

**CPC SUBMISSION TO
LAW COMMISSION OF ONTARIO
FOR ITS PROJECT CONSIDERING
ONTARIO'S EXPERIENCE WITH
CLASS ACTIONS IN ONTARIO**

This is the submission of the Class Proceedings Committee (the “Committee”) made in respect of the Law Commission’s project considering Ontario’s experience with class actions in Ontario. The Law Commission has noted that its research will be an “evidence-based and practical analysis of class actions from the perspective of their three objectives: access to justice, judicial economy and deterrence.” Question 3 of the Law Commission’s Consultation Paper (the “Consultation Paper”) asks questions relevant to the Committee and the Class Proceedings Fund (the “CPF”). The Committee will address these questions in an evidenced-based manner addressing the objectives of class actions which the Commission noted above. The submission is organized as follows:

- A. Brief summary of the CPF’s mandate and history
- B. Question 3i) Should Ontario retain the two-way costs rule?
- C. Question 3ii) Should the CPF have the flexibility to alter its current 10 % levy?
- D. Question 3iii) Is third party funding a positive development in class action practice? Should it be more tightly regulated?
- E. Question 3iv) Should the source and extent of funding be disclosed to the court?

A. Brief summary of the Fund’s mandate and history

1) In 1982, the Law Reform Commission Report on Class Actions identified costs as the single most important issue for policy-makers to consider when designing class actions regimes and recommended that a “no costs” regime be adopted.¹ In February 1990, the Attorney General’s Advisory Committee on Class Action Reform (“AG Advisory Committee”) released its report. It agreed that the manner in which costs were dealt with was important to the success of any class action legislation. The AG Advisory Committee’s report stated in part as follows:

...Few private individuals could afford to undertake such financial risks and obligations...The problem in financing a class proceeding are particularly acute in cases where the amount sought on behalf of each member of the class is relatively small. Consider the case of users of a transit system denied access to it by an illegal strike (as was the case in Quebec). Tens of thousands of transit users who had purchased monthly transit passes did not receive full value for their purchase during the strike. If the loss of value was, for example, less than ten dollars per user, it would be unlikely that any one transit rider would come forward and act as the representative

plaintiff. To do so under the existing costs regime would expose such a person to liability for the other side's costs if the lawsuit were ultimately unsuccessful.²

2) However, the AG Advisory Committee did not agree with a “no costs” regime:

...the Committee is also of the opinion that the existing costs regime should not be completely restructured simply to accommodate class proceedings. The answer to accessibility is not the removal of all risk of the obligation for costs but, rather, the support of worthwhile class proceedings through assistance with disbursements and protection against adverse costs awards. The fund need not be responsible for plaintiffs' counsel's legal fees. Those fees can be the responsibility of the class and representative plaintiff and are a matter between the class and their lawyer.³

3) The AG Advisory Committee's report recommended a modified costs regime whereby normal costs rules should apply but that in exercising discretion, courts should have regard to whether any issue was in the nature of a test case, raised a novel point of law or concerned a matter of public interest. It also recommended that the Ministry of the Attorney General establish a “Costs Assistance Fund” in conjunction with non-governmental sources which would assist plaintiffs with disbursements, costs of experts and notice to class. This Costs Assistance Fund should also provide indemnification for costs and be self-funding.⁴

4) The CPF was thus established in 1992 under s. 59.1 of the *Law Society Act*, (the “Act”)⁵ at the same time that class actions legislation was proclaimed in Ontario.⁶

5) The CPF is administered by the Foundation. (The relationship between the CPF, the Committee and the Foundation is more particularly set out in this endnote.⁷)

6) As Justice Winkler (as he then was) wrote in *Garland v Consumers' Gas Co*, “The purpose of the CPF [sic] is to improve access to justice in the Province of Ontario.”⁸ It does so by moderating the operation of normal cost rules in the context of class actions. The CPF protects representative plaintiffs from personal exposure to significant cost awards, so that potential class representatives are not discouraged from bringing their claims.

7) As described in the Foundation's 2016 Annual Report which is attached as Appendix "A", the CPF's financial support of public interest cases enables individuals to use the law to positively affect the lives of other class members and members of the public by helping to achieve justice, accountability, and transparency in public and private institutions.⁹

8) The CPF serves the overall class proceedings regime through the following purposes mandated by s. 59.1(2) of the *Act*:

- a. Providing financial support to approved class action plaintiffs for legal disbursements; and
- b. Payments to defendants in respect of costs awards made in their favour against plaintiffs who have received financial support from the Fund.¹⁰

9) Pursuant to section 59.1(1) of the *Act* the CPF received a \$500,000 endowment from the Foundation, and is otherwise funded by a 10 % levy on settlements or awards in favour of class members pursuant to s. 8(4) of Regulation 771/92.¹¹

10) The Committee was established pursuant to section 59.2 of the *Act* to make decisions about which cases should receive support. The Committee is composed of senior and highly respected members of the Bar. The Foundation and Attorney General each appoint one member and jointly appoint the other three.¹² The current members of the Committee are Wendy J. Earle (former Partner with Borden Ladner Gervais), Paul Evraire (former Special Counsel with the Department of Justice), Scott C. Hutchison (Partner, Henein, Hutchison LLP), Kim Twohig (former General Counsel, Ministry of the Attorney Counsel), and Sandra Barton (Partner Gowling WLG). Each term is three years long, but members are eligible for reappointment and usually serve for many terms.¹³ The Committee members are volunteers with no vested interest in the CPF.

11) The Committee is strictly mandated to act in accordance with the *Act* and the Regulation 771/92 enacted pursuant to the *Act*.¹⁴ The Committee does not have discretion to negotiate alternative arrangements for funding.

12) The Committee decides which cases will be supported based upon an applicant's written materials and submissions at an oral hearing using explicit factors set out in section 59.3 of the *Act*, and section 5 of Regulation 771/92:

- 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;
- e. Any other matter that the Committee considers relevant;
- f. The extent to which the issues in the proceeding affect the public interest;
- g. If the application for financial support is made before the proceeding is certified as a class proceeding, the likelihood that it will be certified; and
- h. 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.¹⁵

13) In *Edwards v Law Society of Upper Canada*,¹⁶ the Committee described, in part, how it makes decisions and the manner in which it applies the criteria. Chair Anne Molloy (as she then was), writing for the majority emphasized the importance of the merits of the case as well as the public interest engaged. In addressing the merits, she rejected an approach in which only cases with a 50% or better chance of success would be funded. Instead, she opted for an approach which she described as similar to the courts on motions for summary judgment with a slightly stricter approach. The plaintiff would have to present a strong arguable case:

...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.¹⁷

14) She indicated that applications would not be rejected because they were novel or test cases, recognizing that “the common law is a fluid thing. It is only by bringing cases which challenge existing precedent that the common law can evolve.”¹⁸

15) She further stated that the application of criteria by the Committee would be “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.¹⁹

16) With respect to the definition of “public interest” the Chair stated that although it was difficult to articulate a definition:

...Generally speaking, the committee would lean 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 society. One of the central purposes of the class proceedings fund is to provide access to justice for those who would otherwise 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 will enhance an application which may be weaker under other factors.²⁰

17) The Fund has a website which sets out a rigorous process which applicants must follow to be considered for funding. This includes:

- a. A legal opinion regarding the merits of the case which must address key facts for the plaintiff to succeed, relevant documents, uncontroverted and disputed facts, the statutory framework and context, leading cases, the defendants’ theory if known, cases which the defendant may rely on, statutory defences available to the defendant such as limitation defences, and the strengths and weaknesses against different defences; and
- b. An opinion on likelihood of certification including an analysis of the causes of action, description of the identifiable class, the common issues versus the individual issues, whether the representative is appropriate (does he or she adequately and fairly represent the interests of the class, are there any conflicts with or amongst the class?), jurisdictional issues, whether there is a national class, whether Ontario is the proper

forum, whether the defendant will oppose Ontario's jurisdiction, any arguments which the defendant will raise with respect to any certification criteria and copies of all relevant cases for and against the plaintiff's position.²¹

18) The Committee is not permitted to seek any submissions from the defendant unless the plaintiff consents, in accordance with Justice Winkler's direction (as he then was) in *Garland v. Consumers' Gas*.²² Out of 246 files opened at the end of 2017, 108 applicants have consented to defendant's submissions but only 18 defendants in those cases made submissions to the Committee. Thus, when the Committee considers an application, it usually only has the plaintiff's submission.²³

19) After the plaintiff's materials are received and reviewed, the Committee, through its counsel, typically provides detailed questions in respect of any areas of the application which require further assessment and/or follow-up.

20) Once all materials are assembled, the applicant has answered any questions posed by the Committee and provided any additional materials requested by the Committee, the applicant attends a hearing where the applicant may present her case and the Committee can address any issues which require further exploration. Following the hearing, the Committee provides a written notification of an offer to fund which must be accepted by the applicant.

