further explained that these loans were “due the day before the customer’s next pay day and were usually for a term of 14 days but no more than 37 days”. *Supra* note 33 at para 5.

165. See e.g. *Smith Estate v Oriet*, 2010 ONSC 1334, 94 CPC (6th) 126 (a payday loan “is a loan of a relatively small amount of money (up to approximately \$1,500 and typically up to around \$500)” at para 9).

166. RSC 1985, c C-46, s 347(1).

who will be compelled to release their claims against the defendant in exchange for their participation in the class action settlement.

...

The judge's task is difficult because judges are more accustomed and more comfortable adjudicating in the context of an adversarial system, but at the time of the settlement approval process, the active parties to the class action are no longer adversarial, and they all will be recommending the settlement.¹⁶⁷

Additional problems encountered in the judicial review of honorarium applications were revealed by an Australian judge:

The court is denied the benefit of the contribution of a contradictor in relation to these payments. Although the same may be said of the settlement distribution scheme as a whole, the problem is particularly acute where the court has only the say-so of those who claim these benefits with respect, for example, to the time occupied on the work to which their claims relate and the hourly rates by reference to which particular categories of personnel should be compensated.¹⁶⁸

To address the non-adversarial nature of the process followed to secure judicial approval of class action settlements, courts must look elsewhere for independent information regarding the potential shortfalls or weaknesses of the proposed settlement agreement. Thus, third parties—such as special counsels, masters, guardians, *amicus curiae* and contradictors—have, on occasions, been appointed to assist trial judges in Canada, Australia and the US in their review of proposed settlements or particular aspects of the settlements such as the award of fees to class counsel.¹⁶⁹

167. *Kidd v Canada Life Assurance Co*, 2013 ONSC 1868 at paras 118, 121, 115 OR (3d) 256. See also *Robertson v Thomson Canada Ltd* (2009), 80 CPC (6th) 77 at para 14, 178 ACWS (3d) 721 (Ont Sup Ct J); Susan P Koniak & George M Cohen, "Under Cloak of Settlement" (1996) 82:7 Va L Rev 1051 at 1104; *Farkas*, *supra* note 39 at para 46; Jasminka Kalajdzic, "Access to a Just Result: Revisiting Settlement Standards and Cy Pres Distributions" (2010) 6:1 Can Class Action Rev 215 at 227–29; Edward H Cooper, "Class Action Advice in the Form of Questions" (2001) 11:2 Duke J Comp & Intl L 215 at 240; *Pettway v American Cast Iron Pipe Company*, 576 F (2d) 1157 at 1169 (5th Cir 1978); *Chopik v Mitsubishi Paper Mills Ltd* (2003), 29 CPC (5th) 277 at para 17, 119 ACWS (3d) 727 (Ont Sup Ct J); *Epstein v First Marathon Inc*, (2002) 41 CPC (4th) 159 at paras 29, 32, [2000] OTC 109 (Sup Ct J); *Lane v Facebook Inc*, 696 F (3d) 811 at 829–30 (9th Cir 2012); *Amchem Products, Inc v Windsor*, 521 US 591 at 623 (1997).

168. *Darwalla*, *supra* note 133 at para 75. See also *Milfull v Terranora Lakes Country Club Ltd*, [2006] FCA 801 at para 11.

169. See *Smith (Estate of)*, *supra* note 17 at paras 6, 15–31; *Killough v Canadian Red*

The most obvious source of information with respect to the merits of the proposed settlement is provided by the class members themselves, the very people who will be bound by the settlement. As explained in 2007 by Winkler J, while the *CPA* does not

expressly provide a process for receiving objections by class members, there is now a well-established practice of combining the settlement approval motion with a fairness hearing, on notice to the class, at which objections to the settlement are routinely received and considered by the court.¹⁷⁰

This raises the following important question: to what extent do class action judges in Ontario seek the assistance of third parties in their review of honorarium applications? Also, what role have class members played in this process?

In the US, the assistance of a special master has been secured on some occasions.¹⁷¹ In a recent application for additional compensation in Australia, Gordon J of the Federal Court sought the advice of the Court's District Registrar and then implemented the recommendation that she was subsequently provided with.¹⁷² No similar requests for assistance by judges in Ontario and British Columbia were found.

