

2023

## Tawdry or Honourable? Additional Payments to Representative Plaintiffs in Ontario and Beyond

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### Repository Citation

Chiodo, Suzanne E., "Tawdry or Honourable? Additional Payments to Representative Plaintiffs in Ontario and Beyond" (2023). *All Papers*. 363.

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# Tawdry or Honourable? Additional Payments to Representative Plaintiffs in Ontario and Beyond

## Section I – Introduction

Class actions have always had an uncomfortable relationship with traditional civil litigation. From the very roots of class actions in North America, courts and commentators have had to wrestle with the question: what is a class action? One view is that it is merely procedural in nature, an aggregation of individual claims that does not otherwise depart from the traditional rules of court (the adjectival view). Another is that a class action is greater than the sum of its parts, allowing aggrieved individuals to band together and force wrongdoers to change their behaviour (the regulatory view).<sup>1</sup> While the Ontario *Class Proceedings Act* and its equivalent in other provinces state that “[t]he rules of court apply to proceedings under this Act,”<sup>2</sup> Canadian courts have also accepted the role of behaviour modification.<sup>3</sup>

This inherent tension within class actions has manifested itself in some mechanisms that are decidedly not a part of traditional civil litigation. While some of these have been subject to extensive discussion (for example, *cy-près* distributions), others lie forgotten in the corners of the class actions field. Until recently, an example of the latter was the widespread practice of paying representative plaintiffs. Two conflicting judgments from the Ontario Superior Court have put a spotlight on this practice, however,<sup>4</sup> and it is currently under appellate consideration.<sup>5</sup> This brings to the fore crucial questions about the purpose of such payments. While the subject of payments to representative plaintiffs is worthy of consideration in its own right, it also implicates the purposes of class actions in general.

This article begins with a brief overview of the subject of additional payments (usually called ‘honoraria’ in Canadian class actions), including the role of the representative plaintiff. Although this

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<sup>1</sup> David Marcus, “The History of the Modern Class Action, Part I: Sturm Und Drang, 1953-1980” (2013) 90 Wash U L Rev 1, 4-11 [Marcus].

<sup>2</sup> *Class Proceedings Act, 1992*, SO 1992, c 6, s 35 [CPA].

<sup>3</sup> *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 29 [Dutton].

<sup>4</sup> *Doucet v The Royal Winnipeg Ballet*, 2022 ONSC 976 [Doucet]; *Redublo v CarePartners*, 2022 ONSC 1398 [Redublo].

<sup>5</sup> The Divisional Court hearing in *Doucet*, *supra* note 4, took place on January 26, 2023, but no decision had been rendered at the time this article was approved for publication.

subject has received conflicting treatment in the Ontario courts and in recent US judgments, it has not been investigated extensively in the Canadian academic literature and has been overlooked entirely in recent law reform efforts in Ontario and elsewhere. Section II considers the threshold question of whether additional payments should be awarded at all, in light of their normative goals and the concerns reflected in the case law. Section III discusses the doctrinal and theoretical basis for additional payments, as well as questions of quantifying those payments and the source from which they should be taken. Section IV proposes a structure for the awarding of additional payments, which is based on the representative plaintiff's time and expenses but also pursues a trauma-informed approach. Section V concludes.

This article brings conceptual clarity to an overlooked area of class actions and provides practical guidance to judges and lawyers. It therefore contributes to our knowledge about class actions and our principled pursuit of them. As two lawyers from an Ontario defence-side firm recently stated, “[e]fforts to identify a brighter line that representative plaintiffs must pass, on compelling evidence, before they are entitled to honoraria payments may be welcomed by many class actions judges.”<sup>6</sup> This article identifies that bright line.

#### (a) Honoraria and the Representative Plaintiff

Representative plaintiffs play a key role in class proceedings. Like traditional civil litigation, a class action requires a plaintiff, and in Ontario that plaintiff must be a member of the class she represents.<sup>7</sup> According to *CPA* s 5(1)(e) and similar provisions in other Canadian class action statutes,<sup>8</sup> one of the prerequisites for certification is that the representative plaintiff:

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<sup>6</sup> Cheryl M Woodin and Gannon G Beaulne, “Requests for honoraria in class actions face rising scrutiny and resistance” (August 4, 2021), online (blog): *Westlaw Today* <[www.iadclaw.org/assets/1/6/Requests\\_for\\_honoraria\\_in\\_class\\_actions\\_face\\_rising\\_scrutiny\\_-\\_Cheryl\\_Woodin\\_-\\_Westlaw\\_Today\\_-\\_8.4.2021.pdf](http://www.iadclaw.org/assets/1/6/Requests_for_honoraria_in_class_actions_face_rising_scrutiny_-_Cheryl_Woodin_-_Westlaw_Today_-_8.4.2021.pdf)> [Woodin].

<sup>7</sup> *CPA*, *supra* note 2, s 2(1). All other provinces allow for the appointment of representative plaintiffs who are not class members, if doing so is “necessary” to avoid a “substantial injustice” to the class (eg the British Columbia *Class Proceedings Act*, RSBC 1996, c 50, s 2(4) [BC *CPA*]).

<sup>8</sup> Eg BC *CPA*, *supra* note 7, s 4(1)(e).

- (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.

The representative plaintiff has an unenviable job. In traditional civil litigation, the plaintiff generally sues for herself alone, is exposed to the risk of an adverse costs award that is somewhat proportionate to her potential recovery, and is usually not the subject of media attention or retaliation. In a class proceeding, however, the representative plaintiff sues on behalf of all the class members, exposing her to the risk of an adverse costs award<sup>9</sup> that would dwarf any individual recovery.<sup>10</sup> Because class actions tend to attract media attention, she is also the ‘face’ of the action and may be subject to retaliation from the defendant, as well as public criticism or ridicule.<sup>11</sup> She is also expected to monitor class counsel to ensure they act in the best interests of the class,<sup>12</sup> and (as in traditional litigation) to review documents and submit to cross-examination and discovery. The burdens the representative plaintiff bears on behalf of the class are many, yet the benefits are very few.<sup>13</sup> The class members, by contrast, are not required to do anything<sup>14</sup> until there is a settlement or judgment amount from which they may claim – they are ‘free-riders’ on the representative’s work.

Courts in Ontario and elsewhere have recognized this distinction between the representative plaintiff in a class action and a plaintiff in traditional litigation.<sup>15</sup> As a result, they have been willing to consider class counsel’s requests for additional payments.<sup>16</sup> However, the basis on which courts grant (or

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<sup>9</sup> In Canada, only Ontario, Saskatchewan, Alberta, New Brunswick, Nova Scotia, and Québec have costs-shifting rules that apply to class actions. Québec’s costs are measured along the lines of the Small Claims Court tariff, and are therefore negligible.

<sup>10</sup> Vince Morabito, “Additional Compensation to Representative Plaintiffs in Ontario: Conceptual, Empirical and Comparative Perspectives” (2014) 40:1 Queen’s LJ 341 at 350-351 [Morabito 2014].

<sup>11</sup> *Ibid* at 349.

<sup>12</sup> *Redublo*, *supra* note 5 at paras 107, 111.

<sup>13</sup> For the reasons why people decide to become representative plaintiffs, see 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 [Meili]; Jane Caruana & Vince Morabito, “Turning the Spotlight on Class Representatives: Empirical Insights from Down Under” (2012) 30:2 Windsor YB Access Just 1 [Caruana].

<sup>14</sup> Class members may occasionally be required to submit to discovery or give evidence at trial: *Doucet*, *supra* note 5.

<sup>15</sup> *Windisman v Toronto College Park Ltd*, [1996] OJ No 2897 (Gen Div) at para 28 (per Sharpe J) [Windisman]; William B Rubenstein *et al*, *Newberg on Class Actions*, 5th ed (New York: Thomson Reuters 2020) at section 17.3 [Rubenstein].

<sup>16</sup> This is usually requested at settlement, but such an award can also be made at judgment.

refuse) these requests has been inconsistent and unclear. The *CPA* is silent on this issue,<sup>17</sup> as are the rules and legislation of most jurisdictions with class action regimes.<sup>18</sup> Furthermore, courts appear to have changed their attitude towards such payments in recent years, in Ontario and elsewhere. Perhaps in response to the increasing frequency of these requests, courts have begun to show a scepticism towards ‘paying’ representative plaintiffs for their work (above and beyond what they would be awarded in damages as a class member),<sup>19</sup> with one Ontario judge recently calling the practice “tawdry”.<sup>20</sup>

(b) Contribution to Knowledge

This rise in scepticism means that a discussion of this subject is timely. The disagreement in Ontario, between the characterization of payments to representative plaintiffs as “tawdry”<sup>21</sup> and the description of them as advancing the three goals of class proceedings,<sup>22</sup> is discussed below and is receiving appellate treatment by the Divisional Court. Prior to that, numerous Ontario decisions from early 2019 onwards indicate the courts’ increasing concerns about actual or perceived conflicts of interest, as well as the evidence tendered to support honoraria requests.<sup>23</sup> In Québec, the Court of Appeal held in September 2020 that honoraria cannot be awarded in that province<sup>24</sup> because they are not included in the ‘indemnity’ mentioned in article 593 of the *Code of Civil Procedure*: “[t]he court may award the representative plaintiff an indemnity for disbursements and an amount to cover legal costs and the lawyer’s professional fee.”<sup>25</sup> By contrast, the British Columbia Court of Appeal exhibited a liberal approach to representative plaintiff

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<sup>17</sup> *Windisman*, *supra* note 15 at para 27.

<sup>18</sup> This includes the US *Federal Rules of Civil Procedure*, Title IV: Parties, r 23: Class Actions, 383 US 1029 (1966) [*FRCPP*].

<sup>19</sup> *Woodin*, *supra* note 6.

<sup>20</sup> *Doucet*, *supra* note 5 at para 61 (Perell J).

<sup>21</sup> *Redublo*, *supra* note 5 at paras 110-111 (Akbarali J).

<sup>22</sup> That is, access to justice, judicial economy, and behaviour modification: *ibid*; *Dutton*, *supra* note 3 at paras 27-29, citing the Ontario Law Reform Commission’s *Report on Class Actions* (Toronto: OLRC, 1982) at 117-146 [OLRC Report].

<sup>23</sup> Eg *Park v Nongshim Co, Ltd*, 2019 ONSC 1997 [*Park*]; *Cappelli v Nobilis Health Corp*, 2019 ONSC 4521 [*Cappelli*]; *Makris v Endo International PLC*, 2020 ONSC 5709 [*Makris*]; *Robinson v Medtronic, Inc*, 2020 ONSC 1688 [*Robinson II*]; *Aps v Flight Centre Travel Group*, 2020 ONSC 6779 [*Aps*]; *Casseres v Takeda Pharmaceutical Company*, 2021 ONSC 2846 [*Casseres*].

<sup>24</sup> *Attar c Fonds d’aide aux actions collectives*, 2020 QCCA 1121 at paras 15-20, leave to appeal to SCC dismissed, 2021 CanLII 18042 (SCC) [*Attar*].

<sup>25</sup> *Code of Civil Procedure*, CQLR c C-25.01, art 593 [*CCP*].

honoraria in *Parsons v Coast Capital Savings Credit Union*,<sup>26</sup> in which it held that payments should be made whenever the representative plaintiff provides competent service coupled with results to the class.

In the US, the controversy around additional payments revolves around several recent appellate decisions. In 2020, the 11<sup>th</sup> Circuit Court of Appeals decided in *Johnson v NPAS Solutions*<sup>27</sup> that such payments are an unlawful “bounty” and are prohibited by two US Supreme Court decisions from the 1880s.<sup>28</sup> In March 2023, citing one of those Supreme Court decisions (*Greenough*),<sup>29</sup> the 2<sup>nd</sup> Circuit Court of Appeals held that additional payments “are likely impermissible under Supreme Court precedent” and that the basis for them is “at best dubious.”<sup>30</sup> Although the 2<sup>nd</sup> Circuit affirmed a portion of the service award approved by the lower court, on the basis that “practice and usage” had superseded *Greenough*,<sup>31</sup> petitions to review both the 11<sup>th</sup> Circuit and 2<sup>nd</sup> Circuit decisions are pending before the Supreme Court of the United States. Other Circuit Courts of Appeal disagree that additional payments are impermissible, including the 9<sup>th</sup> Circuit<sup>32</sup> and the 6<sup>th</sup> Circuit.<sup>33</sup> Given the Circuit Court split, it seems increasingly likely that the Supreme Court will review the issue of additional payments in the near future.

Despite these differing views on additional payments, the subject has, for the most part, not been considered in recent class action reform efforts. The Law Commission of Ontario’s 2019 report on *Class Actions: Objectives, Experiences and Reforms*<sup>34</sup> does not mention representative plaintiff honoraria, and they were not discussed in the legislative debates leading up to the 2020 amendments to the CPA.<sup>35</sup> Similarly, there is no mention of payments to representative plaintiffs in the legislative debates leading up

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<sup>26</sup> *Parsons v Coast Capital Savings Credit Union*, 2010 BCCA 311 [*Parsons*].

<sup>27</sup> *Johnson v NPAS Solutions, LLC*, 975 F3d 1244 (11<sup>th</sup> Cir 2020) [*Johnson*].

<sup>28</sup> *Trustees v Greenough*, 105 US 527 (1882) [*Greenough*]; *Central Railroad & Banking Co v Pettus*, 113 US 116 (1885) [*Pettus*].

<sup>29</sup> *Greenough*, *supra* note 28.

<sup>30</sup> *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 2023 WL 2403615 (2<sup>nd</sup> Cir 2023) at 34, 39 [*Interchange Fee*]. The court used the term ‘service awards’.

<sup>31</sup> *Ibid* at 35.

<sup>32</sup> *In re Apple Inc Device Performance Litigation*, 2022 WL 4492078 (9<sup>th</sup> Cir 2022) [*Apple*].

<sup>33</sup> *Shane Group Inc v Blue Cross Blue Shield of Michigan*, 833 Fed Appx 430 (6<sup>th</sup> Cir 2021) [*Shane*].

<sup>34</sup> *Class Actions: Objectives, Experiences and Reforms* (Toronto: Law Commission of Ontario, 2019) [LCO Report].