21) Pursuant to the *Act*, funding is granted in stages and applicants must make different applications for different stages. Where an application has already been approved at an earlier stage, the Committee will consider applications for subsequent stages in writing.²⁴

22) The Committee has discretion as to how much it will award in each stage. However, the indemnity provided to the plaintiff extends for the duration of the funded case, even if no further disbursement funding is awarded. The CPF has a detailed funding disbursement policy which describes what it funds and what materials it requires from applicants. The general categories of funding are: administrative expenses, travel expenses, examiner charges, expert fees, notice to class; and such other disbursements which may be approved in the Committee's discretion.²⁵

23) The Committee is not permitted to award funding for plaintiff counsel fees or any legal services fees.²⁶

24) Attached as Appendices “B”, “C”, “D”, “E”, “F”, “G”, “H”, “I”, “J” and “K” respectively, are the Guidelines on the Opinion on Certification, the Guidelines on the Opinion on Merits, Practice Direction 1 regarding the application process, Practice Direction 2 regarding Defendant Submissions, Practice Direction 3 regarding Repayment of Disbursements, Practice Direction 4 regarding Hearings, the Funding Disbursement Policy, the Notice Regarding Experts, Document Management Services and On-line Research, the Standard Format for Disbursement Funding Requests and a Sample Application Record.

25) After the Committee funds a case, it has no input into how counsel manage these cases. However it does receive information and updates including:

- a. Updates contained in supplementary applications for funding;
- b. Status reports from counsel which may include any significant event in the proceeding which could have implications for the CPF;
- c. Notices of motions and materials related to settlement; and
- d. On request any additional documents filed with the court and requested from the plaintiff.²⁷

26) The Committee holds approximately 9 meetings per year. At each meeting it hears applications for funding, receives and reviews updated information on each of its funded cases (in particular information which may alter the risk assessment of the case), receives and reviews detailed information concerning the CPF’s current financial position and short-term projections of its cash flow. In recent years it has held an annual full day working meeting where it considers any ongoing issues with a view to improving its processes where appropriate, as well as the risk of the entire portfolio at that time.

27) Attached as Appendix “L”, “M” and “N” are the CPF’s financial reports for the years 2013, 2014 and 2015 which set out further information about the Committee’s processes and

financial outcomes. (The financial report for 2016 was previously attached as Appendix “A” and the 2017 report is not yet finalized.)

28) Pursuant to section 8(4) of Regulation 771/92 the CPF receives a levy from successful actions that have received financial support from the CPF. The levy is equal to 10 % of the award or settlement in favor of the class members (after counsel and administration fees are deducted), as well as the total of any funded disbursements which have not yet been repaid.²⁸ The Committee does not have any discretion to negotiate alternative arrangements for funding.

29) When an action is unsuccessful, the CPF is liable for the costs of the defendant.²⁹

30) When the CPF was first established it received few applications and accordingly made few awards. For example:

- a. In 1993, the Committee received two applications and funded none;
- b. In 1994, the Committee received three applications and funded two; and
- c. In 1995, the Committee received no applications and funded none.

31) Up until 2002 the CPF had received a total of 33 applications and funded only 8. However, over time, as the CPF’s balance grew, and as costs awards in Ontario grew, the number of applications made to the CPF, and the number of class actions receiving financial support from the CPF has increased. Taking the last five years as an example:

- a. In 2013, it received 10 applications, held 13 hearings and approved seven applications;
- b. In 2014, it received 20 applications, held 20 hearings, and approved 11 applications;
- c. In 2015, it received 14 applications, held 17 hearings, and approved 12 applications;
- d. In 2016, it received 25 applications, held 22 hearings, and approved 17 new applications; and
- e. In 2017, it received 37 applications, held 26 hearings and approved 18 applications.

32) To date, the CPF has continued to grow, funding more cases and thus increasing access to justice in accordance with its mission. As at December 31, 2017:

- a. It has received 246 applications for funding and awarded funding in 146 cases;
- b. Of the cases funded, 43 have been successful, 30 have been unsuccessful and 73 approved cases were still ongoing;
- c. It has collected \$47,807,957 in levies from successful cases. This money has been reinvested in the ongoing funded cases and new approved cases;
- d. It has awarded disbursement funding to plaintiffs totalling \$24,642,181;
- e. It has paid \$13,447,253 to defendants in respect of costs awards either awarded by the court or settled. It should be noted that of the 30 unsuccessful cases, costs were settled in all but 10 cases; and
- f. The CPF balance as at December 31, 2017 is \$16,650,003.³⁰

33) The Committee funds a broad array of cases including: alleged abuse at residential facilities where children and/or persons with disabilities have resided; general Crown liability for alleged negligence; alleged *Charter* infringement as a result of the manner in which protesters were treated at the G20 Summit; alleged *Charter* infringement as a result of the manner in which inmates have been treated in prison facilities; professional negligence claims against auditors, accountants, financial advisors, lawyers, physicians and hospitals; product liability claims arising from medical appliances and prescription drugs; product liability claims arising from consumer products; consumer protection actions, including cases relating to interpretation of standard form contracts such as prepayment provisions in financial instruments, alleged misrepresentations to students in accredited colleges, undisclosed fees, alleged criminal rates of interest, and alleged breaches of privacy; employment cases, such as failure to pay overtime; pensions cases, including alleged mismanagement, breach of trust and denial of pension benefits; franchise cases, including alleged breach of franchise agreements, and duty of fair dealing; insurance cases, such as an alleged breach of *Insurance Act*, misappropriation of policy-holders funds;

competition law cases involving alleged price-fixing; environmental law matters alleging nuisance and negligence; securities law matters; and copyright cases.

34) In accordance with its access to justice mandate, the CPF has provided funding in cases where there is a small quantum claimed by small number of people as well as medium and large cases where possibly hundreds of thousands and millions of class members have claimed a significant quantum.³¹ The Committee has awarded funding to some unsuccessful cases which have nevertheless been important and precedent setting.³²

35) Many of the CPF's cases are mentioned in the Consultation Paper.³³

36) Attached as Appendix "O" is the CPF 20th Year Anniversary Brochure which provides detailed information on the way in which the CPF has improved access to justice and behaviour modification in Ontario, a cross-section of the types of cases supported, and a description of the novel issues and public interest that they have involved as well as the thousands of people who have benefitted.

37) Attached as Appendix "P" are a series of charts and diagrams which describe certain aspects of the CPF's history since it was created and demonstrate its significant growth.

38) Despite its current success, the CPF is and has been subject to significant and unpredictable contingencies.

39) First, the majority of funding applications are made at the initial stages of a case, and as noted above, without any submissions from the defendant. Despite rigorous analysis and risk assessment, it is very difficult to predict outcomes, levies or costs, particularly at this juncture.

40) Further, as noted by previous Chair Anne Molloy (as she then was), the practical reality is that it is even difficult to predict the outcome of a case after a full trial where both sides have presented all the evidence:

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.³⁴

41) Class actions are complex proceedings that often involve dynamic and complicated issues. These factors, among others, have a pronounced effect on a class action's potential for success and the magnitude of any settlement or damages awarded if successful and the levy which may be awarded or costs which may have to be paid.

42) In the past, there have been significant reversals of fortune in cases initially successful on the merits:

- a. The case of *Pearson v. Inco* was certified by the Court of Appeal in 2005.³⁵ In the costs decision, the Court of Appeal described the case as a matter involving the public interest.³⁶ Thereafter, the CPF awarded funding. The case proceeded to trial in 2009 over the course of one month. The trial judge awarded the plaintiff \$36,000,000 in damages which would have provided a levy to the Fund of approximately \$3,000,000.³⁷ However, the case was overturned on appeal.³⁸ The defendant then claimed over \$6,000,000 in costs, with the court ultimately awarding the defendant \$1,766,000.³⁹ The Fund paid this amount and also lost its investment in the case of \$1,000,192 plus legal fees paid to its counsel.⁴⁰
 - b. In *McNaughton v. Co-operators General Insurance* the plaintiff alleged that the insurer made improper deductions in breach of certain provisions of the *Insurance Act*.⁴¹ Although the trial judge dismissed the case, the Court of Appeal overturned him and granted summary judgment holding that the insurer was liable for deductions which it made when it reimbursed automotive owners for the value of vehicles destroyed in accidents.⁴² Leave to appeal to the Supreme Court of Canada was denied.⁴³ Subsequently, a number of other plaintiffs brought similar claims against their insurers relying upon the same provisions in the *Insurance Act* relied upon in *McNaughton*. The CPF awarded funding for these cases. Thereafter, the defendants in these new actions brought motions to the court and ultimately to the Court of Appeal to overturn its decision in *McNaughton*. The Court of Appeal held that its previous decision had been wrongly decided.⁴⁴ The CPF ultimately paid \$3,017,840 in costs in these cases.⁴⁵
- 43) Even in cases which have been successful, there have been disputes as to whether the CPF is entitled to any levy at all:

- a. The case *Jeffrey Rudd v. London Life* alleged misappropriation by the defendants of surplus funds in accounts held for approximately 1.8 million Canadian policy holders. The CPF awarded \$1,520,346.50 in disbursement funding. After a one month trial, the trial judge awarded the plaintiff \$455.7 million in damages which the court ordered distributed directly to policy holders through a litigation trust.⁴⁶ This would have resulted in a levy to the Fund of potentially over \$40 million.⁴⁷ The case proceeded through two appeals⁴⁸ with the ultimate result that the defendant had to pay \$51.6 million taken from the policy holders' accounts back into those same accounts.⁴⁹ The defendant took the position that no levy was payable, since the moneys were not paid directly to policy holders. The trial judge ordered that the CPF was entitled to its levy and the defendant was ordered to pay that levy from the accounts held for the benefit of policy holders.⁵⁰ The defendant appealed again and the case is currently under reserve.
- b. There have been other cases where plaintiffs negotiate at least in part, non-monetary remedies and in those cases, some plaintiffs have argued that the CPF is not entitled to a levy on any such non-monetary recovery (e.g. coupons or reinstatement of benefits under insurance policies). These cases have been resolved but such issues could arise in the future.⁵¹

B. Question 3i) Should Ontario retain the two-way costs rule?

- 1) As the Consultation Paper points out, there is considerable concern within the Bar about increasing and unpredictable cost awards. The Committee echoes that concern.
- 2) As noted above, the CPF has become a significant part of the class action landscape in Ontario and rising costs have a particularly strong impact on it. As at December 31, 2017, it had 73 ongoing cases; to the Committee's knowledge this is significantly larger portfolio of class actions than any other law firm's or other third party funder's in Ontario. The CPF is also likely the largest payer of costs awards in class proceedings in Ontario having paid a total of \$13,447,253 as at December 31, 2017. There is no other individual defendant of which the Committee is aware which has paid this quantum of costs or had or has the current exposure to costs which the CPF has.

- 3) The unpredictability in the quantum of costs awards (as well as what constitutes public interest or a novel issue for the purposes of section 31 of the *Class Proceedings Act*) makes forecasting difficult for the CPF. The average time it takes for a CPF-funded case to conclude is 5 years.⁵² Accordingly, the Committee awards funding based upon its knowledge of the case, risks, and prevailing court decisions in “X year”, but then pay costs in the future based upon the then status of the case and court cases in “Y year”.
- 4) One of the charts marked as Appendix “P2” shows that costs paid by the CPF have climbed from an average of \$50,000 per case in 2001 to an average of \$448,242 as at the end of December 2017. This average includes costs paid in three trials, two of which each lasted more than 1 month.
- 5) The Consultation Paper makes reference to the case *Das v. Loblaws*⁵³ where the court made a \$2.3 million cost award for certification and jurisdictional motions.⁵⁴ (This case was funded by the CPF, but is not included in the average costs figures above, as it is under appeal and only final orders are included.) In arriving at its costs’ decision in *Das*, the Court was influenced, in part, by the court’s disapproval of the manner in which plaintiff counsel conducted the case, something the CPF does not control.⁵⁵
- 6) By the time the *Das* costs award was made, the CPF had already provided funding for 69 cases which were still ongoing.⁵⁶ If the *Das* case is accepted as an appropriate yardstick for costs orders for interlocutory motions, it has been made too late for the Committee to take into account for the cases it has already funded. An award of this magnitude would have bankrupted the CPF if it had been made in the early years, or even as late as 2000 or 2001. At the very least, this would have discouraged the Committee from having funded many worthwhile cases.
- 7) There is also considerable concern among the Judiciary about costs as well as the volume of materials filed by all counsel when they bring certification or other motions to the court.
- 8) As Belobaba J. wrote in *Sankar v. Bell Mobility*, access to justice is becoming too expensive in the very area that was specifically designed to achieve it:

[1] Normally, costs awards are routine and can be easily adjudicated. Not so in the world of certification motions. Here, excess appears to be the norm in every aspect of the proceeding—in the time spent by legal counsel, the volume of materials filed with the court, the number of days scheduled for the oral hearing and the over-litigation of most issues. No wonder then, that the costs that are typically sought by the successful party are in the hundreds of thousands of dollars. No wonder, also, that the number of class actions on an annual basis is declining. Access to justice, even in the very area that was specifically designed to achieve this goal, is becoming too expensive.⁵⁷

As Perell J. indicated in *Heller v. Uber Technologies Inc.*:

Like a forest fire in this era of climate change, costs in class proceedings have gotten out of control.⁵⁸

The tendency of Class Counsel or Defence Counsel to exercise little restraint because the courts will not second-guess either side's allocation of legal resources needs to be stopped because it is not fair to the litigants and because runaway legal expense is an obstacle for access to justice for both plaintiffs and defendants.⁵⁹

...And there's the rub, the subjective reasonable expectations of the losing party in a class action are no longer reasonable. In a class action, each side expects the other side to prosecute or defend without any sense of what's reasonably necessary to obtain access to justice. Both sides over-litigate, knowing that over-litigating is what their foe will also be doing and knowing that the court will not second-guess the lawyer's decision.⁶⁰

8) A particular concern for the CPF is the possibility of a “Black Swan” event in the future where a funded case proceeds to a lengthy trial where the costs claim is higher than the CPF balance. No amount of due diligence or forecasting could predict such an event. Although this may seem unlikely given the CPF's balance as at December 2017 of \$16,650,003, two cases funded by the CPF which went to trial each had costs claims in excess of \$5,000,000.⁶¹

9) Further, the CPF is exposed to more costs orders in cases it funds than the average class action, since:

- a. Case selection is not simply driven by which cases are “sure winners”—the public interest, behaviour modification and access to justice play an important role. This is a significant difference between third party funders and the CPF;
- b. Certification motions in cases supported by the CPF are more likely to be appealed by plaintiffs.⁶² This makes natural sense since there is no downside for the plaintiff appealing because of the indemnity. Many CPF-funded cases which initially failed were successful on appeal, ultimately settled and established important precedents.

These cases may very well have never proceeded without the CPF's support.⁶³ For example, the representative plaintiff in *Hickey Button v. Loyalist* (a small case brought by a group of nurses which failed at the Superior Court and Divisional Court but was ultimately certified by the Court of Appeal) has stated, "I wouldn't have proceeded without funding from the Class Proceedings Fund because I would have been solely responsible; and as a young person and young professional I would not have put myself in that position." The plaintiff in *Monkton v. CBC* (another small case brought by students for misrepresentation) stated "My class action was a smaller case, but I would have been financially devastated if I'd had to pay the college's costs. And I'm glad that some of our settlement will go to funding other cases like our own".⁶⁴

- c. CPF-funded cases are also more likely to proceed to trial. Although the CPF supported ten per cent of the cases initiated in Ontario as of December 31, 2017, approximately 1/3 of the cases which have proceeded to trial in Ontario as at August 14, 2017 received funding from the CPF.⁶⁵

10) The CPF submits that there is a crucial need for consistency and predictability in costs awards which may be made in class actions. Otherwise, recent case law will most certainly create a chilling effect for the CPF, third party funders, counsel and would-be class action plaintiffs.

11) The Commission has asked whether the two-way costs rule should be retained. The Committee submits that it is not necessarily an all or nothing proposition. Rather, the solution should be crafted taking into account the benefits of the current system as well as the particulars of the problem. The CPF submits that the Commission should take into account the following:

- a. As noted in the Advisory Committee Report referenced in the Consultation Paper, the existence of costs provides a disincentive for frivolous cases.⁶⁶ As Winkler R.S.J. (as he then was) wrote in *Caputo v. Imperial Tobacco Ltd.*, "costs awards remain a potential 'reality check' to deter frivolous litigation and abuses of the justice system."⁶⁷

- b. Two-way costs, in a system where there the CPF and third party funders exist, permit costs awards in favour of plaintiffs who win certification and other motions, which may level the playing field somewhat between plaintiffs and defendants who often have deep pockets.
- c. The CPF would likely cease to exist in a “no costs” regime. While the CPF is not in the business of existing for its own sake, this could have adverse impacts for access to justice as the CPF supports many small cases.⁶⁸ In a “no costs” regime, the risk/reward in such cases may no longer make business sense for counsel.
- d. The policy reasons identified in the Advisory Committee’s report for maintaining the two-way costs regime still exist today.

12) There are other ways of addressing increasing and unpredictable costs such as caps for certain steps in the proceeding like certification and jurisdictional motions, and possibly even trials. The existence of caps for specified stages would be fairer to litigants and would discourage counsel from over-litigating their cases. From the Committee’s perspective it would improve its ability to forecast risk over the long-term so that it can remain self-sustaining and continue its important job of increasing access to justice in Ontario.

