[Indexed as: **Edwards v. Law Society of Upper Canada**]

EDWARDS v. LAW SOCIETY OF UPPER CANADA et al.

Ontario Class Proceedings Committee
Molloy, Chair; McGowan, Vice Chair; Foulds and Fisher, Members

Decision – August 23, 1994.
Written Reasons – December 8, 1994 and April 25, 1995.

Parties – Representative or class actions – Procedural requirements – Funding – Applications by plaintiffs – Requirements – Factors to be considered – Merits of case, fund raising, use of funds, financial controls, public interest, likelihood of certification and amount of funding required – Funding granted – Class Proceedings Act, 1992, S.O. 1992, c. 6 – Law Society Act, R.S.O. 1990, c. L.8, s. 59.3.

The plaintiffs applied for funding of a class action under s. 59.3 of the *Law Society Act* (Ont.) as amended by the *Law Society Amendment Act (Class Proceedings Funding) 1992* (Ont.).

Held – The application was granted by a majority.

Per McGowan Vice Chair (dissenting in the result): Part I of these reasons contains a general discussion of matters that are not confidential and that will be made public by the Class Proceedings Committee. Part II of these reasons contains a discussion of confidential matters about the case. The committee's policy is to protect the confidentiality of the application. It is the applicant's decision whether to publicize Part II.

Under the Act and the regulations, there were eight factors to be taken into consideration on an application for funding. The factors were: (1) the merits of the case; (2) fund raising efforts by the class representative; (3) the proposed use of the funds; (4) financial controls regarding the use of the funds; (5) the extent to which the issues in the litigation affect the public interest; (6) the likelihood of certification; (7) the amount of the class proceedings fund required for other proceedings; and (8) any other matter considered relevant. The committee must consider each application on a case-by-case basis.

Merits of the Case

The merits of the case was the single most critical factor in granting funding. The applicant was required to provide a thorough and frank analysis, and demonstrate a prima facie case. The applicant should also identify and address important possible defences.

Fund Raising

The class representative was expected to make such fund raising efforts as might be necessary and reasonable in the circumstances. What was *necessary* would depend on how the three financial elements of fees, disbursements, and potential costs liabilities were to be financed. If counsel was retained on a fee for service

basis, the committee would have to be satisfied that sufficient fund raising had been or would be done to pay those fees throughout the lawsuit. Although disbursements would generally be paid from the class proceedings fund, some fund raising might be necessary where the committee chose not to pay certain disbursements. Generally, the committee would not consider it necessary to raise funds for potential defence costs awards because if the committee granted funding, the fund would become liable for defence costs and the class representative would be relieved of that risk. All applicants were expected to make reasonable efforts to raise funds. What was reasonable depended upon the facts of the particular case.

Use and Control of Funds

The committee would consider the proposed use of funds and would allocate funds for items that it believed to be reasonable. The issue of proposed use of funds would rarely be determinative of an application for funding. Section 59.3(4)(*d*) established a system of financial controls which should satisfy the committee's concern about financial controls. Therefore, this issue should play little role in the committee's decisions.

Public Interest

The issue of public interest was the most difficult issue to address because it was a very subjective concept. If the committee concluded that an action had a 50 per cent or better chance of success, it was in the public interest that the action be funded. Where an applicant satisfied the committee that its chances were better than 50 per cent, it should not be concerned about being denied funding on the basis of "public interest". However, the reverse was not true. The fact that a class action had a lower than 50 per cent chance of success did not mean that it was in the public interest that funding be denied. There might be cases that appeared unlikely to succeed but should be funded because they appealed to the committee's concept of what was in the public interest. However, an applicant with a lower than 50 per cent chance of success should expect to be denied funding.

Likelihood of Certification

The committee would consider the five requirements for certification, which were as follows: (1) the claim disclosed a cause of action; (2) there was an identifiable class of two or more persons; (3) that common issues were raised; (4) that a class proceeding would be the "preferable procedure" for determining the common issues; and (5) there was a representative plaintiff who: (i) would fairly and adequately represent the interests of the class; (ii) had produced a workable plan for the proceeding; and (iii) had no conflict of interest regarding the common issues with the interests of the class.

The first two requirements represented low thresholds and were easily predictable. The third and fourth requirements should be easily predictable, but early experience suggested that this was not the case. The courts appeared to have taken a restrictive approach in some early decisions. The committee should discount the early restrictive decisions, as our courts were likely to take a more purposive approach in the long run.

The fifth requirement included a requirement that the representative plaintiff retain adequate class counsel. This element should not be difficult to predict.

Experienced litigation lawyers would likely be considered adequate. Inexperienced litigation lawyers would not likely be considered adequate.

Amount Required

The amount of funding required was an additional factor. The fund was endowed with $500,000. Additional funding would come from the 10 per cent levy on recoveries. It was apparent the fund could be exhausted quickly by adverse defence costs awards. The committee could take two different approaches. One approach was to set aside funds to cover any potential adverse costs awards for cases funded. This would allow only a very few cases to be funded. A second approach was to assume that future proceeds would cover future adverse defence costs. This would permit funding of many more cases. The second approach was preferable because the first approach would guarantee that the committee would fail in its purpose of promoting access to the courts. Therefore, the committee should try to select cases so that the average case had at least a 50 per cent probability of success and the average levy was greater than the average defence costs.

Additional Matters

An additional matter of consideration was the ability of the defendant to pay an award against it. If the defendant appeared to be judgment proof, the committee would be unlikely to grant funding.

Simplified Criteria

From the foregoing, the following simplified criteria could be drawn for assessing the likelihood of funding: (1) the case had a 50 per cent or better likelihood of being certified; (2) the case had a 50 per cent or better likelihood of success at trial; (3) the case involved substantial monetary relief; (4) the defendant appeared to have the ability to pay an award against it; (5) reasonable arrangements had been made to retain adequate class counsel for the duration of the case; and (6) the case did not require excessive funds for disbursements from the class proceedings fund.

For the reasons stated in Part II, which were not published, funding should be denied.

Per Molloy, Chair (Foulds and Fisher, Members, concurring):

The committee divided its reasons into two parts. Part I was for general public consumption. Part II was for confidential matters.

Although the committee was divided on the result, the committee was largely in agreement with respect to matters of general principle. The committee adopted the reasons of the vice chair with respect to matters of general principle, subject to the differences in the application of those principles as noted below.