In an unpublished endorsement written in December 2013, Belobaba J of the Ontario Superior Court of Justice explained that significant honorarium payments to the representative plaintiffs in the class action before him were appropriate partly because "several class members took the time to provide affidavits and even attend in court" in

Cross Society, 2001 BCSC 198, 85 BCLR (3d) 233; *Killough v Canadian Red Cross Society*, 2001 BCSC 1060, 91 BCLR (3d) 309; *Rowlands v Durham Region Health*, 2012 ONSC 3948 at para 31, 217 ACWS (3d) 779; *Baxter v Canada (Attorney General)* (2006), 83 OR (3d) 481, 40 CPC (6th) 129 (Sup Ct J); *Froblinger v Nortel Networks Corp* (2007), 40 CPC (6th) 62, 154 ACWS (3d) 542 (Ont Sup Ct J); *Zucker v Westinghouse Elec*, 374 F (3d) 221 (3d Cir 2004); *Weinberger v Great Northern Nekoosa Corp*, 925 F (2d) 518 (1st Cir 1991); *Miller v Mackey International, Inc*, 70 FRD 533 (SD Fla 1976); *King v AG Australia Holdings Ltd*, [2003] FCA 1420 at para 15; *Dorajay Pty Ltd v Aristocrat Leisure Ltd*, [2008] FCA 1311. 170. *McCarthy*, *supra* note 25 at para 9.

171. See e.g. *Roberts*, *supra* note 58; *Cook*, *supra* note 12 at 1016.

172. *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd (No 2)*, [2013] FCA 1163 at paras 8–11.

support of this award.¹⁷³ This case represents one of only two instances identified of class members playing a non-trivial role in the outcome of an application for honoraria in Ontario. The other instance was in *1176560 Ontario Limited v Great Atlantic & Pacific Co of Canada Ltd (A&P)*.¹⁷⁴ In that case, Winkler J granted the three representative plaintiffs additional payments that constituted Ontario's three highest honorarium awards ever (\$80,000, \$60,000 and \$60,000).¹⁷⁵ Class counsel revealed that: "Because of the amount of the honorarium, we asked each class member if they had any objection to the payment and there were no objections. Based on this, Winkler J was comfortable in allocating those honorariums to the [representative plaintiffs]".¹⁷⁶

In only two Ontario class actions did one or more class members file formal objections to honorarium applications.¹⁷⁷ This should be contrasted with the filing of objections by class members to other aspects of the settlement agreements, which was done in 44% of the same class actions. In the first Ontario class action where an objection to the honorarium application was filed by one of the class members, no details were provided by the trial judge as to the reasons for the objection. No reliance was expressly placed on this objection by the trial judge in totally rejecting the honorarium application.¹⁷⁸ The second objection by an Ontario class member to an application for honorarium payments

173. *578115 Ontario Inc v Sears Canada Inc* (6 December 2013), Toronto, Ont Sup Ct J CV-09-378780-000 (endorsement record) at para 2.

174. (9 October 2004), Toronto, Ont Sup Ct J (endorsement record) [on file with author] at para 4.

175. *Ibid.* Not included in the database compiled for this article is the \$95,000 that class counsel agreed to pay to the representative plaintiff in *Garland*. This non-inclusion is attributable to the fact that the trial judge had awarded only \$25,000, and the \$95,000 order made by the Court of Appeal (following the appeal filed by the representative plaintiff) was merely a consent order that simply recorded the agreement between the parties that led to the withdrawal of the appeal. See *Garland v Enbridge*, 2008 ONCA 13 at para 1, 162 ACWS (3d) 891.

176. Email from David Sterns, Sotos LLP (11 February 2014) [on file with author].

177. See also *Donnelly v United Technologies Corp* (2008), 66 CPC (6th) 1 at para 12, 168 ACWS (3d) 290 (Ont Sup Ct J) (where an objection was also made by a class member with respect to the honorarium awards but the complaint was that the decision made by class counsel not to put forward this claimant as representative plaintiff deprived him of the opportunity to receive additional payments).

178. *Tesluk*, *supra* note 14 at paras 14, 18–22.

criticised the quantum of the requested awards. This, however, had no effect on the outcome of the eight applications which were all granted in full.¹⁷⁹

Why are there so few instances of objections to honorarium applications by class members relative to the number of objections to other aspects of the same settlement agreements? The answer to this question may be found through a review of the notices that were sent to class members to advise them of the hearings where the honorarium applications would be considered, among other things, by the court.