13) It should be noted that the existence of caps or limits (at least with respect to the CPF) was contemplated by the Ontario government when it created the CPF. Section 59.5(1) of the *Act* provided that the Lieutenant Governor in Council could make regulations:

(d) Establishing limits and tariffs for payments under section 59.3 and 59.4.⁶⁹

Section 59.4 is the provision whereby defendants with costs claims against the plaintiff may request payment by the CPF.

14) The determination of what those caps or limits should be requires further study and input from all affected stakeholders. Subject to what the Commission learns from others, the Committee suggests that a cap for the period up to and including certification should be \$300,000 absent exceptional circumstances. With respect the period from certification to trials,

the Committee submits that a cap in the amount of \$1,500,000 would be fair and reasonable based on its experience.

C. 3ii) Should the CPF have the flexibility to alter its current 10 % levy?

- 1) As stated above, the CPF receives a fixed 10 % levy on any settlement funds or awards made in funded cases, after deducting plaintiff counsel fees and any administrative costs.⁷⁰
- 2) The CPF's levy has been a thorny issue with some counsel arguing that the current levy is too high or inflexible. When third party funders came to Ontario, the CPF was told that plaintiffs would stop applying to the CPF because of the inflexible levy.⁷¹ This has not happened. If anything, applications to the CPF have increased significantly.⁷²
- 3) It may be useful to examine the existing funding models in Ontario in order to address this question. Based upon reported case law, the Committee is aware of the following types of funding models:
 - a. **Third party funding agreements where the funder's return is capped, there is a full indemnity and very little disbursement support.** For example, in *Dugal v. Manulife*⁷³ the court approved a third party funding agreement where the funder's commission was 7 % of the amount of any settlement or judgment (net of legal fees, disbursements, and administration costs) capped at **\$5 million** if the case was resolved at any time prior to trial and **\$10 million** if the case was resolved at any time thereafter, **with only \$50,000 paid towards plaintiff's disbursements.** In *Marriott v. GM*⁷⁴ the court approved a third party funding agreement where the funder agreed to pay **some disbursements** (unspecified quantum in the reasons) and provide indemnity for costs in exchange for 7 % of the gross settlement (net of fees, disbursements and administration costs) capped at between **\$10 and \$15 million** depending upon when the action was resolved.
 - b. **Third party funding agreements where the indemnity provided by the funder is capped and the percentage recovery by the funder changes depending upon when the case is resolved but there is no cap.** For example, in *Bayens v. Kinross*⁷⁵ the court

approved a third party funding agreement where the indemnity for costs was limited to \$5 million and the funder would receive 7.5 % of the recovery (net of fees, taxes and disbursements) if the action was settled before certification and 10 % (net of fees, taxes and disbursements) if the action was settled later. The case decision does not indicate that there was any cap on the funder's return or that the funder provided any disbursement support.

- c. **Third party funding agreements where the funder takes a higher percentage of the return in exchange for funding full disbursements and part of counsel's fees throughout.** In *Houle v St. Jude*⁷⁶ the funding agreement provided the funder 20 to 25 % of the proceeds depending upon when the case was resolved, in exchange for its agreement to pay 50 % of class counsel's reasonable docketed fees to an undisclosed maximum, as well as full disbursements and full indemnity for any costs assessed, all on a non-recourse basis. The court indicated it would approve the agreement only if it was modified: a) to eliminate provisions which the court felt made it appear as though the representative plaintiff was working on behalf of the funder (e.g. provisions which compelled the plaintiff to: use best efforts to win the action and collect any proceeds in a timely manner, conduct the litigation in a manner which avoided unnecessary costs and delays, provide counsel full and timely instructions, not take any steps which would adversely affect the claim); b) to eliminate the extensive termination rights held by the funder in its sole discretion which together with the matters set out in (a) above gave the funder too much control over the litigation in the court's opinion. The court was also concerned about the commission earned by the funder and indicated that it would only approve the arrangement if changes were made to items (a) and (b) above, in addition to reducing the funder's return to 10 % with the opportunity for the funder to request a higher return with court approval at the conclusion of the case. This decision is currently under appeal.
- d. **The CPF where there is an uncapped levy in the amount of 10 % with potentially unlimited disbursement support and an unlimited indemnity.** As noted above, the CPF's levy is 10 % (net of counsel fees, disbursements and administration costs.) In

addition, while the CPF has discretion with respect to the level of disbursement funding, it in fact provides significant support which in several cases has exceeded one million dollars.⁷⁷ Although there are no caps on the levy, the highest levy ever received by the Fund was \$4,343,325⁷⁸ so a cap similar to the lowest third party funding cap above would have made no difference to the CPF. Finally, once the CPF makes a decision to support a case, the indemnity lasts for the duration of the case and the CPF has no ability to withdraw from the case, apart from its ongoing discretion with respect to future disbursements. It also may not and does not interfere with the conduct of the case.

- 4) Thus far in Ontario, the funding provided by the CPF, considering all of the elements (return, quantum of disbursement funding, indemnity provided) is at least competitive and arguably better than the funding provided by any existing third party funding agreement.
- 5) Furthermore, the levy as it is, has allowed the CPF to prosper and grow so that its ability to provide funding to worthwhile public interest cases has similarly grown. Choking off its levy, particularly in a climate of exponentially rising costs would be disastrous for the CPF and for access to justice in Ontario. Although the CPF currently has a very healthy balance, as at December 31, 2017, it also has 73 ongoing cases, each of which either require ongoing support or where there could be a costs order made. Any reduction in the levy would be inadvisable.
- 6) Even giving the CPF the discretion to determine the applicable levy in each case at the outset would be problematic; the Committee would have to redirect scarce resources from its core mission of evaluating cases to engaging in endless negotiations which counsel would then feel obligated to pursue. This would require a wholesale restructuring of the entire manner in which the CPF operates which at present involves only 5 voluntary Committee members, one in-house counsel, 1 legal assistant, and one LFO staff who devotes 10 % of her time to act as the Committee's Secretary.
- 7) The Committee is open to potential discussions, ideas and options concerning the levy which would not harm CPF's ability to support access to justice, but to propose something on a theoretical basis at this time, particularly when the issues of costs is so uncertain, is neither

practical nor realistic. Further, if and when such changes are implemented, they should be prospective so as to not interfere with the CPF's current risk/reward analysis which has been based upon the current system.

8) There is, however, one thing that the Committee has discussed in the past which it would like to propose. The Committee would like to have the discretion to partially fund counsel fees in an appropriate case where an indemnity and disbursement funding are still not enough to allow such a case to proceed. There are now few firms bringing class actions and it is difficult for new firms to enter the market without an established war-chest. This discretion would allow the Committee to further increase access to justice by providing support to such firms.

D. Question 3iii) Is third party funding a positive development in class action practice? Should it be more tightly regulated & Question 3iv) Should the source and extent of funding be disclosed to the court?

1) The Committee estimates that it funds approximately 10 % of class actions initiated in Ontario based on the Commission's estimate that there have been 1,450 class actions commenced in Ontario as of March 2018⁷⁹ and the CPF year-end figures for 2017 which show that it has funded a total of 146 cases.⁸⁰

2) The CPF does not have the capacity to support all class actions in Ontario. Accordingly, third party funding is a positive development for access to justice. However, the Committee believes it should be regulated and the source and extent of funding should be disclosed to the court to ensure transparency.

¹ Ontario Law Reform Commission, Report on Class Actions, (Toronto: Ministry of the Attorney General, 1982), Volume 1, 77 & 80, online:<<https://archive.org/details/reportonclassact01onta>>.

² Ministry of the Attorney General, Report of the Attorney General's Advisory Committee on Class Action Reform, (Toronto, 1990), at pp 56 - 73.

³ Same, at pp 59-60.

⁴ Same, at pp 56-73.

⁵ *Law Society Act*, R.S.O. 1990, c. L.8, as amended, (the "Act").

⁶ *Class Proceedings Act*, 1992, S.O., c.6.

⁷The Foundation is a not-for profit corporation established under the *Act*. The Foundation is governed by a Board of Trustees appointed by the Law Society of Ontario and the Attorney General of Ontario. The Foundation aims to increase access to justice by investing in knowledge and services that help people understand the law and use it to improve their lives. Specifically, the Foundation's legislative mandate under s. 55(1) of the *Act* is to maintain a fund to be used for the following purposes: a) legal education and legal research; b) legal aid; c) the establishment, maintenance and operation of law libraries; and d) the provision of costs assistance to parties to class proceedings and to proceedings commenced under the *Class Proceedings Act*, above at 6. This last provision was added when the CPF and the Committee were created. The *Act* assigns to the Foundation the task of administering the CPF. The *Act* assigns to the Committee the task of responding to applications by plaintiffs seeking financial support for various stages in class proceedings. Pursuant to section 59.3(3) the Committee may direct the Foundation to make payments to a plaintiff who makes an application in the amount the Committee considers appropriate, but the Foundation has no input into which cases are funded. Pursuant to section 59.4 the Foundation shall make payments to defendants from the CPF in respect of a costs award made in any funded proceeding in the defendant's favour. The money in the CPF is held in a separate bank account held by the Foundation and there is no intermingling of money. The Foundation cannot use money in the CPF for purposes other than as directed by the Committee, or to pay administration costs related to the CPF (e.g. rent, fees to counsel performing work for the Committee, administrative assistance etc.) Further, the CPF has no access to the Foundation's other accounts.