<sup>35</sup> Legislative Assembly of Ontario (OLA), “Bill 161, *Smarter and Stronger Justice Act, 2020*, Debates and Progress” online: OLA <[www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-161/debates](http://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-161/debates)>.

to the recent passage of Prince Edward Island’s *Class Proceedings Act*.<sup>36</sup> The subject appears not to have been discussed at all in connection with the competition law class actions regime in the UK.<sup>37</sup> With regard to Australia, Vince Morabito has noted that the law reform commissions of Australia and Victoria did not study the subject of additional payments in their extensive studies on class actions<sup>38</sup> published in 2018.<sup>39</sup> Only the Te Aka Matua o te Ture (Law Commission of New Zealand) considered the issue in its May 2022 report recommending the enactment of a class actions statute.<sup>40</sup> It supported the payment of honoraria in principle (because of the time invested by the plaintiff and the paid opportunities they may have had to pass up as a result),<sup>41</sup> but recommended periodic payments throughout the litigation rather than a lump sum at settlement, “because of the risk of a conflict of interest, since the representative plaintiff stands to receive an additional benefit from the settlement.”<sup>42</sup>

Canadian courts have been very concerned that additional payments be modest.<sup>43</sup> This is for two reasons, both of which will be discussed in Section II: to avoid real or imagined conflicts of interest, and to ensure that the role of a representative plaintiff does not become a profit-making venture. It is this very modesty, however, that has pushed the subject of additional payments into a forgotten corner of class actions. Honoraria requests are almost always requested as part of a settlement and therefore have the

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<sup>36</sup> *Class Proceedings Act*, RSPEI 1988, c C-9.01; “Bill 36, the Class Proceedings Act”, 1st reading, *House of Commons Debates*, 66-2 (19 October 2021) at 1961 (Hon Bloyce Thompson), 2nd reading, *House of Commons Debates*, 66-2 (22 October 2021) at 2132-2136 (Hon Darlene Compton), Committee of the Whole House, 66-2 (22 October 2021) at 2132-2136 (Blair Barbour, Hon Lynne Lund), 3rd reading and Royal Assent, *House of Commons Debates*, 66-2 (17 November 2021) at 2772-2773.

<sup>37</sup> Although presumably out-of-pocket expenses would be considered part of “the costs or expenses incurred by the representative in connection with the proceedings” and could be claimed from any undistributed damages pursuant to s 47C(6) of the *Competition Act 1998* (UK), and Rule 93(4) of *The Competition Appeal Tribunal Rules 2015* (UK).

<sup>38</sup> Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders: Report 134* (Canberra: ALRC, 2018); Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings* (Melbourne: VLRC, 2018).

<sup>39</sup> Vince Morabito, “An Evidence-Based Approach to Class Action Reform in Australia: Common Fund Orders, Funding Fees and Reimbursement Payments” (2019) online: SSRN <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3326303](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3326303)> at 21.

<sup>40</sup> Te Aka Matua o te Ture | Law Commission, *Class Actions and Litigation Funding: Report 147* (Auckland: Law Commission, 2021) [NZLC Report].

<sup>41</sup> *Ibid* at para 3.77.

<sup>42</sup> *Ibid*. See also Te Aka Matua o te Ture | Law Commission, *Class Actions and Litigation Funding: Supplementary Issues Paper* (Auckland: Law Commission, 2021) at paras 3.21 and 6.65-6.67.

<sup>43</sup> Eg *Parsons*, *supra* note 26 at paras 20-22.

support of both plaintiff and defence counsel and, given that they generally constitute less than 0.2 per cent of class recovery,<sup>44</sup> they are very rarely the subject of class member objections.<sup>45</sup>

Only a handful of academic articles have considered honoraria in the Canadian context,<sup>46</sup> and none have conducted an in-depth investigation into the conceptual and normative underpinnings of additional payments in Ontario.<sup>47</sup> Representative plaintiff honoraria truly occupy the ‘dark web’ of class actions. This state of affairs is compounded by the conceptual confusion surrounding the subject. Additional payments have received different labels in different jurisdictions, largely because of the disagreement as to what is actually happening when those payments are made.<sup>48</sup> These labels include the following:

- Canada: Honoraria/honorarium<sup>49</sup>
- US: Incentive payments (or incentive awards/fees)  
Time and efforts funds  
Enhancement fees  
Service awards/case contribution awards<sup>50</sup>
- Australia: Reimbursement awards/payments  
Expense claims

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<sup>44</sup> Morabito 2014, *supra* note 10 at 384. Morabito noted that the median total honoraria award in Ontario constituted, on average, 0.07% of class recovery. In BC, he found that “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.” See also Theodore Eisenberg & Geoffrey P Miller, “Incentive Awards to Class Action Plaintiffs: An Empirical Study” (2006) 53:6 UCLA L Rev 1303 at 1309 [Eisenberg], which found that, in 374 state and federal class actions in the US, the total incentive award to all representative plaintiffs averaged 0.16% of total class recovery while the median total award averaged 0.02% of total class recovery.

<sup>45</sup> However, Morabito has noted that this lack of objection may also be because of the minimal detail about additional payments in notices to the class: Morabito 2014, *supra* note 10, at 381-382.

<sup>46</sup> *Ibid*; Marie Ong, “Fair Compensation or Unjustified Temptation to Compromise?: An Empirical Review of Requests for Honorarium Awards in Canadian Class Actions” (2022) 17:2 CCAR 1.

<sup>47</sup> Morabito’s empirical work on additional payments in Ontario is unsurpassed (*ibid*), although much has changed since his work was published. I am currently undertaking similar empirical work which will be published in a separate paper.

<sup>48</sup> 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 203 [Morabito Australia 2014]; Richard A Nagareda, “Restitution, Rent Extraction, and Class Representatives: Implications of Incentive Awards” (2006) 53:6 UCLA L Rev 1483 at 1488 [Nagareda]. I discuss this point in Section III.

<sup>49</sup> Other terms have included “compensation” (eg *Windisman*, *supra* note 15 at para 36), “stipend” (*Glover v City of Toronto and HMQ*, 2014 ONSC 305 at para 32), “incentive payments/awards” (*Wiggins v Mattel*, 2011 ONSC 2964 at para 31), and “performance honorarium” (*Baroch v Canada Cartage*, 2021 ONSC 7376 at para 23; *MacDonald et al v BMO Trust Company et al*, 2021 ONSC 3726 at para 56 [MacDonald]). These terms are generally interchangeable in the Ontarian case law and refer to a payment to the representative plaintiff for their service to the class. “Compensation” in the Ontario case law can mean a general payment for service (courts sometimes refer to *quantum meruit*, a principle discussed further below) or reimbursement for time and expenses (*Windisman*, *supra* note 15 at para 36).

<sup>50</sup> Rubenstein, *supra* note 15 at section 17.2.



I will be using the term ‘additional payments’ (coined by Vince Morabito)<sup>51</sup> because it makes no assumptions about what the payments are for. A major contribution of this article will be undoing the conceptual threads that have become entangled as courts have struggled to make sense of this subject; it will provide a clear and accessible account of the bases for additional payments, and which of these bases are normatively preferable given the objectives of class proceedings legislation.

## **Section II – Should Additional Payments be Awarded at All?**

In Ontario, as elsewhere, the proliferation of additional payments to representative plaintiffs has resembled “dandelions on an unmowed lawn – present more by inattention than by design.”<sup>52</sup> While judges often (but do not always) consider the case-specific facts that would support such payments, and even the policy arguments in favour, they rarely consider the legal authority for making them. Where they do, they acknowledge that such authority is minimal.<sup>53</sup> The case law from Canada, the US, and elsewhere reveals that “the judiciary has created these awards out of whole cloth.”<sup>54</sup>

This section reviews the jurisprudence from Ontario and elsewhere, as well as the normative goals of class proceedings, to answer the question of whether additional payments should be awarded at all. As noted in the opening of this article, this question is inextricably linked to the question of what class proceedings are for, and to what extent they should depart from the traditional rules of civil litigation. Canadian courts and legislatures have never fully resolved this question, and the resulting conceptual confusion has seeped into the jurisprudence on additional payments.

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<sup>51</sup> Morabito 2014, *supra* note 10. Although the article’s title refers to “additional compensation”, the term “additional payments” is used throughout.

<sup>52</sup> Rubenstein, *supra* note 15 at section 17.4.

<sup>53</sup> Windisman, *supra* note 15 at para 27.

<sup>54</sup> Rubenstein, *supra* note 15 at section 17.4.

(a) Normative Goals

The jurisprudence in Ontario and elsewhere indicates a spectrum of positions on the subject of additional payments. At the more restrictive end is the position that additional payments should not be made at all; towards the middle (but still restrictive) is the position that such payments should only be made in exceptional circumstances; and at the more liberal end is the position that such payments should be made whenever the representative plaintiff has provided competent service coupled with results to the class. While the majority of decisions on additional payments in Ontario occupy the middle of the spectrum, the province's Divisional Court is currently considering the appeal of a decision at the restrictive end.

*Doucet v The Royal Winnipeg Ballet*<sup>55</sup> is the only Canadian decision in which the court refused to award an additional payment on the basis that such payments should not be made at all. Justice Perell considered the Ontario case law as well as the representative plaintiffs' submissions regarding their exceptional efforts, and decided that the practice of making additional payments "should be stopped as a matter of principle."<sup>56</sup> He stated that the practice is contrary to the administration of justice because it involves paying litigants for providing legal services and appearing as witnesses; it gives the appearance that the representative plaintiff's contribution is tainted by self-interest; there is no way of testing the evidence in support of the honorarium request; and the practice is "repugnant" and "tawdry" because the honorarium request is dwarfed by the fee request, and it creates a grading of the plaintiff's contribution in comparison to other class actions.<sup>57</sup>

Justice Akbarali's decision in *Redublo v CarePartners* occupies the more liberal end of the spectrum,<sup>58</sup> following the BC Court of Appeal's approach in *Parsons*.<sup>59</sup> Her Honour held that additional payments advance the three normative goals of the CPA<sup>60</sup> by incentivizing representative plaintiffs to step

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<sup>55</sup> *Supra* note 5.

<sup>56</sup> *Ibid* at para 58.

<sup>57</sup> *Ibid* at para 61.

<sup>58</sup> *Redublo*, *supra* note 5 at para 114.

<sup>59</sup> *Parsons*, *supra* note 26 at para 21.

<sup>60</sup> See the text accompanying note 22.

forward and to monitor class counsel, compensating them for being the ‘face’ of the class action and for expending time and money for the sake of the class.<sup>61</sup> She took direct issue with Justice Perell’s characterization of the practice as “tawdry” or that it amounts to paying a litigant for legal services; she also held that his concerns regarding self-interest and the testing of evidence could be managed by court scrutiny and the use of a trauma-informed approach.<sup>62</sup>

These differing views on the issue of additional payments reflect disagreements on the role of class actions generally. The adjectival view of class actions holds that they are procedural in nature and should not depart from the traditional rules of civil litigation.<sup>63</sup> In the same vein, Justice Perell objected to additional payments to litigants for the provision of legal services, or for being a witness at discovery or trial, on the grounds that such practices are contrary to the administration of justice.<sup>64</sup> If class actions are seen as merely an expansion of traditional civil litigation, then departures from the traditional rules will be seen as undesirable.<sup>65</sup> As Vince Morabito has stated, “[r]estrictive 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.”<sup>66</sup>

On the other hand, if class actions are seen as a vehicle for bringing about societal change and holding wrongdoers to account (the regulatory view), then departures from the rules of traditional civil litigation will be acceptable in order to achieve this end. Justice Akbarali implicitly endorsed this view when she stated that, “[h]onoraria serve to encourage a representative plaintiff to take on obligations and risks out of proportion to her damages to ensure defendants are held to account.”<sup>67</sup>

Conflicting approaches to class proceedings explain the conflicting approaches to additional payments. Courts in Ontario have been more comfortable with making such payments on the basis of some

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<sup>61</sup> *Redublo*, *supra* note 5 at para 111.

<sup>62</sup> *Ibid* at para 112.

<sup>63</sup> Marcus, *supra* note 1 at 4-11.

<sup>64</sup> *Doucet*, *supra* note 5 at para 61.

<sup>65</sup> Although there are numerous examples of such a departure, for example *cy-près* distributions, aggregate damages, and opt-out classes.

<sup>66</sup> Morabito 2014, *supra* note 10 at 354.

<sup>67</sup> *Redublo*, *supra* note 5 at para 111.

concept of restitution, because this can be explained within the traditional framework of civil litigation. They have been less comfortable with incentivizing plaintiffs or rewarding them for their service,<sup>68</sup> which does not have a parallel within the policy of the administration of justice, as Justice Perell noted.<sup>69</sup>

This reluctance to stray outside the bounds of traditional civil litigation also explains why courts in Ontario and several other Canadian jurisdictions have required that the representative plaintiff's contribution be exceptional or extraordinary to warrant an additional payment.<sup>70</sup> In *Windisman v Toronto College Park Ltd*, the first decision on additional payments in Ontario, Sharpe J stated that such payments can be made where the representative plaintiff shows that they rendered "active and necessary assistance" that "resulted in monetary success for the class", but cautioned that "such awards should not be seen as routine."<sup>71</sup> Nevertheless, he did not require extraordinary or exceptional service. This requirement appeared in the 2006 case of *Garland v Enbridge Gas*, where Justice Cullity stated that "compensation is to be awarded only where the representative's contribution is greater than that which would normally be expected of a representative party ... It will often be indicated – and, perhaps, usually – by an extraordinary commitment of time and effort".<sup>72</sup> Several decisions have indicated that this requirement will be applied more strictly where the settlement proceeds are distributed entirely *cy-près*.<sup>73</sup>

In *Robinson v Rochester Financial Limited*, Justice Strathy listed six factors that courts should consider when determining exceptionality:<sup>74</sup>

- (i) active involvement in the initiation of the litigation and retainer of counsel;
- (ii) exposure to a real risk of costs;

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<sup>68</sup> Only one honorarium decision in Ontario mentions the term 'incentive' in the positive sense: *Redublo*, *supra* note 5 at para 111.

<sup>69</sup> *Doucet*, *supra* note 5 at para 61. Nagareda, *supra* note 48 at 1488, has articulated the distinction between restitution and reward; Morabito 2014, *supra* note 10 at 353, notes that this dual purpose of 'incentive awards' in the US has been one of the reasons for conflicting rulings on additional payments in that country.