In the US, the *Manual for Complex Litigation* makes it clear that the settlement notice provided to class members must “disclose any special benefits provided to the class representatives”.¹⁸⁰ A number of American courts have not granted incentive awards partly on the basis that the settlement notices did not provide any or adequate information with respect to the awards.¹⁸¹ Other courts have supported their rulings that incentive awards were appropriate because notice of the filing of applications for such awards had been provided to the relevant class and no objections were made.¹⁸² In Canada, the Federal Court rejected the request made by several class members that the representative plaintiff be paid more than what he had requested on the ground that it was not appropriate that the representative plaintiff “receive more than the amount described in the Preliminary Notice of Settlement sent to class members”.¹⁸³

Unfortunately, a diametrically opposed scenario was discovered in Ontario following a review of over 82% of all notices sent to class

179. *Humphreys v Adams*, 2006 CanLII 40993, [2006] OJ No 4882 (QL) (Sup Ct J). The amounts requested and awarded in this case were \$6,000 to one representative plaintiff and \$2,000 to each of the remaining seven plaintiffs.

180. Federal Judicial Center, *Manual for Complex Litigation*, 4th ed (2004), § 21.312.

181. See e.g. *Montgomery v Aetna Plywood*, 231 F (3d) 399 at 410 (7th Cir 2000); *Robles v Brake Masters Systems Inc*, 2011 US Dist Lexis 14432 at 41 (N Mex). See also *Re Southern*, *supra* note 58 at 277.

182. See e.g. *Re Catfish Antitrust Litigation*, 939 F Supp 493 at 504 (ND Miss 1996); *Goodshall v Franklin Mint Co*, 2004 US Dist Lexis 23976 at 20–21 (ED Pa); *Re Plastic Tableware Antitrust Litigation*, 1995 US Dist Lexis 18166 at 2 (ED Pa); *Women’s Committee for Equal Employment Opportunity v National Broadcasting Co*, 76 FRD 173 at 181–82 (SD NY 1977); *Luevano*, *supra* note 72 at 90–91; *Ingram v The Coca-Cola Company*, 200 FRD 685 at 694 (ND Ga 2001); *Lane v Page*, 862 F Supp (2d) 1182 at 1259 (D NM 2012).

183. *Manuge*, *supra* note 130 at para 53.

members for hearings where honorarium applications were to be judicially considered. More than 86% of these notices made no reference at all to the applications for honorarium payments; another 2.2% referred to the applications but did not reveal the amounts sought. Only 11.3% of the notices revealed to class members the amounts sought by representative plaintiffs.¹⁸⁴ It should also be noted that the existence of a broadly similar scenario in Australia's federal class actions was revealed by the Australian Study.¹⁸⁵

H. Quantum of Honorarium Awards

In the US, Eisenberg and Miller found that the average total award per representative plaintiff was \$15,992, whilst the median award per representative plaintiff was \$4,357.¹⁸⁶ In Australia, the average award per representative plaintiff was \$36,751, while the median award per representative plaintiff was \$15,071. This significant difference between the mean and median awards is not surprising. While a majority of the additional compensation awarded to class representatives normally entails sums that are not large, trial judges must at the same time possess the power and discretion to grant large payments when they are justified by the circumstances of the litigation. Thus, the highest award granted to a single representative plaintiff in Australia was \$268,243¹⁸⁷ while the highest reported incentive award identified in the US was over \$1.7 million.¹⁸⁸ Similarly, representative plaintiffs have been awarded as much as \$75,000 and \$50,000 in Quebec¹⁸⁹ and the Federal Court of Canada,¹⁹⁰ respectively.

184. It is thus not entirely surprising that one of the two Ontario objectors in question was a former representative plaintiff. See *Tesluk*, *supra* note 14 at para 3.

185. Morabito, "Australia's Class Representatives", *supra* note 7 at 202. See also Downs, *supra* note 93 at 682 (where the view is expressed that in the US, incentive awards were often not disclosed in the settlement notices that were sent to class members). The author was able to review only a very small proportion of notices sent to class members in British Columbia.

186. Eisenberg & Miller, *supra* note 43 at 1308.

187. See Morabito, "Australia's Class Representatives", *supra* note 7 at 186.

188. *Allapattah*, *supra* note 67 at 1218–22.

189. *Flamidor*, *supra* note 18.

190. *Manuge*, *supra* note 130.