⁸ *Garland v. Consumers' Gas Co.*, [1995] O.J. No. 997 (S.C.J.) at para 9.

⁹CPC, 2016 Annual Report on Class Proceedings. Online: <<http://www.lawfoundation.on.ca/wp-content/uploads/Report-on-Class-Proceedings-2016-EN.pdf>>.

¹⁰ Above, note 5.

¹¹ Above, note 5.

¹² Above, note 5, s. 59.2(1).

¹³ Above, note 5, s 59.2(2).

¹⁴ Above, note 5.

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- ¹⁵ Above, note 5 and Regulation 771/92 under the Act.
- ¹⁶ *Edwards v. the Law Society* (1994), 36 CPC (3d) 116 (CPC).
- ¹⁷ Same at para 9.
- ¹⁸ Same.
- ¹⁹ Same at para 10.
- ²⁰ Same at para 16.
- ²¹ CPC, Opinion on Merits and Opinion on Certification, Class Proceedings Fund. Online: <<http://www.lawfoundation.on.ca/class-proceedings-fund/>>.
- ²² Above, note 8 at para 42.
- ²³ These figures have been derived from the CPF's internal database.
- ²⁴ Above, note 5 at s. 59.3(5). See also above note 21, Practice direction 1—Application Process.
- ²⁵ Above note 21, Funded Disbursement Policy and Standard Format for Disbursement Funding Request.
- ²⁶ Above, note 5, s. 59.3(2).
- ²⁷ Above note 15, Regulation 771/92 at ss. 8(6)-(8).
- ²⁸ Above, note 15, Regulation 771/92 at s. 10.
- ²⁹ Above, note 5, at s. 59.4.
- ³⁰ This information has been assembled from the CPF's internal files and financial statements.
- ³¹ See Class Proceedings Fund, 20 Years in Review, at pp. 16-18. Online: <http://www.lawfoundation.on.ca/wp-content/uploads/CPF-Brochure-2013.pdf>.
- ³² Same, at pp 8 & 10.
- ³³ E.g. *Hollick v. Toronto (City)*, 2001 SCC 68.; *AIC Limited v. Fisher*, [2013] 3 S.C.R. 949; *Das v. George Weston Limited*, 2017 ONSC 5583; *Crisante v. DePuy Orthopaedics*, 2013 ONSC 6351; *Smith v. National Money Mart*, 2010 ONSC 1334;
- ³⁴ Above, note 16 at para 8.
- ³⁵ *Pearson v. Inco.* (2006), 78 O.R. (3d) 641 (ONCA).
- ³⁶ *Pearson v. Inco.*, [2006] O.J. No. 991 (ONCA) at paras 4, 9, and 19.
- ³⁷ *Pearson v. Inco.*, [2010] O.J. No. 2864 (SCJ) at para 337.
- ³⁸ *Pearson v. Inco.* (2011), 107 O.R. (3d) 321 (ONCA).
- ³⁹ *Pearson v. Inco.*, [2012] O.J. No. 4225 (SCJ) at para 109.
- ⁴⁰ This amount is derived from our internal records.
- ⁴¹ *McNaughton v. Co-operators*, [2000] O.J. No. 3230 (SCJ).
- ⁴² *McNaughton v. Co-operators*, [2001] O.J. No. 2312 (ONCA)
- ⁴³ *McNaughton v. Co-operators*, [2001] S.C.C.A. No. 451.
- ⁴⁴ *David Polowin Real Estate Ltd. v. The Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161 (ONCA).
- ⁴⁵ This number is calculated by adding the amounts which were settled with various defendants and the amount the court awarded in favour of the remaining defendants set out in *Mrozinski v. Allianz Insurance et al.*, 2011 ONSC 4065 (SCJ)
- ⁴⁶ *Jeffery v. London Life et al*, 2010 ONSC 4938 (SCJ) at paras 331-333.
- ⁴⁷ The CPF is entitled to 10 % of the award after deducting counsel fees, administration costs and disbursements. Counsel fees and administration would have been significant and so we conservatively estimate that there would have been \$400,000,000 afterwards which would have resulted in a \$40,000,000 levy.
- ⁴⁸ *Jeffery v. London Life et al*, 2011 ONCA 683.
- ⁴⁹ *Jeffery v. London Life et al*, 2014 ONCA 87 at para 58.
- ⁵⁰ *Jeffery v. London Life et al*, 2016 ONSC 5506 (SCJ) at para 123.
- ⁵¹ This information is taken from our internal files.
- ⁵² We have calculated this from our internal files.
- ⁵³ *Das v. George Weston et al.*, [2017] O.J. No. 3542 (SCJ)
- ⁵⁴ *Das v. George Weston*, 2017 ONSC 5583 (SCJ) at para 135.
- ⁵⁵ Same at para 130.

⁵⁶ This number is derived from our internal files.

⁵⁷ *Sankar v. Bell Mobility*, 2013 ONSC 6886 (SCJ) at para 1.

⁵⁸ *Heller v. Uber Technologies*, 2018 ONSC 1690 (SCJ) at para 1.

⁵⁹ Same at para 2.

⁶⁰ Same at para 17.

⁶¹ See *Pearson v. Inco*, above, note 40 at para 4 where Inco's costs claim was \$5,340,000 and *Jeffery Rudd v. London Life*, above note 51 where the costs claim against the CPF was in excess of \$6,000,000 even though the plaintiff had been successful. The court rejected this argument and awarded the plaintiff costs as well as the CPF its levy. The levy portion of the decision is under appeal.

⁶² Gina Papageorgiou, "The Class Proceedings Fund: Separating Fact From Fiction" (2015), 10 *Class Action Review*, Volume 10, p 81, at p 90. This study reviewed reported class actions in the Quicklaw database as well as the CPF database as at December 31, 2013. It showed that although the CPF funds 10 % of Ontario class actions, 30 % of failed certification motion appeals by plaintiffs to Divisional Court were made in CPF-funded cases, 50 % of appeals by plaintiffs heard by the Court of Appeal of certification motions were made in CPF-funded cases and 60 % of appeals by plaintiffs heard by the SCC in class action matters were CPF-funded cases. It further revealed that as at that time, 30 % of the merit trials were CPF-funded and 50 % of those which lasted more than one month were CPF-funded cases.

⁶³ 1) *Garland v Consumers Gas*, [2006] O.J. No. 4907 (SCC) involved allegations that late payment penalties violated the interest rate provisions in the *Criminal Code*. It went to the Supreme Court of Canada twice and resulted not only in a \$22 million settlement but also established an expansive definition of section 347 of the *Criminal Code* which has become the basis for many other consumer protection actions.; 2) The case *Hickey-Button v Loyalist*, [2006] O.J. No 2393 (ONCA) involved allegations of misrepresentations to students in a nursing program. After a failed certification attempt and appeal to Divisional Court the Ontario Court of Appeal certified the case. The defendant ultimately consented to judgment and there have been individual assessments ongoing with 16 claimants being paid damages in the range of approximately \$9,000 to \$68 thousand (after deducting counsel fees and the CPF levy). This case has also been a strong precedent relied upon by others seeking to certify misrepresentation claims in the consumer context; 3) The case *Cassano v. Toronto Dominion Bank* (2009), 98 O.R. (3d) 543 (SCJ) involved allegations of the defendant's failure to disclose foreign exchange fees on credit cards. It failed certification, failed at the Divisional Court and was ultimately certified by the Ontario Court of Appeal whereafter the defendant agreed to settle the case for \$55 million; and 4) The case *Robertson v. Thomson*, [2006] S.C.J. No. 43, involved allegations of copyright infringement in respect of articles placed in digital media after the writer agreed to its publication in print media. This was a new area and went all the way to the Supreme Court of Canada who made the breakthrough decision that consent is required by producers of print media to further produce that media in electronic media. This case resulted in a significant settlement and has influenced industry practices in this increasingly important area.

⁶⁴ Above note 31 at 12.