<sup>70</sup> Warren K Winkler *et al*, *The Law of Class Actions in Canada* (Toronto: Canada Law Book, 2014) at 153-154.

<sup>71</sup> *Windisman*, *supra* note 15 at para 28.

<sup>72</sup> *Garland v Enbridge Gas Distribution Inc*, 2006 CanLII 41291 (ONSC) at para 43 [*Garland*].

<sup>73</sup> *Cappelli*, *supra* note 23 at para 39; *Park*, *supra* note 23 at para 86; *Robinson II*, *supra* note 23 at para 97; *Sutherland v Boots Pharmaceutical PLC*, [2002] OJ No 1361 at para 22 (SCJ) [*Sutherland*]. See also *Welsh v Ontario*, 2018 ONSC 3217, where Justice Perell refused to award an honorarium where only 10 per cent of the student class members and none of the family class members would receive benefits (even indirectly) under the settlement agreement.

<sup>74</sup> *Robinson v Rochester Financial Limited*, 2012 ONSC 911 at para 43 [*Robinson*].

- (iii) significant personal hardship or inconvenience in connection with the prosecution of the litigation;
- (iv) time spent and activities undertaken in advancing the litigation;
- (v) communication and interaction with other class members; and
- (vi) participation at various stages in the litigation, including discovery, settlement negotiations and trial.

In *Redublo*, Justice Akbarali disagreed that payments should only be made where there is an exceptional contribution, but adopted the factors above in determining quantum. She also stated that the following should be considered:<sup>75</sup>

- (vii) Did the representative plaintiff suffer direct financial losses or incur out-of-pocket costs that she would not have incurred as an individual litigant?
- (viii) Did the representative plaintiff take on a role that was extraordinarily onerous, or potentially traumatic, or that put her at risk of suffering additional harms?
- (ix) How does the settlement or judgment benefit the class?
- (x) Is the proposed honorarium an amount that does not create an actual or perceived conflict with the class?
- (xi) Are there objectors to the proposed honorarium and if so, what are the nature of their objections?

Unfortunately, the courts have applied these factors inconsistently.<sup>76</sup> This is partly because the courts disagree or are unclear on the purpose of these factors: are they intended to provide guidance on whether the service is exceptional and therefore whether payment should be awarded at all,<sup>77</sup> or are they meant to guide the court on the quantum of such payments? Some courts have rejected the requirement that the representative plaintiff's service be exceptional, yet have still applied the above factors when determining quantum.<sup>78</sup> Others have agreed that exceptional service is required, but apply the above factors as part of

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<sup>75</sup> *Redublo*, *supra* note 5 at para 114.

<sup>76</sup> *Morabito* 2014, *supra* note 10 at 366, 373-376.

<sup>77</sup> *Robinson*, *supra* note 74 at para 43; *Hodge v Neinstein*, 2019 ONSC 439 at para 50 [*Hodge*]; *Kaplan v PayPal CA Limited*, 2021 ONSC 1981 at paras 95-102 [*Kaplan*]; *Cannon v Funds for Canada Foundation*, 2017 ONSC 2670 at paras 13-18 [*Cannon*]; *Makris*, *supra* note 23 at paras 37-46; *Robinson II*, *supra* note 23 at paras 99-100; *Charette v Trinity Capital Corporation*, 2019 ONSC 3153 at paras 89-97 [*Charette*]; *Walmsley v 2016169 Ontario Inc*, 2020 ONSC 1416 at paras 48-50 [*Walmsley*]; *Cappelli*, *supra* note 23 at paras 37-40; *Park*, *supra* note 23 at paras 87-92; *Robertson v ProQuest Information and Learning LLC*, 2011 ONSC 2629 at para 79.

<sup>78</sup> *Redublo*, *supra* note 5 at para 114; *Seed v Ontario*, 2017 ONSC 3534, at paras 18-20 [*Seed*].

a global assessment of exceptionality and quantum.<sup>79</sup> Analyses of quantum tend to be perfunctory and vague.

The subject of additional payments to representative plaintiffs has not yet received direct appellate treatment in Ontario, although the Court of Appeal has implicitly confirmed the propriety of such payments. In *Smith Estate v National Money Mart Company*, the Court confirmed that additional payments should be paid from the settlement fund and not from class counsel fees, as the latter “raises the spectre of fee-splitting”.<sup>80</sup>

Canadian common-law jurisdictions other than BC and Ontario have followed Ontario’s ‘exceptional contribution’ requirement.<sup>81</sup> This includes the Federal Court,<sup>82</sup> Nova Scotia,<sup>83</sup> and Newfoundland and Labrador.<sup>84</sup> In fact, *Redublo* is the only decision outside of BC to cite with approval the *Parsons* approach of competent service coupled with positive results.<sup>85</sup> However, the ‘exceptional contribution’ requirement has numerous flaws, not least the inconsistent and opaque manner with which it is applied.

Jurisdictions outside of common-law Canada have also pursued divergent approaches to the issue of additional payments. In Québec, a September 2020 decision of the Court of Appeal held that honoraria cannot be awarded in that province, because the indemnity provided for in article 593 of the *CCP* does not include compensation for the representative plaintiff’s time and effort.<sup>86</sup> Although the indemnity provision only came into existence with the new *CCP* on January 1, 2016, the Court noted that honoraria were not

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<sup>79</sup> *Kalra v Mercedes Benz*, 2022 ONSC 941 at paras 34-40 [*Kalra*]; *Aps*, *supra* note 23 at paras 42-46; *Goyal v Niagara College of Applied Arts and Technology*, 2020 ONSC 739 at paras 41-43; *McIntosh v Takata Corporation*, 2020 ONSC 968 at paras 40-42; *Rezmoves v Hohots*, 2020 ONSC 5595 at paras 44-47 [*Hohots*].

<sup>80</sup> *Smith Estate v National Money Mart Company*, 2011 ONCA 233, at para 135 [*Smith Estate*].

<sup>81</sup> *Robinson*, *supra* note 74 at para 43.

<sup>82</sup> *Lin v Airbnb, Inc*, 2021 FC 1260 at paras 118-120 [*Lin*]; *Tk’emlúps te Secwepemc First Nation v Canada*, 2021 FC 1020 at para 46 [*Tk’emlúps*]; *Toth v Canada*, 2019 FC 125 at para 96 [*Toth*]; *Merlo v Canada*, 2017 FC 533 at para 73 [*Merlo*]; *McCrea v Canada*, 2019 FC 122 at paras 83-84 [*McCrea*]; *McLean v Canada*, 2019 FC 1077 at para 57.

<sup>83</sup> *Sweetland v Glaxosmithkline Inc*, 2019 NSSC 136 at para 44.

<sup>84</sup> *Anderson v Canada (Attorney General)*, 2016 CanLII 76817 (NLSC) at paras 79-84 [*Anderson*].

<sup>85</sup> Although several have adopted the requirement in *Parsons*, *supra* note 26 at paras 19 and 22, that honoraria be modest and proportionate to the benefits flowing to the class, eg *Lin*, *supra* note 82 at para 121.

<sup>86</sup> *Attar*, *supra* note 24. In multijurisdictional class proceedings in Canada, certain courts have declined to award honoraria to representative plaintiffs in other parts of the country, on the basis that the Quebec representative plaintiffs are not eligible to receive honoraria and it would be unfair to treat them unequally: *Hello Baby Equipment Inc v Bank of Montreal*, 2021 SKQB 316; *Coburn and Watson’s Metropolitan Home v Bank of Montreal*, 2021 BCSC 2398.

available previously either.<sup>87</sup> It relied on a 2008 decision in which the Court of Appeal maintained the ban on remuneration in order to avoid turning the representative plaintiff's role into a money-making one and to avoid real or apparent conflicts of interest.<sup>88</sup> The new indemnity provision was intended to temper the effects of the 2008 judgment and allow for compensation for disbursements, fees, and legal costs, but that did not include compensation for the plaintiff's time and effort.<sup>89</sup>

In the US, 'incentive payments' are made in around three-quarters of US class actions and average between \$10,000-15,000 per representative plaintiff.<sup>90</sup> However, there is currently a Circuit Court split on the propriety of such payments. The 11<sup>th</sup> circuit in *Johnson v NPAS Solutions* held that, based on two US Supreme Court decisions from the 1880s,<sup>91</sup> the representative plaintiff cannot recover a salary or personal expenses from the amount recovered for the class (the "common fund") because it could potentially create a conflict of interest.<sup>92</sup> The Court held that modern-day incentive payments are equivalent to a salary (they are intended to compensate representative plaintiffs for their time), but they are also a bounty (they exist to promote litigation by providing a prize to be won).<sup>93</sup> In addition, the Court noted that Rule 23 of the *FRCP* is silent on this issue.<sup>94</sup> As a result, the Court held that incentive payments should not be permitted.<sup>95</sup> The dissent held that, in light of the case law from across the US and *obiter* reasoning from the 11<sup>th</sup> circuit, incentive awards are permissible provided that there is no marked disparity between the treatment of the representative plaintiff and the class members.<sup>96</sup> More recently, the 2<sup>nd</sup> Circuit Court of Appeals held that additional payments "are likely impermissible under Supreme Court precedent" and that the basis for them is "at best dubious",<sup>97</sup> citing one of the Supreme Court decisions relied upon in *Johnson*.

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<sup>87</sup> *Attar*, *supra* note 24 at para 10, citing *Association for the Protection of Savers and Investors of Quebec (APEIQ) c Ontario Public Service Employee's Union Pension Plan Trust Fund*, 2008 QCCA 1132 [APEIQ].

<sup>88</sup> *Attar*, *supra* note 24 at paras 12-13, citing APEIQ, *supra* note 87 at para 19.

<sup>89</sup> *Attar*, *supra* note 24 at paras 14-20.

<sup>90</sup> Rubenstein, *supra* note 15 at sections 17.1, 17.7, 17.8.

<sup>91</sup> *Greenough and Pettus*, *supra* note 28.

<sup>92</sup> *Johnson*, *supra* note 27 at 21.

<sup>93</sup> *Ibid* at 23.

<sup>94</sup> *Ibid* at 39-40.

<sup>95</sup> *Ibid* at 23-25.

<sup>96</sup> *Ibid* at 37-38, citing *Holmes v Continental Can Co*, 706 F2d 1144 (11th Cir 1983).

<sup>97</sup> *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 2023 WL 2403615 (2nd Cir 2023) at 34, 39 [Interchange Fee]. The court used the term 'service awards'.

On the other side of the split, the 6<sup>th</sup> Circuit decision of *Shane Group v Blue Cross* held that incentive awards do not amount to an unlawful “bounty” and that such an award is proper where the payments correlate with the amount of time the plaintiffs have spent advancing the case.<sup>98</sup> Last year, the 2<sup>nd</sup> Circuit held that the “common fund” doctrine established in *Greenough and Pettus* “allows reasonable incentive payments to class representatives but not ‘special rewards’.”<sup>99</sup> According to the Court, as long as incentive payments are reasonable and do not amount to a “preferred position in the settlement”, they can be awarded.<sup>100</sup> The subject of incentive awards still awaits direct consideration by the US Supreme Court.<sup>101</sup> In light of the petitions that have been filed to the Supreme Court to review the 11<sup>th</sup> and 2<sup>nd</sup> Circuit decisions discussed above, this consideration is likely to come sooner rather than later.

In Australia, there appears to be no recent controversy as exists in Ontario and the US. At the Federal Court level, courts have justified additional payments to representative plaintiffs “on the basis of the expenses incurred in, and the time devoted to, the prosecution of the litigation by class representatives and some of the class members.”<sup>102</sup> The underlying judicial philosophy is that it is *prima facie* reasonable that parties who have incurred time and expenses in prosecuting the proceeding should be able to look to the corpus of the settlement funds for reimbursement.<sup>103</sup>

It can be seen, therefore, that there are numerous approaches to the question of whether and in what circumstances additional payments should be made to representative plaintiffs. Justice Perell in *Doucet* and Justice Akbarali in *Redublo* both broke away from the ‘exceptional contribution’ requirement in Ontario, the Federal Court, Nova Scotia, and Newfoundland and Labrador. Justice Perell has adopted Québec’s approach of not allowing honoraria at all, while Justice Akbarali has adopted BC’s approach of competent service coupled with positive results. The approach that will be followed by the Divisional

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<sup>98</sup> *Shane*, *supra* note 33. Certain lower courts have also declined to follow *Johnson*, eg *Somogyi v Freedom Mortgage Corp*, F Supp (3d) 337 (D NJ 2020).

<sup>99</sup> *Apple*, *supra* note 32 at 12.

<sup>100</sup> *Ibid* at 12-13.

<sup>101</sup> 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 Legal Ethics* 873 at 875 [Sperle].

<sup>102</sup> Morabito Australia 2014, *supra* note 48 at 183.

<sup>103</sup> *Ibid* at 183-184, citing *Milfull v Terranora Lakes Country Club Ltd* [2006] FCA 801 at para 76 [Milfull].



Court in Ontario, and whether the Supreme Court of Canada will consider this issue, remains to be seen. What is certain, however, is that in many cases the inconsistent approaches to the question of additional payments arise from disagreements as to their theoretical basis.

(b) Concerns About Additional Payments

What of the concerns discussed by Justices Perell and Akbarali? Justice Perell objected to additional payments to representative plaintiffs on the grounds of evidence, unseemliness, and ethics. These will be discussed in turn.

With regard to evidence, Justice Perell noted that, “[p]ractically speaking, there is no means to testing the genuineness and the value of the Representative Plaintiff’s or Class Member’s contribution” because class counsel have no reason not to ask for the payment, and courts and class members are reluctant to question the bravery and efforts of the representative plaintiff. Affidavits submitted in support of the request have become *pro forma* and there is no cross-examination.<sup>104</sup> In response, Justice Akbarali stated that courts are able to test the reasonableness of class counsel fees and settlements, “even though they arise outside of an adversarial context”, and can do the same with requests for additional payments, using similar tools.<sup>105</sup> However, the ability of the courts to meaningfully assess the reasonableness of fees and settlements has long been questioned, precisely due to the non-adversarial nature of that stage of the proceedings.<sup>106</sup> The problems that arise at settlement and fee approval – potential for collusion between plaintiff and defence counsel, *pro forma* evidence, a desire by the court to approve the settlement – also arise when approving requests for additional payment.<sup>107</sup> These evidentiary difficulties will be addressed in Section III.

