

Volatile Class Representative Removed

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The Representative Plaintiff

In order to bring a class action before the courts, class counsel must find a representative plaintiff. This member of the class is willing to participate closely with class counsel to help drive the litigation forward. The *Class Proceedings Act* dictates that there must be a representative plaintiff or defendant who:

- (i) would fairly and adequately represent the interests of the class,
- (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
- (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. [1]

One of the leading cases in the Canadian class action sphere with respect to the relationship between representative plaintiff and class counsel is *Fantl v. Transamerica Life Canada* [2].

In *Fantl*, the law firm representing the class dissolved, creating a schism between lead counsel and three of his partners. After hearing the application for an order to require Mr. Fantl, the representative plaintiff, to accept lead counsel and his new firm to represent the class, Justice Perell dismissed the application and allowed Mr. Fantl to retain counsel of his choosing.

Justice Perell outlined his reasoning in the decision as follows:

The reasons amount to no more than concluding that Mr. Fantl is a genuine plaintiff and while in the context of a class proceeding the Court has the jurisdiction to overrule a plaintiff's choice of lawyer, the Court should defer to the plaintiff's choice, unless it is demonstrated that the choice is inadequate; that is, the Court should only intervene if the plaintiff's choice would deny the proposed class or the class in a certified class action the relationships and the representation to which it is entitled in a class action. [2]

The test for representation in a class action is one of adequacy, rather than superiority. A lawyer or firm need not be the best suited in order to represent a class; they need only be adequate to the task.

Justice Perell went on to elaborate that the test for showing inadequacy of representation is difficult to meet. If a plaintiff's choice of firm is adequate, the court is not likely to intervene.

In other words, a genuine plaintiff will be treated much like the plaintiff in a traditional solicitor/client context. Provided the counsel preferred by the representative plaintiff is adequate, and a change in lawyer will not adversely affect the rest of the class, the court will likely allow the representative plaintiff to change class counsel as they see fit.

However, what happens when a plaintiff is not genuine, and how do we determine when a plaintiff is no longer genuine?

The Volatile Plaintiff

In *Azar v. Strada Crush Limited* [3], a recent decision from Justice Morgan of the Superior Court of Justice, a representative plaintiff was found to be inadequate to the task of representing his class not once, but twice. This resulted in the class action being decertified in accordance with section 10(1) of the *Class Proceedings Act*.

This class action began with a claim for unpaid wages by employees. The class of 154 employees at Strada Crush Limited alleged that their employer intentionally misclassified them in order to avoid paying overtime and holiday pay to which they were entitled. The class proceeding was certified on August 17, 2018. Mr. Azar was the representative plaintiff and Mr. Henry Juroviesky had carriage of the action.

Subsequent to the certification of the class action and a falling out with Mr. Juroviesky, Mr. Azar moved to appoint Darryl Singer of Diamond and Diamond as new class counsel. Mr. Azar alleged that Mr. Juroviesky had failed to inform him of the possible adverse cost consequences of proceeding as the representative plaintiff (it is commonplace, though not mandatory, for class counsel to indemnify the representative plaintiff against any potential cost award).

Mr. Juroviesky brought his own motion, which alleged Mr. Azar was not competent to act as representative plaintiff, and required a litigation guardian. Defence counsel brought a cross motion to have Mr. Azar removed from his position as representative plaintiff.

Through Mr. Azar's affidavit, Justice Morgan learned that a personal relationship motivated Mr. Azar's decision, stating:

It seems to me that in seeking to terminate the retainer of class counsel who successfully took a difficult case through the certification stage, and in seeking instead to appoint the lawyer representing his friend who is in a business dispute with class counsel, the Plaintiff has not put forward the best interest of the class he represents. [4]

In the result, Mr. Azar was removed as representative plaintiff and Mr. Juroviesky was given 60 days to replace him with a new representative plaintiff. Having failed to find a willing plaintiff within the two months allotted to him, and having reconciled with Mr. Azar, the pair brought a motion before the court to have Mr. Azar reappointed as class counsel.

This time, Mr. Azar accused Diamond and Diamond of improperly influencing him into changing counsel. Once again Justice Morgan found Mr. Azar inadequate to the task, writing in his decision that “Mr. Azar is too volatile, too self-focused, and too easily manipulated and distracted from the class’ interest to qualify as representative Plaintiff in this action.” [4]

This notion of the representative plaintiff being manipulable is one with particular application in the class action context. The issue of how involved a representative plaintiff ought to be can change depending on which judge is hearing the case.

In a system where representative plaintiffs are often sought out and recruited by class counsel, judges are wary of plaintiffs with no genuine interest in the litigation acquiescing to every whim of class counsel.

The concern is that a representative plaintiff who is not appropriately involved might, for example, approve a settlement that is more favourable for the lawyers than the class members.

In this case, Mr. Azar’s suspect motivations prevented Justice Morgan from allowing him to be reinstated as representative plaintiff. Mr. Azar accused both Mr. Juroviesky and Mr. Singer of misleading him, as well as convincing him to bring both ill-fated motions.

Justice Morgan felt that Mr. Azar’s action “exhibited a lack of independent judgment and an inability to provide guidance to, and a check on, counsel’s approach to the claim.” [3]

Conclusion

Ultimately, the greatest loss in this case is to the class itself. The three driving goals of class proceedings in Canada are judicial economy, access to justice, and behaviour modification. Class actions are an incredible tool for access to justice because they allow otherwise economically unviable claimants a chance to have their day in court.

Mr. Azar's behaviour robbed the other class members of that chance. However, as Justice Morgan himself wrote: "it does not foster access to justice for the class to be represented by someone who is not up to the task"[3]. Should a representative plaintiff be found in the future, pending any limitation periods, it remains possible for the action to be recertified.

Defence counsel should ensure they are alive to these issues, and consider bringing a motion to have a volatile or disingenuous representative plaintiff removed, where appropriate.

[1] *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[2] 2008 CarswellOnt 2249

[3] 2020 ONSC 549

[4] 2019 ONSC 4436

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