The committee adopted the reasons of the vice chair on the test for funding, including the summary of the eight relevant factors to be considered. The discussion on four of the factors was adopted: fund raising, the proposed use of funds, financial controls and the amount of class funding required.

Typically, the merits of the case would be the most important factor to be considered. It was important that the plaintiff applying for funding identify and analyze potential defences. The plaintiff was at least to present a prima facie case. If the case was so weak that the plaintiff would virtually lose the trial, clearly, funding would be refused. Conversely, a sure winner would satisfy the merits component. For the majority of cases, the committee would apply a "strong arguable case" analysis. The committee ought not to refuse funding an arguable case raising important issues merely because there was precedent against it.

Public interest was a very difficult factor to articulate. The regulations required that the committee go beyond an assessment of the merits and consider the issues of the case itself. The committee would lean more favourably towards funding cases which raised issues of broad public importance or which were directed towards improving the situation of persons or groups who were historically disadvantaged by our society.

It would only be in the clearest of cases that the committee would reject funding an application on the grounds of likelihood of certification, with respect to an otherwise meritorious case.

The ability of a defendant to satisfy a judgment was a relevant factor to be considered, although the weight to be given to it would vary. A critical factor would be the arrangements made by class counsel to manage the case. One component of this was the competence and experience of class counsel. Another was the overall strategy and planning of the case. There were required to be workable plans in place to insure that the case would be carried forward to its completion. The fund could not afford to pay out considerable sums only to have cases abandoned by counsel who subsequently lost interest in the case or found it too costly or time-consuming to manage.

Cases considered

Per McGowan, Vice Chair (dissenting in the result)

Rogers Broadcasting Ltd. v. Alexander (1994), 25 C.P.C. (3d) 159, 4 C.C.L.S. 227 (Ont. Gen. Div. [Commercial List]) – considered.
Sutherland v. Canadian Red Cross Society (1994), 21 C.P.C. (3d) 137, 17 O.R. (3d) 645, 112 D.L.R. (4th) 504 (Gen. Div.) – considered.

Statutes considered

Per Molloy, Chair (Foulds and Fisher, Members, concurring)

Class Proceedings Act, 1992, S.O. 1992, c. 6.
Law Society Act, R.S.O. 1990, c. L.8 –
- s. 59.3 [en. Law Society Amendment Act (Class Proceedings Funding), 1992, S.O. 1992, c. 7, s. 3]
- s. 59.3(4) [en. Law Society Amendment Act (Class Proceedings Funding), 1992, S.O. 1992, c. 7, s. 3]

Per McGowan, Vice Chair (dissenting in the result)

Canada Business Corporations Act, R.S.C. 1985, c. C-44.

Class Proceedings Act, 1992, S.O. 1992, c. 6 –
s. 2(1)
s. 5(1)
s. 5(1)(*a*)
s. 5(1)(*b*)
s. 5(1)(*c*)
s. 5(1)(*d*)
s. 5(1)(*e*)
s. 5(1)(*e*)(i)
s. 5(2)
s. 17
s. 17(7)
s. 23
s. 25
s. 26(4)
s. 29
s. 31(1)
Law Society Act, R.S.O. 1990, c. L.8 –
s. 59.3 [en. Law Society Amendment Act (Class Proceedings Funding), 1992, S.O. 1992, c. 7, s. 3]
s. 59.3(1) [en. Law Society Amendment Act (Class Proceedings Funding), 1992, S.O. 1992, c. 7, s. 3]
s. 59.3(3) [en. Law Society Amendment Act (Class Proceedings Funding), 1992, S.O. 1992, c. 7, s. 3]
s. 59.3(4) [en. Law Society Amendment Act (Class Proceedings Funding), 1992, S.O. 1992, c. 7, s. 3]
s. 59.3(4)(*d*) [en. Law Society Amendment Act (Class Proceedings Funding), 1992, S.O. 1992, c. 7, s. 3]
s. 59.4 [en. Law Society Amendment Act (Class Proceedings Funding), 1992, S.O. 1992, c. 7, s. 3]
s. 59.4(3) [en. Law Society Amendment Act (Class Proceedings Funding), 1992, S.O. 1992, c. 7, s. 3]
s. 59.5(1)(*d*) [en. Law Society Amendment Act (Class Proceedings Funding), 1992, S.O. 1992, c. 7, s. 3]

Rules considered

Per McGowan, Vice Chair (dissenting in the result)

United States, Federal Rules of Civil Procedure –
R. 23

Regulations considered

Per Molloy, Chair (Foulds and Fisher, Members, concurring)

Law Society Act, R.S.O. 1990, c. L.8 –
Class Proceedings,
O. Reg. 771/92
s. 5

Per McGowan, Vice Chair (dissenting in the result)

Law Society Act, R.S.O. 1990, c. L.8 –
Class Proceedings,
O. Reg. 771/92
s. 5
s. 6
s. 8(3)
s. 9
s. 10

Words and phrases considered

Bullock order – "[*Per McGowan, Vice Chair (dissenting in the result)*:] . . . 'Bullock' order (requiring the plaintiff to pay the successful defendant's costs and the unsuccessful defendant to reimburse the plaintiff . . .)"

disbursements related to the proceeding – "[*Per McGowan, Vice Chair (dissenting in the result)*:] Section 59.3 of the *Law Society Act* [R.S.O. 1990, c. L.8] as amended by the *Law Society Amendment Act (Class Proceedings Funding), 1992* [S.O. 1992, c. 7], indicates that the funds are to be used for 'disbursements related to the proceeding'. This will include the usual disbursements common in all litigation for filing fees, transcript costs, expert fees, etc. It will also include disbursements for expenses which usually arise only in class proceedings such as the cost of class notice and perhaps obtaining statistical evidence under s. 23 of the *Class Proceedings Act, 1992* [S.O. 1992, c. 6]."

fairly and adequately represent the interests of the class – "[*Per McGowan, Vice Chair (dissenting in the result)*:] There have been only a handful of certification cases in Ontario to date and the interpretation of the certification requirements is not settled law in Ontario. I will discuss the various requirements and indicate the interpretations which I will apply for funding purposes unless the courts authoritatively adopt other interpretations.

. . .