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<sup>104</sup> *Doucet*, *supra* note 5 at para 61. His Honour also expressed these concerns in *Eidoo v Infineon Technologies AG*, 2015 ONSC 2675 at para 20.

<sup>105</sup> *Redublo*, *supra* note 5 at para 112.

<sup>106</sup> Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (Vancouver: UBC Press, 2018) at 97 [*Class Actions in Canada*].

<sup>107</sup> These issues have also been noted by the Australian judiciary: *Darwalla Milling Co Pty Ltd v Hoffman-La Roche Ltd (No 2)* [2006] FCA 915 at para 75 [*Darwalla No 2*]. In some US courts, judicial scrutiny of incentive awards has become so rigorous that there is a general presumption against making such awards at all: Charles R Korsmo & Minor Myers, “Lead Plaintiff Incentives in Aggregate Litigation” (2019) 72:6 *Vanderbilt L Rev* 1923 at 1935 [Korsmo].

With regard to the potential unseemliness of additional payments, Justice Perell called the practice “tawdry” because any honorarium would be dwarfed by the size of the counsel fee, and it would create a “repugnant” grading and pricing of the contribution of the representative plaintiff.<sup>108</sup> Justice Akbarali responded by stating that each case turns on its own facts, and that if a representative plaintiff is seeking an additional payment, she presumably does not find the practice dishonourable or tawdry.<sup>109</sup> Justice Perell’s holding reflects the discomfort that many courts feel towards putting a price tag on a litigant’s efforts. The possibility that litigants might make a profit is seen as even more repugnant.<sup>110</sup> Courts in Ontario have held that “[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”.<sup>111</sup> Yet, if the representative plaintiff’s service is taken into account, an additional payment would not lead to personal gain over and above that of other class members. It would actually ensure that plaintiffs are treated equally, “reward[ing them] both for the value of their claims (like other class members) but also for their unique service to the class.”<sup>112</sup>

The main concerns exhibited in the case law, however, focus on ethics: that additional payments have the potential to create conflicts of interest.<sup>113</sup> Justice Winkler stated in *Tesluk v Boots Pharmaceutical PLC* that additional payments should be awarded “sparingly”<sup>114</sup> and purely on a compensatory basis, because to give a representative plaintiff benefits over and above those awarded to class members raises the spectre of a conflict of interest between the two.<sup>115</sup> A condition of certification in the *CPA* and other Canadian class proceedings statutes is that the representative plaintiff would fairly and adequately

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<sup>108</sup> *Doucet*, *supra* note 5 at para 61.

<sup>109</sup> *Redublo*, *supra* note 5 at para 112.

<sup>110</sup> *Korsmo*, *supra* note 107 at 1934, 1974-1975.

<sup>111</sup> *Tesluk v Boots Pharmaceutical PLC* (2002), 113 ACWS (3d) 768 (Ont Sup Ct) at para 22 [*Tesluk*]; *Toronto Community Housing Corporation v Thyssenkrupp Elevator (Canada) Limited*, 2012 ONSC 6626 at para 45 [*TCHC*]; *Markson v MBNA Canada Bank*, 2012 ONSC 5891 at para 59 [*Markson*].

<sup>112</sup> Rubenstein, *supra* note 52 at section 17.3.

<sup>113</sup> *Doucet*, *supra* note 5 at para 61.

<sup>114</sup> *Tesluk*, *supra* note 111 at para 22.

<sup>115</sup> *Ibid.*

represent the interests of the class and “does not have, on the common issues for the class, an interest in conflict with the interests of other class members.”<sup>116</sup>

In *Tesluk*, the entire settlement was being distributed *cy-près* so that, if honoraria were awarded, the representative plaintiffs would be the only class members receiving monetary benefits.<sup>117</sup> Treating the representative plaintiffs so differently from other class members not only seems unfair in this context, but also raises the question of whether the plaintiffs consented to a suboptimal settlement in exchange for the additional payments.<sup>118</sup> This is what happened in the US case of *Radcliffe v Experian Info Solutions Inc*,<sup>119</sup> where the settlement agreement provided for awards of \$5,000 to each representative plaintiff, but only if they supported the settlement. The Ninth Circuit Court of Appeals held that this removed a critical check on the fairness of the settlement.<sup>120</sup> A less egregious US example is *Rodriguez*,<sup>121</sup> where the initial retainer agreement obliged class counsel to seek additional payments for the representative plaintiffs on an upward sliding scale depending on the settlement or verdict amount, capped at \$75,000 for an amount of \$10 million or more. The Ninth Circuit held that this threshold misaligned the interests of the representatives and the class, because after it was reached, the representatives would have no interest in pursuing a settlement for a higher amount.<sup>122</sup> The court disapproved of advance agreements to seek incentive awards as a general proposition, because of their tendency to create conflicts of interest between representative plaintiffs, their counsel, and class members.<sup>123</sup>

While the Canadian case law on additional payments does not offer such stark examples, courts have been careful to keep payments modest in order to avoid the prospect of a conflict of interest.<sup>124</sup> The BC Court of Appeal in *Parsons* refused to award an additional payment of \$10,000 because “it could create

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<sup>116</sup> *CPA*, *supra* note 2, s 5(1)(e)(i) and (iii).

<sup>117</sup> *Tesluk*, *supra* note 114 at para 21.

<sup>118</sup> *Sperle*, *supra* note 101 at 878.

<sup>119</sup> *Radcliffe v Experian Info Solutions Inc*, 715 F3d 1157 (9th Cir 2013).

<sup>120</sup> *Ibid* at 1165; Rubenstein, *supra* note 15 at sections 17.16, 17.17.

<sup>121</sup> *Rodriguez v West Publishing Corp*, 563 F3d 948 (9th Cir 2009) [*Rodriguez*].

<sup>122</sup> *Ibid* at 959.

<sup>123</sup> *Ibid* at 959-960; Rubenstein, *supra* note 15 at section 17.15.

<sup>124</sup> *Parsons*, *supra* note 26 at paras 20-22.

an appearance of a conflict of interest to award such a significant sum”.<sup>125</sup> Instead, it approved a payment of \$3,500, in accordance with “the more modest sums reflected in other British Columbia cases”.<sup>126</sup> The Court also cautioned that payments must not only be modest, but also proportionate “to the benefit derived by the class members, the effort of the representative plaintiff, and the risks assumed by the representative plaintiff.”<sup>127</sup> If a payment is modest and proportionate, so the reasoning goes, then representative plaintiffs will not receive significantly more than other class members (thus avoiding the appearance of a conflict), and they will be less tempted to ‘sell out’ the class members by agreeing to a suboptimal settlement (thus avoiding an actual conflict).<sup>128</sup> Justice Akbarali followed this reasoning in *Redublo*.<sup>129</sup> The difficulty with the ‘modest and proportionate’ approach, however, is that it provides no principled guidance on the issue of quantum, as discussed in Section III(b).

Courts in Ontario and elsewhere have also emphasised that the representative plaintiff role should not be a profit-making venture. This is not only because of the potential for conflicts of interest, but also because representative plaintiffs are already required by statute to fairly and adequately represent the interests of the class and avoid conflicts of interest.<sup>130</sup> Several courts have held that representative plaintiffs should not be paid simply because they have done what is expected of them.<sup>131</sup> This also implicates the inherent conservatism of courts and the ‘adjectival’ view that class proceedings should not depart from the traditional rules of civil litigation.

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<sup>125</sup> *Ibid* at para 24.

<sup>126</sup> *Ibid* at para 25.

<sup>127</sup> *Ibid* at para 19.

<sup>128</sup> *Ibid* at paras 19 and 22; *Aps*, *supra* note 23 at paras 5, 42-46; Rubenstein, *supra* note 15 at section 17.18; Sperle, *supra* note 101 at 878; Korsmo, *supra* note 107 at 1932-1933; Morabito Australia 2014, *supra* note 48 at 196; Nantiya Ruan, “Bringing Sense to Incentives: An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions” (2006) 10:2 *Emp Rts & Emp Pol’y J* 395 at 418-420 [Ruan]; Richard M Eittrheim *et al*, “Ethical Issues in the Settlement of Complex Litigation” (2005) 41:1 *Tort Trial & Ins Prac LJ* 21 at 36-38; Jason Jarvis, “A New Approach to Plaintiff Incentive Fees in Class Action Lawsuits” (2020) 115:3 *Northwest Univ L Rev* 919 at 938-942 [Jarvis].

<sup>129</sup> *Redublo*, *supra* note 5 at paras 112, 120.

<sup>130</sup> *CPA*, *supra* note 2, s 5(1)(e)(i) and (iii).

<sup>131</sup> *McCarthy v Canadian Red Cross Society*, 2007 CanLII 21606 (ONSC) at para 19 [*McCarthy*]; *Cappelli*, *supra* note 23 at para 38; *Park*, *supra* note 23 at para 84; *Bellaire v Daya*, 2007 CanLII 53236 (ONSC) at para 71; *Baker (Estate) v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105 at para 95 [*Baker*].

As Justice Akbarali noted in *Redublo*, however, there are ways in which “the court [can] have confidence that the representative plaintiff’s instructions are not tainted by self-interest.”<sup>132</sup> These include requiring notice of honoraria to be given to the class, and requiring compelling evidence from class counsel and the representative plaintiff.<sup>133</sup> Such evidence, as discussed in Section III, should consist of timesheets and expenses relating to the efforts the representative plaintiff has expended on behalf of the class. In addition, plaintiffs could be paid periodically throughout the litigation.<sup>134</sup> This would make the plaintiff less likely to accept a suboptimal settlement in exchange for a lump sum additional payment.<sup>135</sup>

Concerns about conflicts of interest exist in tension with the notion that representative plaintiffs who have performed a useful service for the class deserve to be compensated.<sup>136</sup> The next section will discuss the theoretical grounds on which courts have justified the making of additional payments, before moving on to the issue of quantifying those payments.

### **Section III – Basis and Quantum**

It is rare for a Canadian court to take the position that, as a matter of principle, additional payments to representative plaintiffs should not be made at all.<sup>137</sup> More commonly, inconsistencies arise when courts discuss the basis for additional payments, as well as their quantum. The first part of this section will consider the theoretical bases on which additional payments have been justified. The second addresses issues of quantum and the source of such payments.

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<sup>132</sup> *Supra* note 5 at para 112.

<sup>133</sup> *Ibid.* Notices should also include details of the requested amounts: Morabito 2014, *supra* note 10 at 377-382.

<sup>134</sup> They could be paid by class counsel, with court approval, and counsel could eventually be reimbursed from the funds available to the class at settlement or judgment.

<sup>135</sup> NZLC Report, *supra* note 40 at para 3.77.

<sup>136</sup> *Parsons*, *supra* note 26 at para 9.

<sup>137</sup> The exceptions are Justice Perell’s decision in *Doucet*, *supra* note 5, and the Québec courts’ interpretation of article 593 of the *CCP*, *supra* note 25.

(a) Theoretical justifications for additional payments

When it comes to theoretical analysis of the issue of additional payments, the Canadian jurisprudence is remarkably thin. It is also inconsistent. Theoretical justifications differ between Canadian decisions, and in many decisions are not discussed at all. Vince Morabito has noted the problem in Ontario of unreported honorarium awards (either the settlement approval decision has not been published, or it has been published but does not discuss the subject of additional payments) and unexplained honorarium awards (where the decision discusses additional payments, but not the reasons for granting or denying them),<sup>138</sup> stating that 29% of awards are unreported and a further 14% are unexplained.<sup>139</sup> This section will consider the decisions that *do* explain the theoretical justifications, and the various justifications on which they rely. Many of the conflicting views about the bases for additional payments arise from differing perspectives about the goals of class proceedings in general.

i. Restitution: *Quantum Meruit*

The most frequent justification for approving additional payments is on the basis of *quantum meruit*.<sup>140</sup> In *Windisman*, Justice Sharpe acknowledged that ordinary plaintiffs are not compensated for their time and effort in pursuing the litigation, but that a representative plaintiff in a class action is different because

The representative plaintiff undertakes the proceedings on behalf of a wider group and that wider group will ... 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.<sup>141</sup>

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<sup>138</sup> Eg *Bratton v Samsung Electronics Co Ltd*, 2015 ONSC 7786.

<sup>139</sup> Morabito 2014, *supra* note 10 at 366-367.

<sup>140</sup> The most recent Ontario decisions to rely on *quantum meruit* are *Redublo*, *supra* note 5 at paras 103-104; *Hohots*, *supra* note 79 at para 9; *Hodge*, *supra* note 77 at para 48; *Haikola v The Personal Insurance Company*, 2019 ONSC 5982 at para 110. The most recent in BC are *Sherry v CIBC Mortgage Inc*, 2022 BCSC 676 at para 46; *Thomas v ByteDance Ltd, Tiktok Ltd*, 2022 BCSC 297 at para 52; *Chartrand v Google LLC*, 2021 BCSC 7 at para 67; *Cardoso v Canada Dry Mott's Inc*, 2020 BCSC 1569 at para 43 [*Cardoso*].

<sup>141</sup> *Windisman*, *supra* note 15 at para 28.

This ‘free rider’ problem is also discussed in the US literature. Richard Nagareda explains that additional payments aim to prevent the unjust enrichment of the class by “seek[ing] to account for costs and risks uniquely borne by the award recipient for the benefit of absent class members.”<sup>142</sup> The additional payment to the representative plaintiff is therefore justified on *quantum meruit* grounds<sup>143</sup> – the plaintiff performed services and obtained a benefit for the class, and is therefore entitled to “a modest award [that] is consistent with restitutionary principles”.<sup>144</sup>

However, some Ontario judges have objected to this approach on the basis that there is no distinction between a plaintiff in ordinary litigation and a representative plaintiff in a class action. Justice Lederman in *Kerr v Danier Leather Inc* stated that the representative plaintiff “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.”<sup>145</sup> Such reasoning carries echoes of the adjectival approach, which holds that class actions should not depart from the traditional rules of civil litigation.

Another objection to the *quantum meruit* approach is that it says nothing about quantum. If a representative plaintiff has provided services and the class has benefited, then, in order to prevent the class unjustly enriching themselves at the plaintiff’s expense, the plaintiff must be paid the value of the services. However, as discussed below, the analysis on quantum in most Canadian decisions is perfunctory and usually consists of an approval in whole or in part of the amount requested by class counsel. The *quantum meruit* approach in itself provides no principled way of valuing the representative plaintiff’s contribution.