In Ontario, the average award per representative plaintiff was \$6,419, while the median award per representative plaintiff was \$3,500. The additional compensation granted by Ontario courts ranged from \$250 to \$80,000. 17% of these honorarium payments were equal to \$10,000 or more. In British Columbia, the average award per representative plaintiff was \$5,456, while the median award per representative plaintiff was \$5,000. The additional compensation granted by British Columbia courts ranged from \$500 to \$15,000. Only 4.3% of these honorarium payments were equal to \$10,000 or more. This lack of large honorarium awards in British Columbia is somewhat surprising in light of the less restrictive approach adopted by trial judges and the Court of Appeal. Paradoxically, it was actually the Court of Appeal's judicial pronouncement in *Parsons v Coast Capital Savings Credit Union*¹⁹¹ that has had a downward effect on the quantum of honorarium awards in British Columbia.

In *Parsons*, the representative plaintiff requested \$10,000 in additional compensation. The Court of Appeal granted \$3,500.¹⁹² A reason for this lesser amount was that, to the court's knowledge, \$5,000 was the highest additional compensation that had been granted by British Columbia trial judges.¹⁹³ However, in two other British Columbia class actions, honorarium payments of \$10,000 were awarded¹⁹⁴ and in a third class action, a representative plaintiff was awarded \$15,000.¹⁹⁵ All of these awards were made before the Court of Appeal's decision in *Parsons* and only the \$15,000 award was unreported.¹⁹⁶ The downward impact that *Parsons* has had on the quantum of honorarium awards is apparent when one compares the mean and median awards per representative plaintiff in the pre-*Parsons* period (\$6,590 and \$5,000, respectively) with corresponding data in regard to the post-*Parsons* period (\$4,416 and \$3,000, respectively).

In terms of relative size of awards, the Australian Study revealed that the total reimbursement awards to all claimants (i.e., both representative

191. *Parsons CA*, *supra* note 15.

192. *Ibid* at para 24.

193. *Ibid* at para 25.

194. *Bodnar*, *supra* note 11 at para 49; *Casavant*, *supra* note 33 at para 32.

195. *Antoniali v Coquitlam (City of)* (12 May 2008) BCSC (order) [on file with author].

196. The reason for the Court of Appeal's lack of knowledge about these two prior reported honorarium awards of \$10,000 was apparently because the two judgments in question were handed down after class counsel's factum was filed in the *Parsons* appeal. See *National Money* 2010, *supra* note 33 at para 55.

plaintiffs and class members) constituted, on average, 1.09% of the total class recovery whilst the median reimbursement award constituted, on average, 0.06% of the total class recovery.¹⁹⁷ In the US, Eisenberg and Miller concluded that “incentive awards constitute such a small fraction of class action settlements that their effect on distributions to class members is de minimis”.¹⁹⁸ This conclusion was based on their finding that the total incentive award to all representative plaintiffs constituted, on average, 0.16% of the total class recovery while the median total award constituted, on average, 0.02% of the total class recovery.¹⁹⁹

In Ontario, total honorarium payments to all representative plaintiffs constituted, on average, 0.27% of the class recovery while the median total honoraria award constituted, on average, 0.07% of the class recovery. In British Columbia, total honorarium payments to all representative plaintiffs constituted, on average, 0.18% of the class recovery while the median total honoraria award constituted, on average, 0.14% of the class recovery.

With respect to US incentive awards, Eisenberg and Miller revealed that

[t]he substantial incentive awards observed in employment discrimination cases can be interpreted as reflecting the courts’ wish to make representative plaintiffs whole by compensating them for the high costs of their service to the class, including risks of stigmatization or retaliation on the job.²⁰⁰

The Ontario class actions that produced the highest median and mean awards per representative plaintiff involved disputes between franchisees and franchisors followed by claims against governments with respect to systemic abuse at residential schools and institutions. However, these two “categories” of class actions are similar to employment discrimination class actions to the extent that they require representative plaintiffs to

197. See Morabito, “Australia’s Class Representatives,” *supra* note 7 at 188.

198. Eisenberg & Miller, *supra* note 43 at 1347.

199. *Ibid* at 1309. Similarly, “the median percentage of the total settlement that was awarded to representative plaintiffs was less than or equal to eleven thousandths of one per cent (0.011%) in all four districts”. Willging, Hooper & Niemic *supra* note 94 at 26.