The fifth requirement (s. 5(1)(*e*)) [of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6] is that there be a representative plaintiff who

(i) will fairly and adequately represent the interests of the class;

(ii) has produced a workable plan for the proceeding; and

(iii) has no conflict of interest regarding the common issues with the interests of the class.

United States caselaw and the Ontario Law Reform Commission's *Report on Class Actions* (p. 359 et seq.) make it clear that fair and adequate representation includes retaining adequate class counsel. This element should not be difficult to predict. Experienced litigation lawyers with medium or large firms will be considered adequate. Experienced litigation lawyers with very small firms might have some difficulty persuading the court that sufficient resources can be devoted to the class action but that could be solved by creating a consortium of firms or sole practitioners to conduct the case. Inexperienced litigation lawyers are unlikely to be considered adequate.

One issue which has become apparent in the Ontario cases is whether the representative plaintiff must represent the *characteristics* of the class . . .

The class representative must be a *member* of the class (s. 2(1)) but the Act does not require the class representative share all the *characteristics* of the class . . .

. . .

In my opinion the courts will ultimately take the position that the class representative's not sharing some characteristics of other class members is only relevant to the issue of whether separate representation is required. If so, the result is not to refuse to certify the action but rather to create a subclass and appoint a representative for the subclass."

preferable procedure – "[*Per McGowan, Vice Chair (dissenting in the result)*:] There have been only a handful of certification cases in Ontario to date and the interpretation of the certification requirements is not settled law in Ontario. I will discuss the various requirements and indicate the interpretations which I will apply for funding purposes unless the courts authoritatively adopt other interpretations.

. . .

The fourth requirement is that a class proceeding be the 'preferable procedure' for determining the common issues: s. 5(1)(*d*) [of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6]. This is a comparative test. Is the class proceeding a better way to resolve the common issues than the alternatives? In every case one alternative is determining the common issues by requiring each class member to conduct separate lawsuits in which there will be a trial of both the common issues and individual issues. This would mean that the common issues would be tried over and over again with an obvious duplication of effort and risk of inconsistent results. One might expect that would rarely be a preferable course."

public interest – "[*Per Molloy, Chair (Foulds and Fisher, Members, concurring)*:] I share Mr. McGowan's view of the difficulty in articulating what is meant by 'public interest'. Obviously, as he points out, it is in the public interest that persons whose legal rights have been infringed should be able to enforce them. I do not think however, that this principle necessarily translates into a determination that the public interest requires that funding be granted to any case with a better than 50% chance of success. Obviously the legislation creating the class proceedings fund is itself public interest legislation and to that extent it must be in the public interest that deserving class actions receive funding. However, in my opinion, the reference to public interest in s. 5 of the regulations [*Law Society Act*, R.S.O. 1990, c. L.8 – Class Proceedings, O. Reg. 771/92] goes beyond that and mandates our consideration of the subject matter of the litigation itself and the nature of the class bringing it.

. . .

'Public interest' is a difficult concept to describe and one for which an objective test is impossible to devise. However, generally speaking, the committee would lean more favourably towards funding a case which raises issues of broad public importance or which is directed towards improving the situation of persons or groups who are historically disadvantaged in our society."

public interest – "[*Per McGowan, Vice Chair (dissenting in the result)*:] This is a most difficult issue to address because the 'public interest' is a very subjective concept . . .

> Parliament and the Legislative Assembly determine the public interest by passing laws. If the law provides rights to a class of persons, it is in the public interest that they be permitted to enforce those rights. If it is not in the public interest such rights be enforced, Parliament or the Legislative Assembly should change the law to remove those rights.
>
> This analysis reduces to a merits test. In my opinion, if the committee concludes that a class action has a probability of success of 50% or more, then it is in the public interest that the class action be funded. The result is that if an applicant can satisfy the committee it has a 50% or greater probability of success, it should not in my opinion be concerned about being denied funding based on the committee's interpretation of the 'public interest'.
>
> However, I would not go so far as to say that the reverse is true. The fact that a class action has a probability of success below 50% does not mean it is in the public interest that funding be denied . . .
>
> . . . if the case has a lower than 50 per cent probability of success at trial the applicant should expect it will be denied funding. It would be exceptional that a weak case would be granted funding based on the committee's interpretation of the 'public interest'."

Sanderson order – "[*Per McGowan, Vice Chair (dissenting in the result)*:] . . . a 'Sanderson' order requiring the losing defendant to pay the winning defendant's costs."

APPLICATION by plaintiffs for order under s. 59.3 of *Law Society Act* funding class action.

David E. Wires and *Karen E. Jolley*, for applicants (plaintiffs).

(Doc. C.P.C. 003/94; court action 94-CQ-48311)

The reasons of the Committee were delivered by

1 April 25, 1995. MOLLOY, Chair (FOULDS and FISHER, Members, concurring): – This application for funding of a class action under s. 59.3 of the *Law Society Act* as amended by the *Law Society Amendment Act (Class Proceedings Funding), 1992*, S.O. 1992, c. 7 was heard before four members of the Class Proceedings Committee (the "committee") on August 23, 1994.

2 The committee heard submissions from counsel for the plaintiffs. Following these submissions, the committee retired to consider its decision. A majority of the committee was of the opinion that the application for funding should be granted. The applicants were advised forthwith that funding would be granted and that written reasons for the decision would be issued subsequently.

3 The *Class Proceedings Act, 1992* came into force in Ontario on January 1, 1993. The scheme for class actions in Ontario which was introduced under this legislation is novel. The committee considers

that it would be useful to the public and to the profession if reasons for its decisions could be issued in appropriate cases, particularly in these early days under the legislation.

4 In this particular case, the members of the committee are divided on the result. Three members of the committee decided in favour of the application on its merits, one member is opposed. However, on matters of general principle, we are largely in agreement. It is only upon the application of those principles to this particular case that we find ourselves in disagreement.

5 I have had the benefit of reading the reasons for decision of the committee's vice chair Michael McGowan who is dissenting in the result. Mr. McGowan has divided his reasons into Part I (general matters for public consumption) and Part II (confidential matters about this particular case which may or may not be made public by the applicants). I find this structural approach to be sensible and I adopt it. Part I of these reasons shall be public and Part II for the use of the applicants to be made public only if they choose to do so.