Most importantly, there is a question of whether the principle of *quantum meruit* applies at all. The leading US text on class actions argues that the principle does not quite fit in the context of additional

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<sup>142</sup> Nagareda, *supra* note 48 at 1486; Eisenberg, *supra* note 44 at 1313, 1315-1316; Rubenstein, *supra* note 15 at section 17.4; The American Law Institute, *Principles of the Law of Aggregate Litigation*, 21st ed (Washington, DC: Thomson Reuters, 2022) at section 1.05 [*Principles of the Law of Aggregate Litigation*]; David Betson & Jay Tidmarsh, “Optimal Class Size, Opt-Out Rights, and Indivisible Remedies” (2011) 79:2 *Geo Wash L Rev* 542 at 548 [Betson].

<sup>143</sup> In the US, additional payments have also been justified on the basis of the common fund doctrine, which operates on similar lines to *quantum meruit* – where “a litigant recovers a common fund for the benefit of persons other than herself, she is entitled to recover some of the litigation expenses from the fund as a whole”: *Hadix v Johnson*, 322 F3d 895 at 898 (6th Cir 2003), cited in Morabito 2014, *supra* note 10 at 358; *Apple*, *supra* note 32 at 12.

<sup>144</sup> *Parsons*, *supra* note 26 at para 20.

<sup>145</sup> *Kerr v Danier Leather Inc*, 2005 CanLII 16619 (ONSC) at para 63. See also *Hodge*, *supra* note 77 at para 51; *Doucet*, *supra* note 5 at para 51.

payments, because the basic rule of unjust enrichment (under which *quantum meruit* falls) is that if the person who is enriched has not requested the payment or provision of services, then she is under no obligation to repay:<sup>146</sup> “If you dive into a lake and save a drowning person, you are entitled to no fee.”<sup>147</sup>

Canadian scholars on *quantum meruit* state that

[I]f a benefit has been conferred on the defendant this would appear not to suffice to ground recovery by the plaintiff in the absence of the essential elements of request or acquiescence, both of which entail knowledge on the part of the defendant in advance of what is done by the plaintiff.<sup>148</sup>

Given that most class members are unaware that they are involved in a class proceeding until it comes time to claim (and perhaps not even then), there is a strong argument that additional payments cannot be justified on *quantum meruit* grounds. Furthermore, when viewed from the perspective of unjust enrichment generally (which requires a gain by the defendant, a corresponding deprivation by the plaintiff, and a lack of juristic reason for the enrichment), the statutory obligation to “fairly and adequately represent the interests of the class”<sup>149</sup> arguably provides a juristic reason. The framework of *quantum meruit*, then, may not be the best way to justify additional payments to representative plaintiffs.

## ii. Compensation and Reimbursement: Time and Expenses

Courts and commentators have often categorized compensation for representative plaintiffs’ time and reimbursement for their expenses as *quantum meruit*.<sup>150</sup> However, as noted above, payments to additional plaintiffs do not easily fit that framework. Furthermore, while courts in Ontario have held that additional payments can cover or defray out-of-pocket expenses incurred in relation to the proceeding,<sup>151</sup> they have

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<sup>146</sup> Rubenstein, *supra* note 15 at section 17.4.

<sup>147</sup> *Matter of Continental Ill Sec Litigation*, 962 F2d 566 at 571 (7th Cir 1992).

<sup>148</sup> GHL Fridman, “*Quantum Meruit*” (1999) 37:1 Alberta L Rev 38 at 48 [emphasis added].

<sup>149</sup> CPA, *supra* note 2, s 5(1)(e)(i).

<sup>150</sup> In Canada, see *Windisman*, *supra* note 15 at para 28; in Australia, see Georgina Dimopoulos and Vince Morabito, “An Australian Perspective on the Judicial Review of Class Action Settlements” (2021) 29 NZULR 529 at 554 [Dimopoulos], citing *Smith v Commonwealth of Australia (No 2)* [2020] FCA 837 at para 30 [Smith].

<sup>151</sup> *Redublo*, *supra* note 5 at para 111; *Hodge*, *supra* note 77 at para 53; *Windisman*, *supra* note 15 at para 23; *Dow v 407 ETR Concession Company Limited*, 2016 ONSC 7086 at para 25; *Fraser v Falconbridge Ltd*, [2002] OJ No 2383 at para 17.



been divided on the practice of compensating plaintiffs for their time. Some judgments have stated that if the representative plaintiff had produced records of exceptional amounts of time spent on the case, then these might have been evidence of exceptional service.<sup>152</sup> However, in the cases where the representative plaintiff has produced timesheets, these have rarely been a major factor in the court's determination of whether the plaintiff's contribution was exceptional.<sup>153</sup> They have also not provided any basis for quantifying the honorarium except in the most general terms.<sup>154</sup> Even where the court has awarded an honorarium based on the plaintiff's timesheets and hourly rate, the quantum requested has been vastly (and somewhat arbitrarily) reduced.<sup>155</sup> Other decisions have expressed an aversion to paying representative plaintiffs on the basis of their time,<sup>156</sup> because they are usually not professional advisors and are merely fulfilling their statutory obligation to "fairly and adequately represent the interests of the class".<sup>157</sup>

This aversion has led to vastly reduced payments to representative plaintiffs in comparison to Australia,<sup>158</sup> where payments are routinely calculated on the basis of plaintiffs' time and expenses. The Australian approach appears to be much more pragmatic. In the first Australian decision in which an additional payment was awarded,<sup>159</sup> Justice Jessup of the Federal Court carefully considered the grounds for making such an award, but made no reference to *quantum meruit*. His Honour simply concluded that it was "*prima facie* reasonable that particular parties who have sacrificed valuable time and incurred

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<sup>152</sup> *Robinson II*, *supra* note 23 at para 100; *Peter v Medtronic, Inc*, 2020 ONSC 1687 at para 74; Markson, *supra* note 111 at para 70.

<sup>153</sup> *Robinson*, *supra* note 74 at paras 28, 43-44 (representative plaintiffs submitted evidence showing that they had each spent more than 300 hours assisting counsel, but service held not to be exceptional); *Sutherland*, *supra* note 73 at paras 19-21 (four representative plaintiffs each spent on average 100 hours of time for which they claimed at \$200/hr; court held the work was unnecessary and did not benefit the class because it began after settlement was structured); *Cannon*, *supra* note 77 at paras 13-18 (representative plaintiff spent more than 280 hours working on the case, but his opportunity costs, the financial risks to which he exposed himself, and his willingness to suffer notoriety, were equally important in decision to award \$50,000). An exception is *TCHC*, *supra* note 111 at paras 46-51, in which TCHC employees spent more than 500 hours on the case, although the court also considered TCHC's willingness to be exposed to an adverse costs award.

<sup>154</sup> *TCHC*, *supra* note 111 at para 50 (\$15,000 honorarium for more than 500 hours).

<sup>155</sup> *Windisman*, *supra* note 15 at paras 24-29 (honorarium request of \$13,275 based on a rate of \$125/hour reduced to \$4,000 based on \$40/hour); *Garland*, *supra* note 72 at paras 47-52 (honorarium request of \$95,000 reduced to \$25,000, but timesheets provided were found at para 49 to be "equivocal and insufficient").

<sup>156</sup> *McCarthy*, *supra* note 131 at paras 18, 20; *Kalra*, *supra* note 79 at para 36.

<sup>157</sup> *CPA*, *supra* note 2, s 5(1)(e)(i).

<sup>158</sup> Morabito 2014, *supra* note 10 at 382-383: "In Australia, the average award per representative plaintiff was \$36,751, while the median award per representative plaintiff was \$15,071 ... In Ontario, the average award per representative plaintiff was \$6,419, while the median award per representative plaintiff was \$3,500."

<sup>159</sup> *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* [2006] FCA 1388.

expenses in the interests of prosecuting this proceeding on behalf of group members as a whole should be able to look to the corpus of the settlement sum for some degree of compensation and reimbursement.”<sup>160</sup>

Most requests for additional payments in Australian class actions have followed this “time and efforts” approach.<sup>161</sup> They are routinely supported by detailed evidence regarding the time and expenses that representative plaintiffs have incurred. Time dockets are attached to sworn affidavits, and such dockets “are almost invariably generated from the solicitors’ billing software and then supplemented by additional time entries extracted from the relevant applicant’s time records.”<sup>162</sup> They contain details of the date the work was performed, the amount of time spent on each task (often in six minute increments), the hourly rate applied and the dollar amount relating to the task, a description of the work completed, and the source of the information.<sup>163</sup> Lawyers often describe the percentage of the work that relates to the class, as opposed to the representative plaintiff’s individual claim, as courts will only reimburse time that pertains to the former.<sup>164</sup> Where litigants have provided less precise accounts of time spent, the courts have applied a corresponding discount.<sup>165</sup> Timesheets are not used to determine whether a representative plaintiff’s contribution was exceptional; the plaintiff is simply reimbursed for the time she expended on behalf of the class.

The hourly rate in Australian proceedings has been calculated in a variety of ways.<sup>166</sup> The courts have generally calculated the hourly rate of that person in their field of employment,<sup>167</sup> presumably because of the opportunity costs of serving as representative plaintiff. Where the person is retired, “reliance has been placed on their qualifications and professional experience to arrive at hourly rates that were

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<sup>160</sup> *Ibid* at para 76.

<sup>161</sup> Morabito Australia 2014, *supra* note 44 at 183. Morabito notes that “time and efforts funds” have also been approved in several US class proceedings.

<sup>162</sup> *Ibid* at 192.

<sup>163</sup> *Ibid*.

<sup>164</sup> *Darwalla No 2*, *supra* note 107 at para 74; *Sutherland*, *supra* note 73 at paras 19-22 (Ontario court refused to award additional payment because the work performed did not benefit the class).

<sup>165</sup> *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia* [2011] FCA 277 at para 46; *Clime Capital Ltd v Credit Corp Group Ltd* [2012] FCA 218 at para 36, both cited in Morabito Australia 2014, *supra* note 48 at 193-194. This also occurred in *Garland*, *supra* note 72, at para 49.

<sup>166</sup> Morabito Australia 2014, *supra* note 48 at 198-201.

<sup>167</sup> *Ibid*.

commensurate with the hourly rates they would receive for providing consulting services in their fields of expertise.”<sup>168</sup> In Australia, this has led to hourly rates per individual ranging from \$26 to \$634.64.<sup>169</sup> In Canada, courts have approved hourly rates ranging from \$30<sup>170</sup> to around \$200-250.<sup>171</sup> The largest awards of additional payments in Ontario have in fact been to representative plaintiffs who have used their business expertise to benefit the class, and who have submitted evidence of the time they spent on the litigation.<sup>172</sup> However, the Canadian decisions rarely refer to the representative plaintiff’s usual rate of compensation.<sup>173</sup>

In the US, “[j]udges have encouraged lead parties to invest more heavily in litigation by reimbursing them for expenses incurred and time expended at reasonable hourly rates” and to reflect the additional responsibilities and burdens they bear.<sup>174</sup> Although most US courts have held that the *Private Securities Litigation Reform Act (PSLRA)* bars incentive awards,<sup>175</sup> representative plaintiffs in securities class actions have been reimbursed for “reasonable costs and expenses (including lost wages)”.<sup>176</sup> While some courts have required minimal documentation supporting such a request, thereby treating it more like an incentive award, others have required detailed evidence showing “actual costs and expenses ... directly relating to the representation of the class”<sup>177</sup> in a similar manner to the Australian courts.

The Australian approach is much more objective in terms of quantum, as discussed below. This is perhaps an explanation for the increased size of awards in comparison to Ontario – courts may be more comfortable with making larger awards when there is less guesswork. In addition, the “time and efforts”

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<sup>168</sup> *Ibid* at 199.

<sup>169</sup> *Ibid* at 200.

<sup>170</sup> *1176560 Ontario Ltd v Great Atlantic & Pacific Co of Canada Ltd*, 2004 CarswellOnt 6549 at para 8.

<sup>171</sup> *Charette*, *supra* note 77 at paras 57, 95-97 (each representative plaintiff devoted 200-300 hours to the case, and each was awarded \$50,000).

<sup>172</sup> *Ibid* at paras 57, 95-97; *Cannon*, *supra* note 77 at paras 13-18. Each representative plaintiff was awarded \$50,000 in both cases.

<sup>173</sup> An exception is *Windisman*, *supra* note 15 at para 29.

<sup>174</sup> *Principles of the Law of Aggregate Litigation*, *supra* note 142 at section 1.05.

<sup>175</sup> *Private Securities Litigation Reform Act*, 15 USC § 78u (1995), sections 4(a)(2)(A) and 4(a)(4).

<sup>176</sup> *Ibid*, section 4(a)(4).

<sup>177</sup> *Swack v Credit Suisse First Boston, LLC*, Fed Sec L Rep (CCH) P94, 106 (D Mass 2006).

approach allows for flexibility and consideration of the particular circumstances of each representative plaintiff.

a. Trauma and Hardship

Where a class action involves a traumatic occurrence such as institutional abuse, the representative plaintiff will almost certainly have to relive her experience. She may also face retaliation by the defendants, reputational damage,<sup>178</sup> or ‘trolling’ on social media.<sup>179</sup> This re-traumatization is sustained on behalf of the class, who can rely on the representative plaintiff’s efforts without having to recount their own stories.<sup>180</sup> In several class actions in Ontario and elsewhere, the representative plaintiff’s bravery has been reflected in the honorarium awarded by the court.<sup>181</sup> In this way, additional payments provide compensation for the non-financial costs that the representative plaintiff incurs in her re-traumatization and personal exposure. Justice Akbarali in *Redublo* supported this trauma-informed approach.<sup>182</sup>

This approach is also reflected in the Australian “time and efforts” framework. In *Smith*, Justice Lee of the Federal Court of Australia acknowledged the “distress and vexation” endured by one representative plaintiff and his family who had “been the subject of frequent and sustained abuse by disgruntled community members” because of the class proceeding.<sup>183</sup> Justice Lee approved of an additional payment based not only on the time expended by the representative plaintiff, but also on the

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<sup>178</sup> Such treatment is not limited to cases involving traumatic events – retaliation is particularly prone to occur in employment class actions: Ruan, *supra* note 128 at 397; Nagareda, *supra* note 48 at 1486. For Ontarian examples, see *Aps*, *supra* note 23 at paras 44-46, *MacDonald*, *supra* note 49 at paras 54-59, *Eklund v Goodlife Fitness Centres Inc*, 2018 ONSC 4146 at para 21, and *Phillip v Deloitte Management Services LLP et al*, 2023 ONSC 1210 at paras 13-17.