200. Eisenberg & Miller, *supra* note 43 at 1308.

face burdens and risks that are not normally faced in other types of class actions.²⁰¹

Some of the major challenges faced by representative plaintiffs in systemic abuse class actions were accurately described as follows by class counsel in *Dolmage*:

Class members often convey to class counsel that they are afraid to be involved because of retribution from the defendants and in that context repeatedly want assurances that they will not be exposed. Further, the class members often explain that they support the action, but are very reluctant to describe their experiences, because they are embarrassed, ashamed or do not want it publicly known what happened to them.

The representative plaintiffs in systemic abuse cases are exposed in a way other class members are not. In this case, [they] were the very public faces of this action and their personal experiences became matters of public record. [They] were required to describe the abuse they alleged in the statement of claim, to swear affidavit evidence in support of certification, endure cross-examinations on those affidavits, attend mediations, motions . . . ²⁰²

In *A&P*, Winkler J drew attention to “the inherent vulnerability in the dependent ongoing nature of the relationship between franchisor and franchisee”.²⁰³ Proof that this vulnerability is not just theoretical was provided by the facts of that case as class counsel persuaded Winkler J that the franchisor/defendant in question had taken steps “solely for the purpose of undermining the proceeding through the harassment and intimidation of the proposed class members.”²⁰⁴

201. See e.g. Ruan, *supra* note 12. Ruan draws attention to the fact that “employees, former and current, take huge risks when they agree to be named plaintiffs in a class action bringing legal claims of unlawful bad acts by employers. Retaliation, isolation, ostracism by co-workers, ‘black listing’ by future employers, emotional trauma, and fear of having to pay defendants’ legal fees are among the most obvious.” *Ibid* at 396–97. See also Nagareda, *supra* note 10 at 1486; *Dominguez*, *supra* note 56 at para 11.

202. *Dolmage*, *supra* note 26 (Factum of the Plaintiffs) at paras 88–89.

203. *Supra* note 3 at para 41. See also Ontario Law Reform Commission, “Class Actions”, *supra* note 45 at 128.

204. *A&P*, *supra* note 3 at para 61.

Conclusion

This article has canvassed how courts in Ontario have grappled with one of the challenging issues raised by the “unique”,²⁰⁵ “special”²⁰⁶ or “sui generis”²⁰⁷ nature of class actions, namely the right of representative plaintiffs to receive honorarium payments if a successful result is secured for the class. It has been uncovered that an unsatisfactory landscape exists for a number of reasons. First, the adoption of a restrictive approach by a majority of trial judges has led to the dismissal of more honorarium applications in Ontario than in British Columbia or Australia. The conceptual basis for this approach is grounded on an inaccurate assessment of what is required to avoid conflicts of interest between representative plaintiffs and class members and to ensure that representative plaintiffs adequately protect the interests of the class.

Second, an inappropriate judicial application of different principles and standards depending on the source and quantum of the requested compensation has been identified. This has led to the frequent implementation in the last six years or so, by plaintiff lawyers, of a strategy that seeks to increase the chances of success by seeking token or symbolic honorarium payments. This strategy has been partly responsible for the median award per Ontario representative plaintiff being lower than the median award per representative plaintiff in not only the US, but also British Columbia and Australia.

A lack of uniformity in the way individual applications for compensation have been dealt with has also been identified. This feature is vividly highlighted by the conflicting judicial responses to the appropriateness of honorarium awards where class members receive no cash payments following the settlement of the class action.

Finally, two other significant problems have been identified. The first is a failure to provide class members with a real opportunity to participate in the process of reviewing honorarium applications. This is attributable to the judicial approval of notices that, in most cases, did not provide class

205. *Endean v Canadian Red Cross Society*, 2000 BCSC 971 at para 40, [2000] 8 WWR 294; *National Money* 2010, *supra* note 33 at para 68.

206. *Red Seal Vacations Inc v Alves*, 2011 SKCA 117 at para 34, 342 DLR (4th) 409.

207. *Heron*, *supra* note 13 at para 10; *Fantl v Transamerica Life Canada*, 2009 ONCA 377 at para 38, 95 OR (3d) 767.

members with any information regarding these applications. Second, there is a judicial practice of frequently not revealing either the approval of honorarium awards or the reasons for such awards. As a result, the inferences and conclusions drawn from a review of Ontario's published judgments on honorarium payments are somewhat different from the inferences and conclusions drawn from a review of the data with respect to all the identified applications for such payments.

Hopefully, these troublesome findings, together with the review of Ontario's class action regime that the Law Commission of Ontario is currently conducting, will result in the Government of Ontario taking a close look at this dimension of Ontario's class action landscape.