6 Further, having reviewed Part I of Mr. McGowan's reasons, I find that I am in such substantial agreement on these matters of general principle that I adopt his reasons almost in their entirety. I set out below my opinion in only those areas on which I am not in agreement with Mr. McGowan's reasons.

Part I

7 I am in full agreement with Mr. McGowan's reasons on the test for granting funding, including his summary of the eight relevant factors to be considered in deciding whether to fund a class proceeding. Further, I am in full agreement with Mr. McGowan's more detailed discussion of four of those factors, namely: 2. fundraising efforts by the class representative; 3. the proposed use of the funds; 4. financial controls regarding the use of the funds; and 7. the amount of the class proceedings fund required for other proceedings. I therefore propose to say nothing further on these topics. I adopt Mr. McGowan's analysis on these issues. My views on the other factors are set out below.

The Merits of the Case

8 I agree with Mr. McGowan that this will typically be the most important and determinative factor to be considered. I also agree with his comments on the expectations of the committee as to the applicant's identification and analysis of potential defences. However, I am not entirely comfortable with the "50% or better chance of success" approach. It is difficult enough to predict even or

better odds of success at the end of a trial having heard all of the evidence. Making such an assessment on the basis of written material and brief oral submissions of counsel for one party, and usually at a very preliminary stage of the proceeding, is even more problematic.

9 I prefer to take an approach similar to that applied by the courts on motions for summary judgment, although with a somewhat stricter standard to be met by the plaintiff. The plaintiff must at least present a prima facie case. If the case is so weak that the plaintiff is virtually certain to lose at trial, then clearly the application for funding will be refused. Conversely, an iron clad case which appears to be a "sure winner" at trial will satisfy the merits component of funding requirements (although it may nevertheless be rejected because of other factors). For the vast majority of cases which are in between these two extremes, I would be inclined to apply a "strong arguable case" analysis. The committee should not become a substitute for a trial judge. If the case is not one which would be dismissed on a motion for summary judgment, I would be reluctant to refuse funding knowing that this would almost certainly be the end of the action. This would particularly be the case if the analysis of the case under other factors (e.g. public interest) was especially favourable. Further, we must be mindful that many of the cases which come before us will be test cases. Funding should not be denied merely because a case or cause of action is novel or unprecedented. The common law is a fluid thing. It is only by bringing cases which challenge existing precedent that the common law can evolve. Therefore, the committee ought not to refuse funding an arguable case raising important issues merely because there is precedent against it.

10 I see the various factors as being interactive. For example, a case which is somewhat weaker on the merits analysis may be enhanced for the purposes of funding by the strong public interest issues which it advances. Conversely a stronger case on the merits may be weakened by other factors such as a failure to attempt to raise funding through other means.

The Extent to which the Issues affect the Public Interest

11 I share Mr. McGowan's view of the difficulty in articulating what is meant by "public interest". Obviously, as he points out, it is in the public interest that persons whose legal rights have been infringed should be able to enforce them. I do not think however, that this principle necessarily translates into a determination that the public interest requires that funding be granted to any case with a better than 50% chance of success. Obviously the legislation creating the class proceedings fund is itself public interest legislation and to that extent it must be in the public interest that deserving class actions receive

funding. However, in my opinion, the reference to public interest in s. 5 of the regulations goes beyond that and mandates our consideration of the subject matter of the litigation itself and the nature of the class bringing it.

12 Section 59.3(4) of the *Law Society Amendment Act* sets out certain criteria this committee *may* consider in deciding whether to grant funding. It provides:

> (4) In making a decision under subsection (3), the Committee may have regard to,
>
> (*a*) the merits of the plaintiff's case;
>
> (*b*) whether the plaintiff has made reasonable efforts to raise funds from other sources;
>
> (*c*) whether the plaintiff has a clear and reasonable proposal for the use of any funds awarded;
>
> (*d*) whether the plaintiff has appropriate financial controls to ensure that any funds awarded are spent for the purposes of the award; and
>
> (*e*) any other matter that the Committee considers relevant.

13 Section 5 of O. Reg 771/92 specifies some additional factors as follows:

> 5. In making a decision under subsection 59.3(3) of the Act, the Committee may have regard to the following matters:
>
> 1. The extent to which the issues in the proceeding affect the public interest.
>
> 2. If the application for financial support is made before the proceeding is certified as a class proceeding, the likelihood that it will be certified.
>
> 3. The amount of money in the Fund that has been allocated to provide financial support in respect of other applications or that may be required to make payments to defendants under section 59.4 of the Act.

14 The logical interpretation of these provisions is that the regulation is meant to add to the factors specifically listed in the Act. It cannot logically be the case that the reference to "public interest" in the regulation means no more than a meritorious case. If that were so, this part of the regulation would merely duplicate what was already provided for in the Act. In my opinion, basic principles of statute interpretation mandate an interpretation of "public interest" as going beyond a merits analysis.

15 Further, the plain meaning of the regulation, and of the words "public interest", in my opinion, clearly mandate an interpretation that goes beyond an assessment of merits. This is particularly the case since the regulation refers to "*issues* in the proceeding" which "affect the public interest". Our attention must necessarily, therefore, be directed to the *issues* in the case itself and not merely whether the case is meritorious.

16 "Public interest" is a difficult concept to describe and one for which an objective test is impossible to devise. However, generally speaking, the committee would lean more favourably towards funding a case which raises issues of broad public importance or which is directed towards improving the situation of persons or groups who are historically disadvantaged in our society. One of the central purposes of the class proceedings fund is to provide access to justice for those who otherwise would not be able to enforce their rights. It is in the public interest that the fund be administered so as to provide access to justice to those who otherwise would be unable to enforce their rights. Therefore, in my view, we should consider both the nature of the class and the issues being raised in the proceeding in assessing whether the public interest is served by funding a case. That is not to say that meritorious cases which do not have a strong public interest component will not be funded. However, if the public interest factor is raised this, in my view, will enhance an application which may be weaker under other factors.