⁶⁵ See Jon Foreman & Genevieve Meisenheimer, "The Evolution of the Class Action Trial in Ontario", (2014) 4:3 *UWOJ Leg Stud* 3 at pp 14. This paper showed that as at December 31, 2014 there were 18 class action trials of which 6 were CPF funded: 1) *Sutherland v. Hudson's Bay Company* (2007), 60 CCEI (3d) 64 (SCJ), aff'd 2011 ONCA 606, leave to appeal to SCC, refused, [2011] CSCR No. 516; 2) *Ruffolo v. Sun Life Assurance Co. of Canada* (2008), 90 OR (3rd) 59 (SCJ) aff'd 2009 ONCA 274, leave to appeal to SCC refused [2009] CSCR No. 222; 3) *Smith v. Money Mart* (2007), 37 CPC (6th) 171; 4) *Smith v. Inco*, 2010 ONSC 3790, rev'd 2011 ONCA 628, leave to appeal to SCC refused, [2011] CSCR No. 539; 5) *Jeffery v. London Life*, 2010 ONSC 4938, rev'd 2011 ONCA 683, leave to appeal to SCC refused, [2012] SCCA No. 1; and 6) *Mandeville v. Manufacturers Life Insurance*, 2012 ONSC 4316 (SCJ.). Jon Foreman's updated trial list for Ontario as of August 17, 2017 shows that there have been 20 trials in Ontario 6 of which have been CPF-funded.

⁶⁶ Law Commission of Ontario, Consultation Paper, at p 50.

⁶⁷ *Caputo v. Imperial Tobacco Ltd.*, 2005 CanLII 5482 (SCJ) at para 42.

⁶⁸ Above note 31, at pp 16 to 18 which lists several small CPF-funded cases which have been successful including: 1) *Wrigley v. Parker Canada* (2012 unreported) for alleged environmental contamination where 12 class members

shared a recovery of \$275,000; 2) *Givogue v. Burke* (2010, unreported) for alleged pension mismanagement where 200 class members shared a recovery of \$2,900,000; 3) *Speevak v. CIBC*, 2010 ONSC 1128 (SCJ) involving alleged disclosure of personal information where 20 class members shared settlement of \$118,250; 4) *Monkton v. Canada Business College*, 2012 ONSC 5227 regarding alleged misrepresentation in respect of a dental hygienist program where 18 class members shared a settlement of \$115,000 . At para 21, Perell J. stated “In my opinion class counsel should be commended for taking on this small class action. It provided access to justice for the class members and a fair and reasonable settlement; 5) *Hickey-Button v. Loyalist*, (2010, unreported) regarding alleged misrepresentation related to a nursing program where 66 class members obtained summary judgment and have been proceeding through individual damages assessments To date, settlement in 16 individual assessments have resulted in total recovery in the amount of \$994,095 . The rest of the individual assessments are ongoing; 6) *Markle & Horsely v. City of Toronto* (unreported) regarding alleged denial of pension benefits where 600 class members shared \$200,000 but also received health care spending accounts; and 7) *Williams v. The City of Toronto*, 2012 ONCA 915 involved claims that the City of Toronto had been negligent in failing to advise tenants of low income housing of rent reductions. Certification was initially dismissed but the case was ultimately certified and upheld by the Court of Appeal. The plaintiff then moved for and obtained summary judgment which was also upheld by the Court of Appeal (*Williams v. City of Toronto*, 2016 ONCA 666). Counsel estimates there are 210 class members. The City elected to pursue the appeal no longer and the plaintiff is discussing an appropriate individual process to determine damages.

⁶⁹ Above, note 5.

⁷⁰ *Martin v. Barrett*, [2008] O.J. No. 3813 (SCJ).

⁷¹ Above note 62 at p 86.

⁷² See Appendices O and P which set out the growth in the number of applications per year.

⁷³ *Dugal v. Manulife*, [2011] ONSC 1785 (SCJ).

⁷⁴ *Marriott v. GM*, 2018 ONSC 2535 (SCJ).

⁷⁵ *Bayens v. Kinross*, 2013 ONSC 4974 (SCJ).

⁷⁶ *Houle v. St. Jude*, 2017 ONSC 5129 (SCJ).

⁷⁷ This information has been compiled from our internal records. See also Appendices O and P which set out the quantum of funding awarded each year by the Committee.

⁷⁸ *Fulawka v. BNS*, 2014 ONSC 4743 (SCJ).

⁷⁹ Above, Consultation Paper at 30.

⁸⁰ This information is taken from CPF internal records.

Class Proceedings Fund

MESSAGE FROM THE CHAIR



The Class Proceedings Committee (the Committee) has been very busy, with the trend of hearing and funding more and more cases continuing in 2016.

We held 22 hearings and funded 17 new applications. The Class Proceedings Fund received levies of \$5,961,678 and paid cost awards in favour of defendants in the amount of \$528,767. The balance in the Fund at the end of 2016 was \$19,861,537.

These numbers are significant yet it is ultimately the contribution to our mandate that gives the greatest return. This year the Committee was especially active with cases concerning such diverse issues as prisoners' rights, privacy rights, employee overtime, and, at the other end of the spectrum, misrepresentations to the holders and purchasers of securities in the capital markets. Whether upholding basic rights and freedoms or the integrity of our capital markets, the Fund's support of cases in the public interest has the potential to fundamentally affect not only the lives of the class plaintiffs but every single member of the public by helping to achieve justice, accountability, and transparency in our society's institutions, both public and private.

The increasing number of applications requires our Committee to focus on monitoring our levels of disbursement funding, assessing the risk of costs exposure in unsuccessful outcomes as well as projecting levies from successful cases. This is a complex ongoing analysis, which the Committee examines at its meetings and more intensely at our retreat.

On a personal note, I would like to thank: the members of the Committee – Paul Evraire, Scott Hutchison, Jasminka Kalajdzic, and Kim Twohig; our Counsel, Gina Papageorgiou and Legal Assistant, Linda Patki; and the Committee's Secretary, Judy Mark. It is a great joy to work with such talented and astute people who, without exception, devote an enormous amount of time and hard work to the Committee's activities.

Finally, I would like to give a special acknowledgement to Jasminka Kalajdzic. After six years of dedicated service (including a monthly commute from Windsor for meetings), Jasminka stepped down from the Committee. We are grateful for the many ways that Jasminka served and advanced the Committee's work. Her commitment, hard work, and encyclopedic knowledge of class action law and procedure will be greatly missed.

Handwritten signature of Wendy J. Earle.

Wendy J. Earle
Chair, Class Proceedings Committee

Class Proceedings Fund financial highlights

NEW APPLICATIONS HEARD AND APPROVED – 2007-2016

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Hearings held	3	12	13	9	22	12	13	20	17	22
New applications approved	2	9	12	7	15	7	7	11	12	17

2016 RESULTS

Statement of financial position

	<u>For the period from Jan. 1, 2016 to Dec. 31, 2016</u>	<u>For the period from 1994 to Dec. 31, 2016</u>
Opening balance	\$16,750,105	\$500,000
Total funding awarded	(3,144,373)	(20,593,328)
Funding repaid/cancelled	964,008	6,396,083
Administration costs/expenses	(504,308)	(4,052,700)
Interest received	363,194	2,985,988
10% levies received	5,961,678	44,565,772
Cost awards in favour of defendants	(528,767)	(9,940,278)
Balance as at Dec. 31, 2016	\$19,861,537	\$19,861,537

AS REQUIRED BY O.REG.771/92, S.13, WE REPORT AS FOLLOWS:

1. Number of new applications made, by stage in proceeding, at the time of application.

<u>Stage in the proceeding</u>	<u>Number of new applications</u>	
	<u>2016</u>	<u>2015</u>
Pre-certification	19	16
Appeal re: certification		
Discovery	2	
Determination of common issues	1	1
Appeal re: common issues		
Post common issue stage		
Total	22	17

2. New applications granted and refused or pending/withdrawn, by stage in the proceeding, at the time of application.

Stage in the proceeding	Granted	Refused	Deferred/Pending*/ Stayed, etc.	Total
2015				
Pre-certification	11	4	1	16
Discovery				
Other (common issues)	1			1
Total	12	4	1	17
2016				
Pre-certification	14	3	2	19
Discovery	2			2
Other (common issues)	1			1
Total	17	3	2	22

*Carried forward to the next year.

3. In 2016, financial support was awarded for seventeen (17) new cases under section 59.3(1) of the Act¹ and further financial support was awarded for eight (8) cases, which had previously been approved, as a result of supplementary funding applications under section 59.3(5) of the Act. In 2015, financial support was awarded for twelve (12) new cases under section 59.3(1) of the Act and further financial support was awarded for seventeen (17) cases that had previously been approved, as a result of supplementary funding applications under section 59.3(5) of the Act.

4. Total awards, by disbursement type is \$3,144,373.

<u>Type of disbursement</u>	<u>Total amount awarded 2016</u>
Administrative expenses	\$ 548,966
Travel	224,343
Examiners' charges	165,692
Experts' fees	1,917,299
Notice to class	26,984
Other	261,089
Total	\$3,144,373

Under regulation 771/92, this section includes only amounts awarded during 2016. Total amounts paid out by the Class Proceedings Fund (CPF) during 2016 may vary as amounts awarded are reimbursed to applicants on an ongoing basis after funded disbursements have been duly incurred and paid by the applicant.

¹ References are to the Law Society Act.