<sup>179</sup> An internet ‘troll’ attacks others in an inflammatory and mean-spirited way in order to elicit an emotional response. The representative plaintiffs in *Doucet*, *supra* note 5 were subject to this treatment: Plaintiff’s Appeal Factum (filed June 2, 2022) at para 39 (on file with author) [*Doucet* factum].

<sup>180</sup> *Redublo*, *supra* note 5 at para 111. However, class members may be called to provide evidence, as in *Doucet*, *supra* note 5 at para 57.

<sup>181</sup> *Yeo v Ontario*, 2021 ONSC 4534 at paras 42-43; *Seed*, *supra* note 78 at paras 18-20; *Dolmage v HMQ*, 2013 ONSC 6686 at paras 49-50 [*Dolmage*]; *McKillop and Bechard v HMQ*, 2014 ONSC 1282 at paras 41-43 [*McKillop*]; *Brazeau v Attorney General (Canada)*, 2019 ONSC 4721 at paras 34-35; *Johnston v The Sheila Morrison Schools*, 2013 ONSC 1528 at para 43 [*Johnston*]; *Tk’emlúps*, *supra* note 82 at paras 30-31; *Tk’emlúps te Secwépemc First Nation v Canada*, 2023 FC 357 at paras 51-58; *Merlo*, *supra* note 82 at paras 69-70; *TL v Alberta (Director of Child Welfare)*, 2015 ABQB 815 at para 35.

<sup>182</sup> *Redublo*, *supra* note 5 at para 111; *Seed*, *supra* note 78 at para 20.

<sup>183</sup> *Smith*, *supra* note 150 at paras 103-106.

“particular and special hardship” he had suffered in discharging his role.<sup>184</sup> With regard to Ontario, Vince Morabito has observed that the highest median and mean awards per representative plaintiff are in franchisor-franchisee cases, followed by systemic abuse claims against governments, because both types of cases involve risks of retaliation or retraumatization, “burdens and risks that are not normally faced in other types of class actions.”<sup>185</sup>

By contrast, Justice Perell in *Johnston v The Sheila Morrison Schools* recounted the courage of the representative plaintiffs in reliving their experiences of abuse, but then stated that, “[t]he honorarium is not an award but a recognition that the representative plaintiffs meaningfully contributed to the class members’ pursuit of access to justice.”<sup>186</sup> Several other decisions have made this distinction between ‘award’ and ‘recognition’.<sup>187</sup> These decisions do not explain the distinction, and some of them even refer, nonsensically, to the award of an amount that is not an award.<sup>188</sup> ‘Award’ and ‘recognition’ often mean the same thing in everyday usage. Presumably, however, these decisions are attempting to distinguish the term ‘award’ in its compensatory sense, and emphasise instead the symbolic nature of the additional payment.

In *Anderson*, a class action involving residential schools attended by Indigenous persons, the Supreme Court of Newfoundland and Labrador explicitly stated this when awarding \$10,000 to each representative plaintiff, as well as \$1,000 to each class member who testified at trial. This was “a largely symbolic payment appropriate for the other survivors who had the courage and fortitude to relive in Court the abuses they suffered”<sup>189</sup> and “[t]he largely symbolic honoraria are appropriate small tokens of recognition for that effort”.<sup>190</sup>

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<sup>184</sup> *Ibid* at para 94.

<sup>185</sup> Morabito 2014, *supra* note 10 at 384-385. However, outside of Ontario, see *Jane Doe (#7) v Newfoundland and Labrador*, 2022 NLSC 133 at paras 129 and 141, where the Court only granted in part an honorarium request in a sexual abuse class action because “I do not have a detailed record of the actions taken by the Representative Plaintiffs” and it appeared their contribution was modest.

<sup>186</sup> *Johnston*, *supra* note 181 at para 43.

<sup>187</sup> *McKillop*, *supra* note 181 at para 42; *Dolmage*, *supra* note 181 at para 50; *Condon v Canada*, 2018 FC 522 at para 115 [*Condon*]; *Toth*, *supra* note 82 at para 95; *Anderson*, *supra* note 84 at para 82; *McCrea*, *supra* note 82 at para 82.

<sup>188</sup> *McCrea*, *supra* note 82 at para 82; *Toth*, *supra* note 82 at para 95.

<sup>189</sup> *Anderson*, *supra* note 84 at para 79.

<sup>190</sup> *Ibid* at para 84.

Many decisions have therefore characterized payments to representative plaintiffs who have had to re-live their trauma as ‘symbolic’ or ‘token’.<sup>191</sup>

iii. A Token

Another explanation for additional payments, then, is that they are ‘tokens’ that recognize the representative plaintiff’s efforts. Courts in Ontario have often used this term where they acknowledge that the representative plaintiff has not made an exceptional contribution, but they wish to award an amount nevertheless.<sup>192</sup> Many of these token amounts have been \$1,000 or less, following Justice Strathy’s judgment in *Currie v McDonalds Restaurants of Canada Ltd.*<sup>193</sup> However, amounts of up to \$15,000 have been awarded in other decisions where the plaintiff’s contribution has been seen as exceptional, and these have also been described as ‘token’<sup>194</sup> or ‘nominal’.<sup>195</sup>

The use of the term ‘token’ is confusing and leads to the making of additional payments on inconsistent and arbitrary bases. If an exceptional contribution is required before an honorarium is paid, then the representative plaintiff should be rewarded for that contribution. If an exceptional contribution is required but none has been forthcoming, then the representative plaintiff should receive nothing. If an exceptional contribution is not required, then the court should be clear about that and state the grounds for the additional payment.

The term is also somewhat patronizing. If an additional payment is made as a ‘token’ simply because the amount is modest, and there is no exceptional contribution to justify it, then it appears that the court is awarding that amount simply because no-one will object to so small a sum and it does not want to

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<sup>191</sup> This characterization has not been limited to class actions involving traumatic events. *Condon*, *supra* note 187, was a data breach action involving (apart from some media publicity) no obvious trauma.

<sup>192</sup> Morabito 2014, *supra* note 10 at 365. See also *Sheridan Chevrolet v Denso*, 2021 ONSC 3648 at para 25; *Casseres*, *supra* note 23 at para 11; *Sheridan Chevrolet v Valeo SA*, 2021 ONSC 7375 at para 26; *Forbes v Toyota Canada Inc*, 2018 ONSC 5369 at para 33 [*Forbes*].

<sup>193</sup> *Currie v McDonalds Restaurants of Canada Ltd*, 2007 CanLII 39608 (ONSC) at para 35; *Mortillaro v Unicash Franchising Inc*, 2011 ONSC 923 at para 27 [*Mortillaro*].

<sup>194</sup> *Austin v Bell Canada*, 2021 ONSC 5068 at para 25; *Anderson*, *supra* note 84 at para 84.

<sup>195</sup> *MM v FCSLLG*, 2021 ONSC 3310 at para 23.

deny a plaintiff who has gone through years of litigation.<sup>196</sup> But simply awarding a sum so that the representative plaintiff does not walk away empty-handed is a diminution of that role. Either she has earned that sum (in which case, a greater sum might be warranted), or she has not (in which case, nothing is warranted). The ‘modesty’ of an additional payment cannot be a justification for it. The practice of awarding ‘token’ honoraria should therefore be dispensed with.

iv. Reward: Incentive and Bounty

While restitution or compensation focuses on making representative plaintiffs whole because they are working for the benefit of the class, the concept of reward is based on the distinctive nature and objectives of class proceedings themselves. Conceiving of additional payments as a reward, therefore, is much harder to square with the adjectival view that class actions should conform to the traditional rules of civil litigation. Even where the courts have accepted access to justice and judicial economy as legitimate justifications for incentivizing representative plaintiffs, the concept of a ‘bounty’ for exposing the defendants’ wrongdoing and bringing about behaviour modification has proven much more problematic.

a. Incentive: Monitoring Class Counsel

The argument for encouraging representative plaintiffs to monitor class counsel stems from the financial incentives in class actions. Class counsel’s potential recovery by way of fees will usually dwarf any individual class member’s recovery, so that class counsel have the biggest stake in the litigation and will make most of the key decisions.<sup>197</sup> As a result, the representative plaintiff may not be incentivized to

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<sup>196</sup> A stark example is Justice Belobaba’s reasoning in *Renk v Audi Canada et al*, 2020 ONSC 7998, at paras 17-18:

[17] Here there is nothing in the record that would justify the payment of a \$5000 honorarium. However, class counsel was strongly of the view that Mr Renk’s contribution was indeed significant and should be recognized in some measure.

[18] I will yield to class counsel’s impassioned submission and approve an honorarium in the amount of \$3000.

<sup>197</sup> Jasminka Kalajdzic, “Self-Interest, Public Interest, and the Interests of the Absent Client: Legal ethics and Class Action Praxis” (2011) 49:1 OHLJ 1 at 8, 10 [Kalajdzic]; Paul Perell, “Class Proceedings and Lawyers’ Conflicts of Interest” (2009) 35:2 Advoc Q 202 at 216.

monitor counsel, especially if her individual claim is small. In fact, as many decisions rejecting honoraria requests have demonstrated, the representative plaintiff's involvement in the action may be minimal or inconsequential.<sup>198</sup> There is therefore an imbalance of incentives that may cause entrepreneurial class counsel to make decisions at the expense of the class. Some courts and commentators have suggested that additional payments to representative plaintiffs can correct this imbalance and encourage plaintiffs to monitor entrepreneurial counsel.<sup>199</sup>

However, there are some difficulties with this approach. First, the asymmetry between class counsel and representative plaintiff is not only financial – it is also informational. Therefore, while the potential for an additional payment might improve a plaintiff's willingness to monitor counsel, it would not necessarily improve their ability to do so. Class actions are invariably complex, and most representative plaintiffs are not legally trained. Even outside the class actions context, many clients have a limited ability to question their lawyers' judgment and the quality and value of the legal services that are being provided.

As an ex-Treasurer of the Law Society of Ontario put it:

Clients would not need lawyers if they did not require expert assistance. By definition, unsophisticated clients have difficulty assessing the quality of their legal advisors and the quality of the legal assistance provided to them. ... it is difficult for consumers of legal services to assess the impact of legal services even after they have been provided. ... The market for legal services for ordinary people is fairly characterized as a market with asymmetric information...<sup>200</sup>

It is this information asymmetry that appears to have led the New Zealand Law Commission to recommend that, as a condition of certification, representative plaintiffs be required to obtain independent legal advice before taking on the role.<sup>201</sup> Potential objectors to additional payments to representative plaintiffs would

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<sup>198</sup> Kaladjic, *supra* note 197 at 11.

<sup>199</sup> Redublo, *supra* note 5 at paras 107, 111, citing *Snelgrove v Cathay Forest Products Corp*, 2013 ONSC 7282 at para 24 and Morabito 2014, *supra* note 10 at 356-357; Catherine Piché, “The doors to justice are open, but how do I get in?: Experiencing access to justice as a class action member” (2019) 8 IJR 277 at 289-290 [Piché]. For US commentary, see *Principles of the Law of Aggregate Litigation*, *supra* note 142 at section 1.05(c)(5); Ruan, *supra* note 128 at 412-143.

<sup>200</sup> Malcolm Mercer, “Access to Justice and Market Failure” (November 1, 2016), online: *Slaw* <[www.slaw.ca/2016/11/01/access-to-justice-and-market-failure/](http://www.slaw.ca/2016/11/01/access-to-justice-and-market-failure/)>.

<sup>201</sup> NZLC Report, *supra* note 40 at para 3.66.



experience similar information deficits for the same reasons, even if settlement approval notices did make them aware of the amounts to be requested.<sup>202</sup>

Second, and as discussed above, representative plaintiffs are already expected to monitor class counsel as part of their role.<sup>203</sup> Presumably, then, an incentive to monitor class counsel would encourage high-quality monitoring, but not low-quality monitoring.<sup>204</sup> However, it is very difficult for a court to tell the difference between the two, because it is also subject to an informational asymmetry at settlement. Jasminka Kalajdzic has discussed the ‘adversarial void’ that exists at the settlement approval stage where, because “[b]oth plaintiff and defence counsel seek to have the settlement approved ... there is a risk that the interests of the absent class members, and the deficiencies of the proposed settlement, will not be fully pressed.”<sup>205</sup> Perhaps the only way for a court to determine whether high-quality monitoring has taken place is to look at the results achieved on behalf of the class. But even then, these results may have been achieved whether or not the representative plaintiff effectively monitored class counsel, and they provide little guidance as to quantum.<sup>206</sup> As Richard Nagareda explains:

An inquiry into monitoring quality would call for the court to grapple either explicitly or implicitly with a hard counterfactual comparison. The court would have to ask whether the monitoring done by a given class representative improved the conduct of the litigation on behalf of absent class members beyond some implicit baseline. Incentive awards might capture this qualitative dimension of monitoring only impressionistically.<sup>207</sup>

If courts approve additional payments for representative plaintiffs without being able to discern the quality or even the existence of their monitoring, then such payments would not provide an incentive to monitor class counsel (and, in fact, would provide a negative incentive because plaintiffs would get paid regardless).

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<sup>202</sup> Vince Morabito has noted that many settlement approval notices in Ontario do not include the amount of additional payments to be sought, which is one reason why there are so few objections to such payments: Morabito 2014, *supra* note 10 at 377-382.

<sup>203</sup> *Baker*, *supra* note 131 at para 95; see also the text accompanying note 131.

<sup>204</sup> Nagareda, *supra* note 48 at 1488.

<sup>205</sup> *Class Actions in Canada*, *supra* note 106 at 97.

<sup>206</sup> The only way monetary results for the class could determine the quantum of an additional payment is if the payment is calculated as a percentage of the monetary recovery, or on a sliding scale according to the amount of recovery. This brings with it its own hazards, as discussed elsewhere in this article.