The Likelihood of Certification

17 Where it is *clear* that the class will not meet the certification test, I would refuse funding. However, beyond that I prefer not to attempt to predict the outcome of the certification hearing. There is not as yet a significant enough body of case law to enable us to make informed decisions on this issue. Without getting into an analysis of the case law to date, I prefer to state that it would only be in the clearest of cases that I would reject a funding application on an otherwise meritorious case based on speculation that the class is unlikely to be certified. While this may expose the fund to potential adverse cost awards if a funded action is dismissed at the certification stage, at least this will have been at an early stage of the proceeding such that the defences costs will be relatively low. The alternative of dismissing a funding application based on the likely judicial determination of an issue which is new to our courts and on which the law is relatively undeveloped is not an attractive one, particularly since it may well result in the action not proceeding at all.

Any Other Matter Considered Relevant

18 I agree with Mr. McGowan that the ability of the defendant to satisfy any judgment against it is a relevant factor to be considered, although the weight to be given to it will vary depending on the nature of the case. In a commercial case for recovery of money this may be a determinative factor. In cases involving the determination of rights or principles of broad application, the financial status of a particular defendant may not be as important. In such cases, however, one would expect there to be a strong public interest factor before funding would be granted.

19 In addition, I would consider a critical factor to be the arrangements made by class counsel to manage the case as it progresses. One component of this is the competence and experience of class counsel. Another is the overall strategy and planning of the case. Are there workable plans in place to ensure that the case will be carried forward to its completion? Is the class counsel committed to seeing the case through? The fund cannot afford to pay out considerable sums for disbursements in a case only to have it abandoned by counsel who subsequently loses interest in the case or finds it too costly or time consuming to manage.

[CONFIDENTIAL PART II OMITTED]

20 Accordingly, the application for funding in this case is granted.

December 8, 1994. MCGOWAN, Vice Chair (dissenting in the result): –

PART I

21 This is an application for funding of a class action under s. 59.3 of the *Law Society Act* as amended by the *Law Society Amendment Act (Class Proceedings Funding), 1992*, S.O. 1992, c. 7.

22 These reasons are divided into two parts. Part I contains a general discussion of matters which are not confidential and will be made public by the Class Proceedings Committee. Part II contains a discussion of confidential matters about the case. The committee's policy is to protect the confidentiality of the application and it is the applicants' decision whether to publicize Part II.

23 The applicants have made the defendants aware an application for funding is being made so the committee can use the actual name of the case. In some cases the fact that a plaintiff has applied for and been denied funding may prejudice the plaintiff's case so generally

the committee would use pseudonyms to protect the applicant's identity. The committee will generally use the actual names of the parties only if the applicant has previously made the defendant aware an application is being made or if funding is granted in which case the fact of the application for funding would have to be disclosed to the defendant pursuant to s. 8(3) of O. Reg. 771/92.

Test for Granting Funding

24 Section 59.3(4) of the *Law Society Act* as amended by the *Law Society Amendment Act (Class Proceedings Funding), 1992*, S.O. 1992, c. 7 sets out five factors the Class Proceedings Committee may consider in deciding whether to fund a class proceeding. Section 5 of O. Reg. 771/92 sets out three additional factors. These eight factors may be summarized as follows:

1. the merits of the case;

2. fund raising efforts by the class representative;

3. the proposed use of the funds;

4. financial controls regarding the use of the funds;

5. the extent to which the issues in the litigation affect the public interest;

6. the likelihood of certification;

7. the amount of the class proceedings fund required for other proceedings;

8. any other matter considered relevant.

25 While the committee must consider each application on a case by case basis, I believe that it is important that the public and the legal profession be given some indication how they may expect these criteria to be applied. This is particularly important because the committee will generally not consider an application for funding until the statement of defence has been filed. (It cannot consider an application for funding before a proceeding is commenced because s. 59.3(1) of the *Law Society Act* as amended by the *Law Society Amendment Act (Class Proceedings Funding), 1992* permits only plaintiffs or applicants to apply.) The class representative must start an action or application before applying for funding.

26 If funding is denied the class representative will be left either to proceed with the lawsuit and take the risk of a potentially ruinous defence costs award, or seek leave to discontinue or abandon the action under s. 29 of the *Class Proceedings Act, 1992*.

The merits of the case

27 This will generally be the single most critical factor in granting funding. Strong cases are likely to be funded. Weak cases are unlikely to be funded (although it is conceivable a weak case might be funded if other factors, particularly the public interest consideration, strongly favoured granting funding).

28 The applicant will be expected to provide a thorough and frank analysis of the merits of the case to the committee. The funding application is not an adversarial proceeding and the committee will not have the benefit of a contested hearing. Thorough and frank submissions by the applicant are essential for the committee to do its job. The committee will not grant funding to an applicant who has not been thorough and frank in its submissions to the committee.

29 Litigation is an inherently uncertain process and it is obviously not possible to assess the merits of a case with complete assurance, particularly at an early stage of the litigation. We do not expect the applicant to have an ironclad case.

30 We do expect the applicant to show a prima facie case. We also expect the applicant to identify and analyze the important possible defences to the claim. Failure to identify and analyze an important possible defence will at best cause a delay in determining the funding application so the applicant can submit further material on the point. At worst, such a failure could result in an outright refusal of the funding application (in which case the applicant would still have the right to re-apply under para. 13 of the Class Proceedings Committee Practice Direction #1).

31 The committee recognizes that in any given case it may well be possible to create a long list of possible defences. Statements of defence often plead numerous defences which are never seriously pursued and ultimately come to naught. We do not expect or require an exhaustive analysis of each and every possible defence which may be or is raised by the defendant.

32 The purpose of the exercise is not to make work for the applicant by preparing detailed legal and factual analyses of frivolous or weak defences. Rather it is to obtain a practical assessment of the merits of the case. The applicant should exercise good judgment as to how "important" a possible defence may be and devote commensurate attention to it. Of course, there will be occasions in which the committee views a possible defence as more "important" than the ap-

plicant in which case the applicant may be asked to address the issue more thoroughly.

Fund raising efforts by the class representative

33 The class representative will be expected to make such fund raising efforts as may be necessary and reasonable in the circumstances of the case.

34 What is *necessary* in a particular case will depend on how the financial elements of the litigation are proposed to be financed. There are three financial elements of any class action:

(a) class counsel's fees;

(b) class counsel's disbursements; and

(c) costs awards to the defendant.