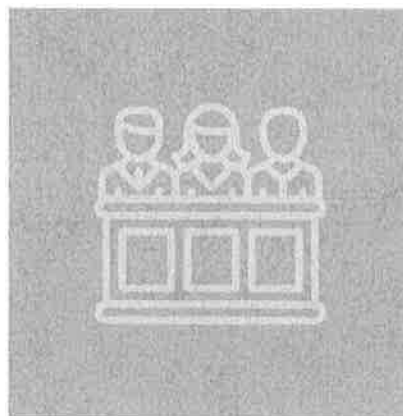
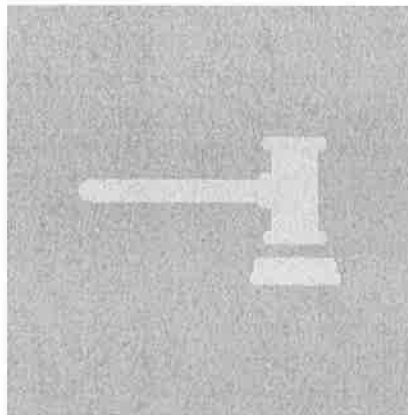
5. The total amount of money paid from the CPF to applicants under section 59.3 of the Act: 2016, \$1,080,364; 2015, \$2,079,284. At December 31, 2016, the balance of all awards outstanding which had not yet been paid to applicants was \$4,479,767.

6. In 2016, 7 (seven) funded proceedings were certified. In 2015, 2 (two) funded proceedings were certified.

7. In 2016, 4 (four) applicants who had received financial support settled their proceedings such that the classes involved in these proceedings would receive or will receive a monetary payment, and summary judgement was obtained in another case. In 2015, 1 (one) applicant who had received financial support settled their proceedings such that the classes involved in these proceedings would receive or will receive a monetary payment.

8. In 2016, 2 (two) defendants made applications to the CPF for payment of costs awards made in their favour pursuant to section 59.4 of the Act; seven (7) applications were received in 2015. This results from the indemnification of plaintiffs against cost awards.

9. In 2016, \$528,767 was paid from the CPF to defendants under section 59.4 of the Act. In 2015, \$676,520 was paid from the CPF to defendants under section 59.4 of the Act. This results from the indemnification of plaintiffs against cost awards.



10. Proceedings for which plaintiff was awarded financial support under section 59.3 of the Act (these included both newly approved cases and previously approved cases for which supplementary funding was awarded during 2016).

	Administrative expenses	Travel expenses	Examiners' charges	Experts' fees	Notice to class	Other	Total
2016	\$	\$	\$	\$	\$	\$	\$
Consumer protection	48,413	22,742	12,700		1,000		84,855
Crown liability - general breach of duty	3,795	638			2,622		7,055
Crown liability - prisoners' rights	30,000	20,000	10,000	125,000			185,000
Employment	35,000	45,000	35,000	390,000			505,000
General negligence	26,463	8,317	53,992	11,353	362	5,634	106,121
Investments/ Securities	153,150	75,050	27,000	1,061,750		91,360	1,408,310
Physician negligence	21,000	15,000	15,000	15,000		10,000	76,000
Product liability	12,000		3,000	185,000			200,000
Product liability - drugs						195	195
Product liability - medical products	5,645	96		52,196		153,900	211,837
Residential schools	213,500	37,500	9,000	77,000	23,000		360,000
Total	548,966	224,343	165,692	1,917,299	26,984	261,089	3,144,373
2015							
All cases	269,459	24,013	28,592	1,344,275	120,000	66,256	1,852,595

Appendix B

Class Proceedings Committee

Opinion on Certification

I. The Test

a) Do the Pleadings Disclose a Cause of Action?

- *What is the cause of action underlying the claim?*
- *Will the defence argue there is no cause of action? Why?*

b) Identifiable Class?

- *What is the identifiable class?*
- *Will the defence argue there is no identifiable class? Why?*

c) Common Issues

- *What are the common issues?*
- *What are the uncommon or individual issues?*
- *How will the defence attempt to show that the “common” issues are in fact not common?*

d) Appropriate Representative Plaintiff

- *Does the plaintiff fairly and adequately represent the interests of the class?*
- *Are there any conflicts with or amongst the class?*
- *Does the plaintiff have a cause of action against each defendant?*
- *Will the defendant object to this plaintiff, and on what basis?*

e) Jurisdiction

- *Is there a national class?*
- *Is Ontario the proper forum to hear this class action?*
- *What class action jurisdictional issues exist in this lawsuit?*
- *Does the proposed class include extra-provincial individuals?*

- *Will the defendant object to the jurisdiction of the Ontario Courts?*

II. The Case Law

a) Plaintiff's Cases

- *Are there certification cases the plaintiff will be relying upon which have comparable or analogous facts or issues?*
- *Provide relevant extracts.*

b) Defendant's Cases

- *Are there certification cases the defendant will be relying upon which have comparable or analogous facts or issues?*
- *Provide relevant extracts.*

III. Opinion

- *Based on counsel's objective assessment of the plaintiff's arguments and the defendant's arguments, what is the likelihood that this matter will be certified?*

Appendix C

Class Proceedings Committee

Opinion on the Merits

I. Overview

- *Provide a brief summary of the nature of this litigation*

II. Theory of the Plaintiff's Case

a) The Facts

- *Set out the key facts the plaintiff must and can establish to succeed*
- *Attach extracts from relevant documents*
- *Indicate what facts are uncontroverted, and what facts are in dispute*

b) Statutory Framework

- *Give brief overview of statutory framework or context*
- *Provide text of relevant statutes and regulations*

c) Case Law

- *Set out leading cases plaintiff is relying upon*
- *Provide relevant extracts from cases*

III. Theory of the Defendant's Case

a) Facts

- *Set out the key facts the defendant will be relying upon*
- *Attach extracts from relevant documents*

b) Case Law

- *Set out leading cases the defendant will be relying upon*
- *Provide relevant extracts from cases*

c) Statutory Defences

- *Set out statutory defences available to defendant*
- *What will defendants say is the relevant limitation period?*

IV. Multiple Defendants

- *If there are multiple defendants, is the case against each defendant identical?*
- *If not, how do the cases against each defendant differ?*

V. Opinion

- *Based on counsel's objective assessment of the facts and the law, and all anticipated defences, what is the prospect for success at trial against EACH defendant?*

Appendix D

Class Proceedings Committee Practice Direction #1 Application Process (Amended September, 2012)

Purpose of the Class Proceedings Committee

1. The Class Proceedings Committee (the “Committee”) has been established under the *Law Society Amendment Act (Class Proceedings Funding)* 1992 S.O. 1992, c.7 to determine whether plaintiffs in class proceedings should receive financial support from the Class Proceedings Fund (the “Fund”) and the amount of such support.

How to Contact the Committee

2. The Committee’s address is Suite 3002, 20 Queen Street West, Toronto, M5H 3R3, and its telephone number is (416) 595-1425.

How to Prepare an Application

3. Section 3 of O. Reg. 771/92 sets out the materials required to be included in the first application. The Committee requests that the materials be submitted to the Committee in electronic format by way of CD. The CD should contain an index and be organized with Tabs corresponding to the paragraph numbers of subsection 3(1) of the regulation. If considered helpful, material under a numbered tab may be subdivided under tabs bearing the number and a letter (e.g. Tabs 5a, 5b, etc.).

4. With respect to Tabs 7 and 9 (the legal opinion describing and assessing the merits of the applicant’s case and the legal opinion assessing the likelihood of certification), please refer to the attached guidelines entitled “Opinion on the Merits” and “Opinion on Certification”. Counsel are asked to use this outline when providing their opinions concerning both the merits of the lawsuit, and the likelihood of certification. Counsel are reminded that this is not a typical advocacy process. In many cases, the Committee will not have the benefit of written submissions from the defendants, nor will the Committee have the opportunity to meet with defendant’s counsel to ask questions. We therefore ask plaintiff’s counsel to fairly present and comment on defences or positions which either have been raised by the defendants, or which plaintiff’s counsel anticipates could be raised by the defendants.

5. With respect to Tab 11 (corresponding to paragraph 11 of s.3(1)), the Committee is interested in knowing the amount, if any, of funds the applicant has or expects to raise to supplement any funding granted by the Committee taking into account the nature of the case and the circumstances of the plaintiff.

6. The first application record should also contain:

- (a) a tab (Tab 16) containing a list of the individual lawyers expected to participate in the prosecution of the case, a description of their experience

and qualifications, a statement whether a contingency fee agreement has been entered into under s.33 of the *Class Proceedings Act, 1992*, and an estimate of the aggregate number of hours the applicant's solicitors expect to and are prepared to devote to the case;

- (b) a tab (Tab 17) containing material addressing the issue of the defendant's ability to pay any judgment and comply with any non-monetary relief which may ultimately be granted against it, and, if it appears the defendant will not be able to pay or comply, explaining why financial support should nevertheless be granted;
- (c) a tab (Tab 18) containing the plan or draft plan which has been or is intended to be filed pursuant to s.5(l)(e)(ii) of the *Class Proceedings Act, 1992*;
- (d) a tab (Tab 19) containing a budget regarding disbursements expected to be required up to an including trial; and
- (e) a final tab (Tab 20) containing an Executive Summary concerning the application.