<sup>207</sup> Nagareda, *supra* note 48 at 1488-1489.

Finally, additional payments could actually undermine the representative plaintiff's incentive to monitor class counsel, especially at the settlement stage, because they could be used to buy the plaintiff's agreement to a suboptimal or collusive settlement.<sup>208</sup> Given these difficulties, additional payments to representative plaintiffs should not be justified on this basis.

#### b. Incentive: Stepping Forward

Several decisions in Ontario and elsewhere have justified additional payments on the basis that “the action likely would not have been commenced but for the active involvement of [the representative plaintiff]”.<sup>209</sup> A class action cannot be commenced without a representative plaintiff,<sup>210</sup> and it can be very difficult to find a class member to take on this role because of the ‘prisoner’s dilemma’ that such proceedings present.<sup>211</sup> The class will be better off if they aggregate, but the individual who tries to aggregate first may end up worse off because of the costs and burdens of the representative plaintiff role. Class members are therefore incentivized to sit back and wait for someone else to take the lead.<sup>212</sup> If no-one steps forward, there is no class action and no access to justice.<sup>213</sup> This also presents barriers to behaviour modification, if there is no other mechanism by which the defendants will be held accountable,<sup>214</sup> and to judicial economy, if the alternative is numerous individual actions.<sup>215</sup>

This situation can be ameliorated by providing a positive net benefit, in the form of an additional payment, to the person who takes on the role of representative plaintiff.<sup>216</sup> However, incentivizing

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<sup>208</sup> Eisenberg, *supra* note 44 at 1312.

<sup>209</sup> *Charette*, *supra* note 77 at para 92; *Windisman*, *supra* note 15 at para 28; *Bodnarchuk v Guestlogix Inc*, 2020 ONSC 4789 at para 40; *Walmsley*, *supra* note 77 at para 49; *Kaplan*, *supra* note 77 at para 100; *Kauf v Colt Resources, Inc*, 2021 ONSC 2814 at para 60; *Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP*, 2020 ONSC 2793 at para 49; *Toth*, *supra* note 82 at para 105. In the US, see *In re Synthroid Mktg Litig*, 264 F3d 712, 722–23 (7th Cir 2001); *Espenscheid v DirectSat USA, LLC*, 688 F3d 872, 876 (7th Cir 2012).

<sup>210</sup> Ruan, *supra* note 128 at 412.

<sup>211</sup> Betson, *supra* note 142 at 547-548.

<sup>212</sup> *Ibid.*

<sup>213</sup> *Redublo*, *supra* note 5 at para 111.

<sup>214</sup> *Ibid.*; *Jarvis*, *supra* note 128 at 928.

<sup>215</sup> Korsmo, *supra* note 107 at 1926, 1944-1945.

<sup>216</sup> Morabito 2014, *supra* note 10 at 359; *Redublo*, *supra* note 5 at para 111; Korsmo, *supra* note 107 at 1931-1932; Eisenberg, *supra* note 44 at 1307.

representative plaintiffs to step forward cannot, in itself, act as a justification for additional payments for two reasons. First, a payment would only act as an incentive if it was guaranteed; a potential representative plaintiff would have to know, prior to the commencement of the litigation, that they would be paid at the end. Any uncertainty would drastically reduce the effectiveness of the incentive. But a guaranteed payment would incentivize poor quality service, because the representative plaintiff would get paid no matter how much effort she invested. The quantum could be calibrated according to the amount of effort invested, but then the court would run into the same problems discussed under ‘Monitoring Class Counsel’.

Second, representative plaintiffs are not necessarily incentivized by money (and most would not be incentivized by money if they knew that a payment of only a few thousand dollars awaited them after years of litigation). In an empirical analysis of the goals of 20 representative plaintiffs, most had more than two goals, and only three plaintiffs said that money (or the equivalent, such as specific performance by the defendant) was their sole motivation for commencing the action. The other 17 identified goals “that would benefit the class as a whole, and perhaps society generally”.<sup>217</sup> Caruana and Morabito canvassed the limited data on why individuals choose to become representative plaintiffs in Australian class actions, and found a variety of motivations, only one of which was that “they believed that there were reasonable prospects of success”<sup>218</sup> (which is not necessarily a financial motivation). In her interviews with a sample of representative plaintiffs, Catherine Piché also found that they had a variety of goals in pursuing their class actions, only one of which was personal compensation.<sup>219</sup> Other non-financial reasons for becoming a representative plaintiff include a desire to pursue justice<sup>220</sup> and “psychic benefits such as the pleasure of having their name on the ‘marquee,’ being catered to by counsel, or participating in an interesting and stimulating activity.”<sup>221</sup> If the decision to become a representative plaintiff is solely motivated by money

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<sup>217</sup> Meili, *supra* note 13 at 88-89.

<sup>218</sup> Caruana, *supra* note 13 at 13-14.

<sup>219</sup> Piché, *supra* note 199 at 296, 301-303. The other goals included making sure the truth ‘comes out’ and securing compensation for others. However, the representative plaintiffs acknowledged that the role is burdensome, and that plaintiffs “should be financially compensated for their involvement” (at 301).

<sup>220</sup> Korsmo, *supra* note 107 at 1943; Charles Silver & Sam Dinkin, “Incentivizing Institutional Investors to Serve as Lead Plaintiffs in Securities Fraud Class Actions” (2008) 57:2 DePaul L Rev 471 at 478.

<sup>221</sup> Eisenberg, *supra* note 44 at 1305.

in only a small minority of cases, the prospect of an additional payment would make little difference to the number of people willing to take on that role.

Consequently, incentivizing representative plaintiffs to step forward should not be used as a justification, and certainly not as a sole justification, for the awarding of additional payments. What about the concept of a ‘bounty’ for exposing defendants’ wrongdoing and calling them to account?

### c. Bounty: Behaviour Modification

Behaviour modification has long been a goal of class proceedings, in Ontario and elsewhere,<sup>222</sup> but it is generally regarded as incidental to the other goals.<sup>223</sup> Very few courts and commentators in Canada see behaviour modification as a standalone objective of class actions.<sup>224</sup> The recent LCO Report on class actions did not go so far, despite devoting an entire chapter to this subject.<sup>225</sup> As in traditional litigation, having the defendant make the plaintiff whole through a payment of damages is usually seen as sufficient to satisfy the goal of deterrence.<sup>226</sup> It is very rare to find a class action that only brought about modification of the defendant’s behaviour, without also compensating the class.<sup>227</sup>

Even in the US, where numerous decisions have supported additional payments on the grounds that representative plaintiffs played the role of a ‘private attorney general’ in enforcing certain statutes,<sup>228</sup> behaviour modification is generally considered as one of many reasons to make such payments. In *Rodriguez*, for example, the court held that incentive awards can be awarded for several reasons, one of

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<sup>222</sup> *Dutton*, *supra* note 3 at para 29; Attorney General’s Advisory Committee on Class Action Reform, *Report of the Attorney General’s Advisory Committee on Class Action Reform* (Toronto: Ministry of the Attorney General, 1990) at 17-18; OLRC Report, *supra* note 22 at 140-146.

<sup>223</sup> OLRC Report, *supra* note 22 at 145; Matthew Good, “Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions” (2009) 47:1 *Alta L Rev* 185 at 222; *Setoguchi v Uber BV*, 2021 ABQB 18 at para 112.

<sup>224</sup> For exceptions, see the dissent in *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58 at para 97; Craig Jones, *Theory of Class Actions* (Toronto: Irwin Law, 2003).

<sup>225</sup> LCO Report, *supra* note 34 at 89-91.

<sup>226</sup> Even the most ardent proponents of the traditional goals of civil litigation accept that damages can have a behaviour modification effect: Ernest J Weinrib, “Deterrence and Corrective Justice” (2002) 50 *UCLA L Rev* 621.

<sup>227</sup> This is why Canadian courts have treated *cy-près* distributions with great caution: Jasminka Kalajdzic, “The ‘Illusion of Compensation’: *Cy Près* Distributions in Canadian Class Actions” (2014) 92:2 *Can Bar Rev* 173 at 193.

<sup>228</sup> Rubenstein, *supra* note 15 at section 17.3; Ruan, *supra* note 128 at 421-422.

which is “to recognize [representative plaintiffs’] willingness to act as a private attorney general.”<sup>229</sup> While incentive awards have been made to representative plaintiffs who helped to enforce the workplace discrimination provisions of Title VII of the *Civil Rights Act*<sup>230</sup> and in many other situations,<sup>231</sup> this public policy reasoning has been “buried” amongst a host of other reasons for making such awards.<sup>232</sup>

Australian courts have not accepted the ‘private attorney general’ approach at all, as evinced by their “clear rejection of the ‘reward’ strand of [that] philosophy” in making additional payments to representative plaintiffs.<sup>233</sup> Instead, as noted above, Australian courts pursue a ‘time and efforts’ approach and use the terms ‘reimbursement awards’ and ‘expense claims’ to reflect that approach.

In Canada, the past decade has seen an increase in class actions that aim to bring about institutional or societal change by modifying defendants’ behaviour. However, courts have not, for the most part, used this goal as a sole justification for the awarding of additional payments. In fact, as noted above, courts have been especially reluctant to award honoraria in class actions that effect behaviour modification but not compensation in that they distribute the settlement funds entirely *cy-près*.<sup>234</sup> The decisions which note concrete changes in the defendants’ behaviour (over and above a payment of damages) do not mention that factor in their honorarium analyses.<sup>235</sup> The exceptions are Justice Akbarali’s recent judgments in *Redublo*<sup>236</sup> and *Suzic*.<sup>237</sup> Even in her analysis, however, Her Honour noted that the question of additional payments should be viewed through the lens of all three goals of class proceedings – not just behaviour modification.<sup>238</sup>

Therefore, although the use of class proceedings as a vehicle for social change is growing in Ontario and elsewhere, behaviour modification is generally not recognized as a standalone objective of

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<sup>229</sup> *Supra* note 121 at 959; Sperle, *supra* note 101 at 880; Rubenstein, *supra* note 15 at section 17.2.

<sup>230</sup> *Civil Rights Act of 1964*, 42 USC tit 7 § 2000e et seq (1964); Ruan, *supra* note 128 at 421.

<sup>231</sup> Rubenstein, *supra* note 15 at section 17.3.

<sup>232</sup> Ruan, *supra* note 128 at 420-421.

<sup>233</sup> Morabito Australia 2014, *supra* note 48 at 203.

<sup>234</sup> See the text accompanying note 73.

<sup>235</sup> *Doucet*, *supra* note 5 at paras 57-61; *Merlo*, *supra* note 82; *Mortillaro*, *supra* note 193; *Rosen v BMO Nesbitt Burns Inc*, 2016 ONSC 4752; *Montague v Handa Travel Student Trip Ltd*, 2020 ONSC 3821.

<sup>236</sup> *Redublo*, *supra* note 5 at para 111.

<sup>237</sup> *Suzic v VIB Event Staffing et al*, 2022 ONSC 3837 at paras 44 and 81 [*Suzic*].

<sup>238</sup> *Redublo*, *supra* note 5 at para 110.

such proceedings. While some courts have recognized that additional payments can serve a regulatory objective of class actions, they have not departed from the adjectival view that civil litigation should primarily serve a compensatory purpose.<sup>239</sup>

(b) Quantum and Source

The Canadian jurisprudence on additional payments provides very little guidance on the issue of quantum. Courts simply approve, approve in part, or deny class counsel's request for an additional amount. Where requests have been approved only in part, courts have relied on certain factors to scale down the size of the award. These are discussed above under Section II(a), where I observed that the factors determining whether a representative plaintiff's service has been 'exceptional' have also been used to determine quantum.

For example, in *Suzic*, Justice Akbarali reduced a \$6,000 honorarium request to \$4,000.<sup>240</sup> Her Honour found that the representative plaintiff initiated the claim, was actively involved in the litigation, helped bring about an advantageous settlement, and also kept class members updated.<sup>241</sup> There were no objectors to the honorarium request.<sup>242</sup> However, the plaintiff was not exposed to a real risk of costs, did not endure significant personal hardship, and the settlement achieved was modest.<sup>243</sup> In order to avoid an actual or perceived conflict of interest and ensure the payment was proportionate to the benefits flowing to the class, Her Honour reduced the honorarium amount to \$4,000.

However, the actual amounts to be received by each class member averaged just \$40.77 (assuming 100 per cent of class members claimed).<sup>244</sup> Her Honour did not explain why an additional payment that was 100 times each class member's recovery was any more proportionate than a payment that was 150

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<sup>239</sup> In *Eidoo v Infineon Technologies AG*, 2015 ONSC 5493 at para 26, Justice Perell expressed concerns about departing from the compensatory objective of class proceedings in favour of behaviour modification alone.

<sup>240</sup> *Suzic*, *supra* note 237 at paras 74-81.

<sup>241</sup> *Ibid* at paras 76-77.

<sup>242</sup> *Ibid* at para 79.

<sup>243</sup> *Ibid* at paras 78, 80.

<sup>244</sup> *Ibid* at para 35.

times that recovery. This raises two related points: the guesswork of quantifying additional payments in Canada, and the limited utility of modesty and proportionality as guiding principles on quantum.

On the first point, the Canadian courts have approached this issue as more of an art than a science. Courts consider some or all of the factors discussed in Section II(a), and, if they find that the requested amount is excessive, will reduce it to an amount that seems more proportionate. Very rarely is this reduction based on any kind of calculation. In *Parsons*, for example, the BC Court of Appeal considered factors such as initiation of the claim and exposure to costs, and found that the \$10,000 honorarium request was excessive in light of the case law<sup>245</sup> and individual class member recovery (around \$1,000). The additional payment was therefore reduced to \$3,500.<sup>246</sup> This amount was not explained further, even though a payment of \$1,000 would have been more proportionate to class member recovery.

The guesswork of quantifying additional payments therefore translates into the principles of modesty and proportionality. Those principles have led to wildly differing reductions in different cases, from 85 per cent in *Cardoso*<sup>247</sup> to 65 per cent in *Parsons* to zero in *McCallum-Boxe v Sony*.<sup>248</sup> In that case, Justice Belobaba approved additional payments totalling \$4,500, calling these payments “modest” even though the recovery for the entire class (which was separate from the additional payments) totalled only \$8,000.<sup>249</sup> There was no discussion of the representative plaintiffs’ contribution, and the settlement as a whole was dubbed “unremarkable”.<sup>250</sup> Nevertheless, the Ontario representative plaintiff received \$3,000 as an additional payment and the Saskatchewan plaintiff received \$1,500,<sup>251</sup> respectively representing 150 times and 75 times each class member’s recovery. These payments, while modest, are not proportionate.<sup>252</sup>

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<sup>245</sup> *Parsons*, *supra* note 26 at para 25. The Court found that the highest amount awarded in BC to that point was \$5,000.