35 Whether it is necessary to raise funds for class counsel's fees depends whether class counsel has been retained on a contingent basis or a fee for service basis. If class counsel is retained on a contingent fee basis, he or she will be paid from the proceeds of the lawsuit and no fund raising is necessary. However if class counsel is retained on a fee for service basis, the committee will have to be satisfied that sufficient fund raising has or will be done to pay the fees for the duration of the lawsuit. The committee's concern is that unless adequate arrangements are made to satisfy class counsel's fees, class counsel may withdraw from the case at some point during the litigation. Such an event might result in the abandonment of the action and personal liability to the representative plaintiff to repay the fund pursuant to s. 9 of O. Reg. 771/92.

36 With respect to disbursements, if funding is granted the bulk of the disbursements will normally be paid from the class proceedings fund (the "fund"). The committee, of course, will not give a blank cheque for disbursements and it may be that some requested disbursements will be refused if they are considered unnecessary or excessive. Some fund raising might be necessary in that regard if the class representative wishes to proceed with disbursements the committee chooses not to pay.

37 It is also conceivable that a case would require a very large amount for disbursements and the committee would not be willing to allocate the amount required for one class action. For example, a case could require a number of expert witnesses whose aggregate fees would be very substantial. The committee might well be willing to fund some but not all of the disbursements. In that case the applicant

would have to show the committee that it had made or would make adequate arrangements for the balance of the disbursements.

38 With respect to defence costs, if the committee grants funding for a class proceeding, the fund becomes liable for defence costs and the class representative is relieved of that risk: s. 59.4 of the *Law Society Act* as amended by the *Law Society Amendment Act (Class Proceedings Funding), 1992*. In general, the committee will not consider it necessary for a class representative to raise funds to satisfy potential defence costs award.

39 All applicants will be expected to make reasonable efforts to raise funds. They will be expected to seek to solicit funds from the class in the notice to the class as contemplated by s. 17(7) of the *Class Proceedings Act, 1992* and/or through other solicitations to the class. In some cases, class counsel may agree to finance some disbursements. In some cases other sources of funds may be available.

40 What is *reasonable* in a particular case will depend on the circumstances. At one end of the spectrum are cases in which the individual claims of the class are small. It will generally be impossible to raise funds from the class in such circumstances and the committee will be content with a promise to seek leave of the court to put a solicitation in the notice to the class. The committee will not expect the class representative to expend time and effort trying to raise funds if there is little reasonable expectation that the efforts will be worthwhile.

41 At the other end of the spectrum are cases in which the individual claims of the class are large and the class members are readily identifiable and small in number. The committee will expect greater fund raising efforts in such circumstances.

42 To remove any doubt, *success* in fund raising will never adversely affect an application for funding. For example, suppose class counsel has been retained on a contingent fee basis and fund raising efforts have produced enough money to pay for the disbursements. The applicant may apply to the committee for support, not because any cash is actually required to pay disbursements, but rather to deal with the risk of personal liability for an adverse defence cost award. If otherwise appropriate, the committee would be prepared to provide a token allowance for disbursements to enable the applicant to be relieved of personal liability for a defence cost award.

43 The only way an applicant can be adversely affected regarding fund raising efforts is by *failure* to make reasonable efforts to raise funds in all the circumstances. Since most applicants will make reasonable efforts, the issue of fund raising efforts will rarely be determinative of an application for funding.

The proposed use of the funds

44 Section 59.3 of the *Law Society Act* as amended by the *Law Society Amendment Act (Class Proceedings Funding), 1992* indicates that the funds are to be used for "disbursements related to the proceeding." This will include the usual disbursements common in all litigation for filing fees, transcript costs, expert fees, etc. It will also include disbursements for expenses which usually arise only in class proceedings such as the cost of class notice and perhaps obtaining statistical evidence under s. 23 of the *Class Proceedings Act, 1992*.

45 Notice costs can be very expensive in class actions. In the United States Rule 23 and due process considerations require individual notice in many cases (see *Newberg On Class Actions*, 3d ed. (Colorado Springs, Colorado: Shepard's/McGraw-Hill, Inc., 1992) c. 8). If the class numbers in the tens or hundreds of thousands the cost of providing notice to individual members of the class can be, and in the United States often is, prohibitively expensive. As in many other areas of the class proceedings law, the *Class Proceedings Act, 1992* has been carefully designed to avoid procedural problems concerning notice and gives the court a broad discretion to tailor notice to the particular circumstances: s. 17 and see also the Ontario Law Reform Commission's *Report on Class Actions*, (Toronto: Ministry of the Attorney General, 1982) p. 510 et seq.

46 The committee will consider the proposed use of the funds and will allocate funds for items it believes to be reasonable. The issue of the proposed use of the funds will rarely be determinative of an application for funding.

Financial controls regarding the use of the funds

47 This factor is based on s. 59.3(4)(*d*) of the Act. Following passage of the Act O. Reg. 771/92 established a system of controls which should satisfy the committee's concerns about financial controls. Accordingly, the issue of financial controls should play little role in the committee's decisions.

48 When the committee grants funding for a class proceeding it will issue a direction to the board of the Law Foundation of Ontario under s. 59.3(3) to make payments from the fund for specified expenses up to specified limits. It is the board, not the committee, which administers the fund and the board will make payments under s. 59.3(4) as directed by the committee.

49 Section 6 of O. Reg. 771/92 states the mechanism by which awards are drawn down. Generally it provides that to obtain payment of amounts awarded by the committee class counsel shall submit a statement to the board certifying that the subject disbursements have

been incurred. The board may require further proof of the disbursements but presumably will usually rely on the certified statement from class counsel for routine expenses if the statement appears to be in order. The board will then reimburse class counsel.

50 For example, suppose the committee allocates $4,000 for the costs of examiners' fees and transcripts up to the end of discovery. Suppose class counsel is billed $1,000 by the official examiner and pays that amount. Class counsel can then issue a statement certifying to the board it has paid $1,000 for examiners' fees and transcripts and request reimbursement. The board can check that at least $1,000 remains in the allowance for examiners' fees and transcripts and issue a cheque to class counsel in trust.

51 When class counsel incurs further charges, the process is repeated until the entire $4,000 has been drawn down. If $4,000 proves to be inadequate an application may be made to the committee for further funding. If the total disbursements for examiners fees' and transcripts to the end of discovery turn out to be only $3,500 the other $500 cannot be drawn down; however, the committee will take any such underspending into consideration when considering the applicant's subsequent funding requests.