<sup>246</sup> *Ibid* at para 25.

<sup>247</sup> *Supra* note 140.

<sup>248</sup> *McCallum-Boxe v Sony*, 2015 ONSC 6896.

<sup>249</sup> *Ibid* at paras 4-6.

<sup>250</sup> *Ibid* at para 1.

<sup>251</sup> *Ibid* at para 22.

<sup>252</sup> Similarly, additional payments may be proportionate but not modest: eg in *Manuge c Canada*, 2013 FC 341, the representative plaintiff was awarded \$50,000 as part of a settlement valued at more than \$887 million.

Furthermore, “there is no obvious connection between the size of each class member’s individual claims and the appropriate compensation for the named plaintiff’s services.”<sup>253</sup> Even if an additional payment is a hundred times that of an individual class member’s recovery, it may still be appropriate if it compensates the representative plaintiff for her time, efforts, and significant personal hardship in pursuing the class action. Courts are anxious to avoid the appearance of a conflict of interest, and therefore shy away from such disparity.<sup>254</sup> However, as Rubenstein notes, this disparity “is built into the very nature of the endeavor: in class suits, the claims will almost invariably be small in nature, yet the class representatives most worthy of an award will typically be those who worked the hardest and suffered most.”<sup>255</sup>

Given the limited utility of current approaches in Canada, then, how should additional payments to representative plaintiffs be quantified? Courts in the US have made clear how such payments should *not* be quantified: as a percentage of the class’s recovery.<sup>256</sup> This approach to quantum is problematic because it privileges monetary recovery over other kinds of recovery (such as injunctive or declaratory relief), it does not necessarily reflect the plaintiff’s effort on behalf of the class, and it has the potential to create excessive awards.<sup>257</sup>

The approach that involves the least guesswork and the most objectivity is the Australian “time and efforts” approach discussed above, whereby additional payments are calculated based on itemized expenses and detailed timesheets. This approach also addresses the concerns of evidence, unseemliness, and ethics raised by Justice Perell in *Doucet*. The evidence is much more objective and verifiable than affidavits that simply “praise... the Representative Plaintiff.”<sup>258</sup> There is no unseemly “grading” of plaintiffs’ contributions,<sup>259</sup> because they are simply compensated for their time and reimbursed for their

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<sup>253</sup> Rubenstein, *supra* note 15 at section 17.18.

<sup>254</sup> Ruan, *supra* note 128 at 398, 419-420.

<sup>255</sup> Rubenstein, *supra* note 15 at section 17.18.

<sup>256</sup> *Ibid* at section 17.16.

<sup>257</sup> *Ibid*. While the problem of excessive awards could be addressed by using a cap, this would then give rise to a conflict of interest: see *Rodriguez*, *supra* note 121.

<sup>258</sup> *Doucet*, *supra* note 4 at para 61.

<sup>259</sup> *Ibid*.



expenses. Finally, there is less of a prospect of treating a representative plaintiff preferentially or conferring excessive benefits on her if she is simply being compensated for the quantifiable work that she has done on behalf of the class.

This leaves the question of the source of additional payments. There are three potential sources: the settlement funds available to the class; class counsel's fees; and a separate payment by the defendant.<sup>260</sup> The Court of Appeal for Ontario has held that payment from class counsel's fees raises the spectre of fee-splitting, as it allocates part of a lawyer's fee to a layperson.<sup>261</sup> On the other hand, Justice Sharpe in *Windisman* held that there is no legislative authority for ordering the defendant to make such payments, and that they are in fact "extraneous to the defendant" because they are based on the benefit the representative plaintiff has conferred on the class.<sup>262</sup> Nevertheless, courts have approved settlement agreements in which defendants have agreed to pay an honorarium separately.<sup>263</sup> Ideally, additional payments should be made from the funds available to the class, because the class is simply paying the representative plaintiff for the time and expense she has incurred on its behalf.<sup>264</sup>

Having discussed the theoretical basis for additional payments, the concerns to which they give rise, and the questions of quantum and source, the final part of this article will propose a framework for additional payments to representative plaintiffs that can be applied in Ontario and in other Canadian common-law jurisdictions.

#### **Section IV – Proposed Structure for Additional Payments**

Courts and commentators in Ontario and beyond generally agree on the principle of making additional payments to representative plaintiffs. While there are some outliers,<sup>265</sup> the ethical concerns they raise can

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<sup>260</sup> Morabito 2014, *supra* note 10 at 369-372; Rubenstein, *supra* note 15 at section 17.5. Rubenstein notes that additional payments could also be paid as disbursements, in which case they could be taken from the funds available to the class or paid separately by the defendant.

<sup>261</sup> *Smith Estate*, *supra* note 80 at para 135. However, see Korsmo, *supra* note 107 at 1927.

<sup>262</sup> *Windisman*, *supra* note 15 at para 36.

<sup>263</sup> Eg *Bourque v Cineflix*, 2021 ONSC 8464 at para 60.

<sup>264</sup> Rubenstein, *supra* note 15 at section 17.5.

<sup>265</sup> See the text accompanying note 137.

be satisfactorily managed. In particular, and as discussed in Section II(b), plaintiffs should be paid periodically throughout the litigation, which would reduce any conflict of interest concerns to which the prospect of a lump sum payment at settlement would give rise. In addition, notices that are distributed to the class in advance of a settlement approval hearing (which must be approved by the court) should include notice of any additional payments sought and their amount. The “compelling evidence” that Justice Akbarali held courts should require in order to address potential conflicts of interest, should consist of timesheets and expenses relating to the efforts the representative plaintiff has expended on behalf of the class.

There should be no threshold requirement for the awarding of an additional payment. The requirement that the representative plaintiff’s service be exceptional is arbitrary and inconsistently applied. By the same token, there should be no requirement that the plaintiff provide competent service coupled with results to the class.<sup>266</sup> Any settlement that receives court approval as being “fair, reasonable and in the best interests of the class”<sup>267</sup> will have provided results to the class, and any plaintiff that has satisfied the certification test<sup>268</sup> will be competent. This requirement therefore adds nothing to the honorarium analysis.

On what basis, then, should additional payments be made? For the reasons discussed in Section III, plaintiffs should be compensated for their time and reimbursed for their expenses. This should be done not on a *quantum meruit* basis (a concept that does not fit squarely with the awarding of additional payments), but simply on the pragmatic basis that plaintiffs who have expended time and effort to secure a sum for class members should be able to look to that sum for compensation and reimbursement.<sup>269</sup> For this reason, I propose that additional payments to representative plaintiffs in Ontario be known as ‘indemnification payments’.

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<sup>266</sup> *Redublo*, *supra* note 5 at para 114.

<sup>267</sup> *CPA*, *supra* note 2, s 27.1(5).

<sup>268</sup> In Ontario, this is s 5(1)(e) of the *CPA*, *supra* note 2.

<sup>269</sup> *Milfull*, *supra* note 103 at para 76.

Courts in Ontario have raised the concern that awarding additional payments on a routine basis would create a category of representative “plaintiffs for hire”.<sup>270</sup> However, the Australian courts routinely make payments based on the ‘time and efforts’ approach, and empirical research has shown that representative plaintiffs are repeat players in less than 10 per cent of Australian class actions<sup>271</sup> (even these plaintiffs are not true repeat players, because they are involved in numerous class actions involving the same disputes).<sup>272</sup> There is little danger, then, of creating a cottage industry of professional plaintiffs in Ontario.

While the average indemnification payment will still be dwarfed by class counsel’s fee (which is what prompted Justice Perell to call such payments “tawdry”),<sup>273</sup> this is to be expected from the nature of class proceedings. Counsel do most of the work, assume or manage most of the risk, and spend most of the money while waiting years for a resolution. It makes sense that the payment they receive would be significantly more than a payment to a representative plaintiff, even one calculated on the basis of that plaintiff’s time and expenses.

The calculation of quantum should also use a trauma-informed approach.<sup>274</sup> If a representative plaintiff has undergone re-traumatization or additional hardship in pursuing the litigation, her payment should reflect that. Once the court has approved the payment to be made on the basis of time and expenses, then a multiplier can be applied to that amount. There are no cases in Ontario which combine the “time and efforts” approach with a multiplier for re-traumatization or personal hardship. However, in *MacDonald*, Justice Belobaba approved a \$10,000 “performance honorarium” for Mr MacDonald and then stated he was entitled to an additional \$40,000 (a five times multiplier) “because of the financial harm he

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<sup>270</sup> *Forbes*, *supra* note 192 at para 31; *Loewenthal v Sirius XM Holdings, Inc et al*, 2021 ONSC 8220 at para 23; *Hardwick v Blue Buffalo Company, Ltd et al*, 2021 ONSC 5297 at para 19.

<sup>271</sup> Caruana, *supra* note 13 at 10-11.

<sup>272</sup> *Ibid* at 11.

<sup>273</sup> *Doucet*, *supra* note 5 at para 61.

<sup>274</sup> *Redublo*, *supra* note 5 at paras 111-112. Jarvis, *supra* note 128, proposes a similar structure, but he suggests a multiplier for financial risk and only briefly touches on non-financial risk. Given that almost all representative plaintiffs in Canada are indemnified against adverse costs (in costs-shifting jurisdictions), and the need for a trauma-informed approach in class actions, the multiplier should apply to the non-financial risks experienced by the representative plaintiff.

sustained as the lead plaintiff in what became a high-profile class action in the banking community.”<sup>275</sup> In the Australian case of *Smith*, the Court increased one representative plaintiff’s payment from \$20,000, which was reflective of the time spent acting in a representative capacity, to \$50,000 (a 2.5 times multiplier) to reflect the trauma and personal attacks the plaintiff had experienced.<sup>276</sup> The multiplier in cases of trauma or hardship should be similar to the multiplier that has been applied to class counsel’s time in the context of fee requests,<sup>277</sup> because both reflect a form of risk in pursuing the proceeding (one personal, one professional/financial). This would suggest a multiplier of around 2.5.<sup>278</sup>

Using a uniform approach by linking the trauma-informed multiplier to the time and expenses incurred in pursuing the litigation, would prevent the “repugnant competition and grading of the contribution of the Representative Plaintiff” that Justice Perell condemned in *Doucet*.<sup>279</sup> It also provides a rationale for the awarding of higher amounts in some cases than others, which His Honour said could not be found in the case law.<sup>280</sup>

Finally, as discussed in Section III(b), the source of the indemnification payment should be the funds available to the class. This follows the guidance provided by the Court of Appeal for Ontario in *Smith Estate*,<sup>281</sup> and is the prevailing practice in BC,<sup>282</sup> Australia,<sup>283</sup> and the US.<sup>284</sup>

One of the few disadvantages to this approach is that representative plaintiffs whose cases started many years ago will not have been aware of the necessity of keeping detailed timesheets from the commencement of the action. The *Doucet* action, for example, was commenced in November 2016. While

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<sup>275</sup> *MacDonald*, *supra* note 49 at paras 56-57.

<sup>276</sup> *Smith*, *supra* note 150 at para 106.

<sup>277</sup> Although the prevailing approach in Canadian class action fee requests is to approve a contingent fee instead of a multiplier, the multiplier approach is still used as a cross-check in “mega-cases” that are settled for very high amounts: *MacDonald*, *supra* note 49 at paras 29-31.

<sup>278</sup> *Ibid* at para 35; *Baxter v Canada (Attorney General)*, 2006 CanLII 41673 (ONSC); *Canadian Imperial Bank of Commerce v Deloitte*, 2017 ONSC 5000 at para 12; *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v SNC-Lavalin Group Inc*, 2018 ONSC 6447 at para 64.

<sup>279</sup> *Doucet*, *supra* note 5 at para 61.

<sup>280</sup> *Ibid* at para 61.

<sup>281</sup> *Supra* note 80 at para 135.

<sup>282</sup> *Parsons*, *supra* note 26 at para 26.

<sup>283</sup> *Dimopoulos*, *supra* note 150 at 554.

<sup>284</sup> *Rubenstein*, *supra* note 15 at section 17.5. Where a case does not create a common fund, defendants may agree to make the additional payment as part of a settlement, but the court has no jurisdiction to order them to do so.

the representative plaintiffs' submissions on honoraria provide details of their extraordinary efforts in pursuing the litigation and holding the defendants accountable,<sup>285</sup> there was no request for compensation or reimbursement on the basis of time or expenses. Nevertheless, it may be possible to infer a certain contribution of time from the representative plaintiffs' contributions overall (and those of the class member witnesses who acted as *de facto* representative plaintiffs).<sup>286</sup> In older cases such as this, where the representative plaintiffs' contributions are obvious and the class has benefitted from their efforts, a more approximate approach may need to be utilized. In *Doucet*, there is certainly a need for a multiplier to reflect the re-traumatization of the representative plaintiffs and class member witnesses, who faced public exposure so that the class members would not have to.

### **Section V – Conclusion**

Indemnification payments in Ontario should be permitted on the basis that representative plaintiffs work to confer a benefit on the class and should therefore be paid by the class. Although plaintiffs in traditional litigation are not paid, there is a principled difference between the roles of a plaintiff in a traditional action and a representative plaintiff in a class action. This is one of many areas of class proceedings that depart from the traditional rules of civil litigation, and do not therefore comply with the adjectival view of class actions. Nevertheless, payments according to the framework proposed in this article do not go so far as to make representative plaintiffs 'private attorneys general' and therefore subscribe to the regulatory view. It is, as in many aspects of class actions in Canada, a compromise between the two views. In this sense, indemnification payments are neither "tawdry" nor symbolic. They are simply what they say they are: a repayment to the representative plaintiff for the additional risks and burdens she has borne for the benefit of the class.

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<sup>285</sup> *Doucet factum*, *supra* note 179 at paras 27-41.

<sup>286</sup> *Jarvis*, *supra* note 128 at 943, suggests this is possible in the US context.