52 The committee appreciates it is difficult to estimate accurately the disbursements which will be incurred and will generally be amenable to adjusting awards so that a surplus for one expense item may be applied to a deficiency for another expense item.

53 Obviously, class counsel should try not to issue statements to the board for small amounts but rather should wait until a larger amount has accrued. The statements should clearly relate expenses incurred to particular items for which funding has been granted to make it easy for the board to keep track of how much has been drawn down on each item.

The extent to which the issues in the litigation affect the public interest

54 This is a most difficult issue to address because the "public interest" is a very subjective concept. The approach I prefer is as follows.

55 Parliament and the Legislative Assembly determine the public interest by passing laws. If the law provides rights to a class of persons, it is in the public interest that they be permitted to enforce those rights. If it is not in the public interest such rights be enforced, Parliament or the Legislative Assembly should change the law to remove those rights.

56 This analysis reduces to a merits test. In my opinion if the committee concludes that a class action has a probability of success of 50% or more, then it is in the public interest that the class action be

funded. The result is that if an applicant can satisfy the committee it has a 50% or greater probability of success, it should not in my opinion be concerned about being denied funding based on the committee's interpretation of the "public interest".

57 However, I would not go so far as to say that the reverse is true. The fact that a class action has a probability of success below 50% does not mean it is in the public interest that funding be denied. I can envision cases which may appear to be unlikely to succeed but which I would wish to fund precisely because they appeal to my subjective concept of what is in the pubic interest. Legal history is replete with cases overturning what was previously thought to be the law. That is how the common law evolves.

58 I regret I cannot formulate a purely objective test for this factor since that would best permit an applicant to predict the outcome of an application for funding. However the test I have stated does provide some level of predictability: if the case has a lower than 50% probability of success at trial the applicant should expect it will be denied funding. It would be exceptional that a weak case would be granted funding based on the committee's interpretation of the "public interest".

The likelihood of certification

59 The requirements for certification are set out in s. 5(1) of the *Class Proceedings Act, 1992*. They are the most liberal of any certification test in any jurisdiction of the United States or Canada. See *Newberg on Class Actions*, c. 13.

60 There have been only a handful of certification cases in Ontario to date and the interpretation of the certification requirements is not settled law in Ontario. I will discuss the various requirements and indicate the interpretations which I will apply for funding purposes unless the courts authoritatively adopt other interpretations.

61 The first requirement is that the claim disclose a cause of action: s. 5(1)(*a*). That is a low threshold and it should usually be possible to predict accurately whether it will be satisfied.

62 The second requirement is that there be an identifiable class of two or more person: s. 5(1)(*b*). That is also an easily predictable and low threshold.

63 The third requirement is that common issues are raised: s. 5(1)(*c*). This is an obvious and necessary requirement for a class action and should be easily predictable; however, recent experience suggests it may not be so easy. In *Sutherland v. Canadian Red Cross Society* (1994), 17 O.R. (3d) 645, 21 C.P.C. (3d) 137 (Ont. Gen. Div.), a case concerning the transmission of the HIV virus through blood products, it was held that there were no common issues. A casual

observer might have expected that common issues would include whether someone had been negligent in not introducing heat treatment of blood products at an earlier point in time or in not warning recipients of blood products about the risk of contracting and spreading the virus.

64 The fourth requirement is that a class proceeding be the "preferable procedure" for determining the common issues: s. 5(1)(*d*). This is a comparative test. Is the class proceeding a better way to resolve the common issues than the alternatives? In every case one alternative is determining the common issues by requiring each class member to conduct separate lawsuits in which there will be a trial of both the common issues and individual issues. This would mean that the common issues would be tried over and over again with an obvious duplication of effort and risk of inconsistent results. One might expect that would rarely be a preferable course.

65 Once again, however, recent experience suggests it is not so easy to predict how the court will rule. In *Sutherland* it was held that individual lawsuits were preferable to a class action. The result is that each plaintiff would have to prove negligence (e.g. failure to warn) separately. If the matter had been allowed to proceed as a class action, there would have been only one trial of the issue of failure to warn and, if successful, there would then have been numerous trials of individual issues (e.g. causation, damages, and third party claims) under s. 25 of the *Class Proceedings Act, 1992*.

66 In some cases there will be other alternatives to a class action. In *Rogers Broadcasting Ltd. v. Alexander* (1994), 25 C.P.C. (3d) 159 (Ont. Gen. Div. [Commercial List]) one alternative was a valuation proceeding under the *Canada Business Corporations Act*. The court held that was preferable to a class action.

67 The fifth requirement (s. 5(1)(*e*)) is that there be a representative plaintiff who

> (i) will fairly and adequately represent the interests of the class;
>
> (ii) has produced a workable plan for the proceeding; and
>
> (iii) has no conflict of interest regarding the common issues with the interests of the class.

68 United States caselaw and the Ontario Law Reform Commission's *Report on Class Actions* (p. 359 et seq.) make it clear that fair and adequate representation includes retaining adequate class counsel. This element should not be difficult to predict. Experienced litigation lawyers with medium or large firms will be considered adequate. Experienced litigation lawyers with very small firms might

have some difficulty persuading the court that sufficient resources can be devoted to the class action but that could be solved by creating a consortium of firms or sole practitioners to conduct the case. Inexperienced litigation lawyers are unlikely to be considered adequate.

69 One issue which has become apparent in the Ontario cases is whether the representative plaintiff must represent the *characteristics* of the class. To use the *Sutherland* case as an example again, the court indicated the plaintiff, who allegedly contracted the HIV virus in blood products received following surgery, could not represent haemophiliacs because she was not a haemophiliac. It seems the court expected the representative plaintiff to share the characteristics of all class members.

70 The class representative must be a *member* of the class (s. 2(1)) but the Act does not require the class representative share all the *characteristics* of the class. A class representative will never represent all the characteristics of the class. Some class members will be right handed and some will be left handed. It does not matter which the representative is because it has no bearing on the issues in the case.

71 The troublesome question is what if the representative does not share a characteristic which is material to the issues in the action. For example in the *Sutherland* case, the class was persons who became infected with the HIV virus as a result of contaminated blood products. Some were patients infected by blood transfusions. Others were haemophiliacs who were infected through a blood product. Still others were cross-infected persons who became infected by contact with a person who received contaminated blood or blood products. No class representative could share all of these characteristics. Does that mean certification should be denied?

72 It appears that s. 5(2) provides the answer. The court can create subclasses for class members who have common issues not shared by all class members. The court could create separate subclasses for haemophiliacs, transfusion recipients and cross-infected individuals. Whether the court should create such subclasses depends upon whether "protection of the interests of the subclass members requires that they be separately represented". This is consistent with s. 5(1)(*e*)(i) which focuses on representing the *interests* of the class.

73 In my opinion the courts will ultimately take the position that the class representative's not sharing some characteristics of other class members is only relevant to the issue of whether separate representation is required. If so, the result is not to refuse to certify the action but rather to create a subclass and appoint a representative for the subclass.

74 As indicated in the above discussion I believe some of the few court decisions to date have taken a somewhat restrictive approach to certification of class proceedings. The same thing happened initially with Quebec's class action reforms. However in the longer run I believe our courts, like the courts in Quebec, will take a more purposive approach. In considering the likelihood of certification for purposes of granting funding I therefore will discount the early restrictive decisions.

The amount of the Class Proceedings Fund required for other proceedings

75 The fund has been endowed with $500,000. It will be decreased by amounts spent on disbursements and by amounts paid to satisfy defence costs. It will be increased by the 10% levy on recoveries in class proceedings for which funding is granted (see. O. Reg. 771/92, s. 10). It is conceivable it might also be increased by cy pres distributions under s. 26(4) of the *Class Proceedings Act, 1992*.

76 It is readily apparent that the fund could be exhausted quite quickly by adverse defence costs awards. In one of the early Quebec cases involving Honda the defence costs claimed were $675,650 which led to statutory amendments limiting defence costs to a small claims court scale (see G.D. Watson, "Ontario's New Class Proceedings Legislation – An Analysis", in Watson & McGowan, *Guide to Case Management and Class Proceedings, Ontario Civil Practice 1993* (Scarborough, Ontario: Carswell, 1993) at p. 6).

77 One approach the committee could take is to set aside an allowance for each case funded sufficient to pay any adverse costs award of defence costs. Under this approach only a very few cases could be funded. Those cases could easily take several years to be resolved and in the meantime no cases could be funded. If such a case were successful the fund would obtain 10% of the proceeds. The committee would then be able to fund another case or two. If such a case were unsuccessful, the fund might well be required to pay substantial defence costs.

78 A second approach would be to make the assumption that future proceeds of the 10% levies on successful cases will cover future adverse defence costs awards. The committee would not set aside part of the initial $500,000 for reserves for defence costs but rather could give those funds to plaintiffs to pay disbursements. This approach would permit the funding of many more cases.

79 Under the second approach, if on average the cases funded by the committee have a 50% or better chance of success, over the long run the 10% levy will generate substantial proceeds for the fund. Whether the fund grows or shrinks will depend on the average size of

the levy and the average size of the defence costs awards. Using this approach the committee should try select cases so that overall

(a) the average case has at least a 50% probability of success; and

(b) the average levy is greater than the average defence costs.

80 I prefer the second approach. I think the first approach would guarantee the committee would fail in its purpose of promoting access to the courts since it could fund very few cases in the foreseeable future. The second approach would permit many more cases to be funded.

81 Either approach could result in the fund being exhausted. The simple reality is that if the committee cannot pick enough "winners", the fund will be exhausted regardless of what approach is taken. On analysis, the second approach is in fact safer than the first one since the number of cases funded is much greater thereby spreading the risk and permitting the law of averages to have effect.

82 This does not mean that every case funded by the committee must entail substantial monetary relief. It is quite possible the committee would fund a meritorious claim for purely non-monetary relief. However over the long run the proceeds of successful monetary cases will have to pay for any unsuccessful non-monetary cases as well as any unsuccessful monetary cases.

83 Nor does this mean that the committee should automatically shy away from cases involving multiple defendants. If the plaintiff succeeds against one defendant but fails against another the court may make a "Sanderson" order requiring the losing defendant to pay the winning defendant's costs. It does not appear that the court could make a "Bullock" order (requiring the plaintiff to pay the successful defendant's costs and the unsuccessful defendant to reimburse the plaintiff) since the defendant cannot actually recover costs from the plaintiff (s. 59.4(3)). However the court might make an analogous order involving the fund.

84 Also on the issue of defence costs it should be noted that s. 31(1) of the Act gives the court a broad hint that it should not award costs against a plaintiff regarding test cases, novel points of law, and matters of public interest.

85 In the unlucky event the fund were, or were about to be, exhausted by adverse defence costs awards the Ontario government could follow Quebec's lead and curtail the amount of defence costs recoverable. It would not have to pass new legislation to do so. It already has the power to limit defence costs payable from the fund by regulation under s. 59.5(1)(*d*) although it has not exercised that power

to date. If defence costs recoverable from the fund were limited by regulation, s. 59.4(3) would prevent the defendant recovering "any part" of the costs award from the plaintiff.

Any other matter considered relevant

86 One additional consideration is the ability of the defendant to pay an award against it. If the defendant appears to be judgment proof, the committee is unlikely to grant funding.

Simplified Criteria

87 Based on the factors set out above I believe it is possible to state simple criteria which, if satisfied, will usually result in funding being granted by the committee. Funding for such cases would not be automatic since there could be unusual additional factors which would cause the committee to refuse funding. Further, there are doubtless many cases which do not satisfy all the criteria which would nevertheless receive funding from the committee. The purpose of identifying these criteria is not to discourage applications regarding cases which do not meet the criteria but rather to give class representatives in cases which do satisfy the criteria some assurance that funding will likely be granted.

88 The criteria are:

1. The case has a 50% or better likelihood of being certified as a class action.

2. The case has a 50% or better likelihood of success at trial.

3. The case involves substantial monetary relief.

4. The defendant appears to have the ability to pay an award against it.

5. Reasonable arrangements have been made to retain adequate class counsel for the duration of the case.

6. The case does not require excessive funds for disbursements from the class proceedings fund.

89 For the reason stated in Part II, I would deny this application for funding. The majority of the class proceedings committee takes a different view and therefore the committee will grant funding for this case.

Application granted by majority.