7. The materials for subsequent application, if any, should also be submitted electronically by way of CD and should be called a First or Second or Third etc. Supplementary Class Proceeding Funding Application (*as the case may b*). Supplementary Funding Applications should not duplicate the contents of any previous record, should be organized under tabs continuing the numbering sequence of the immediately preceding record, and should contain:

- (a) tabs containing whatever materials the applicant thinks necessary;
- (b) a tab containing copies of any pleadings filed and orders made by the court in the proceedings which have not already been included in a previous record;
- (c) a tab containing a concise report on the status of the class proceeding including an estimated timetable;
- (d) a tab containing written submissions concerning the application; and
- (e) a tab containing an Executive Summary.

8. Paragraph 5 of subsection 3(1) of O.Reg. 771/92 requires a copy of the pleadings be included in the application. It should be noted that this includes the statement of defence. The Committee will not consider an application regarding an action to be complete unless the statement of defence is included (or the defendant has been noted in default). Where the defendant does not deliver a statement of defence but rather brings a motion of any kind, it is sufficient to include a copy of the motion record in lieu of the statement of defence. Where the court proceeding has been commenced by Notice of Application, it is sufficient to include a copy of the

respondent's Notice of Appearance and any other materials filed with the court by the respondent.

Confidentiality

9. Subsection 3(1) of O.Reg. 771/92 requires certain confidential documents or information, including legal opinions, to be included in the application. The Committee expects and encourages full and frank disclosure and will protect the confidentiality of such materials except as may be compelled by law. When information is disclosed by the Committee in the course of giving a direction to the Board of Trustees of The Law Foundation of Ontario (the "Board"), and when information is disclosed by the Committee in the course of its annual report to the Law Foundation, and in the event reasons for decision are issued by the Committee, disclosure of specific confidential information will be avoided.

How to Submit an Application

10. Six copies of the CD should be mailed, couriered or hand delivered to the Committee's office. It is the applicant's responsibility to ensure proper delivery; however, the Secretary will acknowledge receipt of all records in writing.

How Applications will be Considered

11. With respect to the applicant's first application, after a complete application is received the Committee will advise the applicant's solicitor of the time and place of the Committee's meeting to consider the application. It is expected the meetings will be held at the Committee's office regularly and may occur in either an afternoon or an evening session. The Committee will meet *in camera* with the applicant and the applicant's solicitor. The applicant's solicitor may make oral submissions not exceeding 20 minutes. The Committee will then discuss the application with the applicant and the applicant's solicitor. The Committee will reserve its decision and advise the applicant of its decision in writing in due course. Applications by conference call may be arranged if appropriate in the circumstances. The Committee's meetings will not be open to the public.

12. With respect to subsequent applications, the applicant may make written submissions as described in paragraph 6 but may not make oral submissions unless leave to do so is granted in special circumstances on written application for that purpose or on the Committee's own motion. The Committee will advise the applicant of its decision in writing in due course.

How Funding is Received

13. In the event an application is granted in whole or in part the Board will make payments in accordance with the Class Proceedings Committee Funding Disbursement Policy. The Board, not the Committee, is responsible for disbursing the funds and the requirements of O.Reg. 771/92 should be considered in that regard. The Board's address is Suite 3002, 20 Queen Street West, Toronto, M5H 3R3, telephone number is (416) 595-1425, and fax number is (416) 598-1526.

If Funding is Refused

14. Where an application is refused, the applicant may re-apply if so desired in which case paragraphs 6 and 11 govern.

Levy Against Awards and Settlement Funds

15. If an applicant is financially supported by the Committee and the class proceeding is successful, the amount advanced to the plaintiff from the Fund plus 10% of the settlement funds or monetary award is to be paid to the Fund. Pursuant to rule 12.05 of the *Rules of Civil Procedure* payment of this levy will be addressed in the order approving the settlement or in the judgment.

Applications for Defendant's Costs

16. Applications regarding payments of defendant's costs are made to the Board, not to the Committee.

Dated the 22nd day of February, 1993

"original signed by"

Anne Molloy
Chair
Class Proceedings Committee

Amended the 27th day of April, 2004

"original signed by"

Robert B. Munroe
Chair
Class Proceedings Committee

Amended this 11th day of September, 2012

"original signed by"

Wendy Earle
Acting Chair
Class Proceedings Committee

Appendix E

Class Proceedings Committee Practice Direction #2 Defendant Submissions (Amended September, 2012)

Defendants' Submissions Regarding Funding Applications

1. An application for funding brought by a representative plaintiff (the "Plaintiff") under s. 59.3 of the *Law Society Amendment Act (Class Proceedings Funding)* 1992 S.O. 1992, c.7 is not an adversarial proceeding and the Act does not provide the defendant in the class proceeding (the "Defendant") with a right to oppose the application. However the Class Proceedings Committee (the "Committee") does have a broad discretion under s.59.3(4)(e) to consider any matter relevant to the application for funding and is at liberty to seek information from any available source including the Defendant.

Plaintiff's Consent Required

2. The committee may ask the Plaintiff to consent to the Committee requesting the Defendant to provide written submissions subject to certain safeguards to protect the Plaintiff and the funding process.
3. Without the express consent of the Plaintiff the Committee will never:
 - (a) request submissions from a Defendant;
 - (b) review unsolicited submissions from a Defendant; or
 - (c) confirm or deny to a Defendant that the Plaintiff has submitted an application.

Acknowledgment and Undertaking

4. If the Plaintiff consents to the Committee requesting written submissions from a Defendant, the Committee will request the Defendant to file the submissions together with a written Acknowledgment and Undertaking directed to both the Committee and the Plaintiff agreeing to specific conditions which the Committee considers appropriate in the circumstances and which may include the following:
 - (a) An acknowledgment that the Defendant will not be entitled to make oral submissions to the Committee;
 - (b) An acknowledgment that the Defendant will not be entitled to any information about, or materials from, the Plaintiff's application;

(c) An acknowledgment that the Defendant's written submissions will not be treated as confidential, a copy of the Defendant's submissions will be provided to the Plaintiff for response, and the Defendant will not be informed of the Plaintiff's response or be given a right of reply;

(d) An undertaking that, in consideration of the delay in the determination of the Plaintiff's application for funding which may result from the Defendant's submissions, the Defendant will consent to any extensions of time for the certification motion, or any other steps in the class proceeding, requested by the Plaintiff until the Committee has either granted or refused the Plaintiff's application;

(e) an undertaking that, in consideration of the extra expense to the Plaintiff which may result from responding to the Defendant's submissions, the Defendant will consent to the discontinuance of the class proceeding without costs in the event the Plaintiff's application for funding is refused and the Plaintiff subsequently seeks leave from the court to discontinue the class proceeding; and

(f) An acknowledgment that the Committee's request for written submissions from the Defendant, and the Defendant's filing of written submissions, do not confer any rights whatsoever on the Defendant, such as, without limitation, the right to a copy of the Committee's reasons for decisions or the right to apply for judicial review of the Committee's decision.

Form of Defendant's Written Submissions

5. The Defendant's written submissions may include any materials it considers relevant and should be organized appropriately and bound into a Class Proceeding Funding Defendant's Record (the "Defendant's Record"). Six CD copies of the Defendant's Record should be provided to the Committee at Suite 3002, 20 Queen Street West, Toronto, Ontario, M5H 3R3 together with proof of service of one copy on the solicitors for the Plaintiff.

Communication of Decision

6. In a case where the Defendant is requested to file, and does file, written submissions, the Committee shall advise the Defendant of the Committee's decision whether to grant or deny funding but the Committee will not disclose to the Defendant any reasons for decision or the amount of any funding granted. In the event the Committee adjourns or temporarily stays the Plaintiff's application for the purpose of permitting the Plaintiff to take certain steps or provide certain information, or for any other reason, the Committee will not advise the Defendant of such adjournment or temporary stay or the reasons therefore.

Dated this 20th day of September 1995.

“original signed by”

Michael McGowan
Chair
Class Proceedings Committee

Amended this 11th day of September, 2012.

“original signed by”

Wendy Earle
Acting Chair
Class Proceedings Committee

Appendix F

Class Proceedings Committee Practice Direction #3

Repayment of Funded Disbursements

1. Pursuant to section 7 of Regulation 771/92 the *Law Society Amendment Act (Class Proceedings Funding) 1992* S.O. 1992, c.7 moneys awarded by the Class Proceedings Committee (the “Committee”) shall only be used for the purpose for which financial support is authorized in the award.
2. Accordingly, where an applicant in a funded proceeding recovers any portion of funded disbursements during the course of a proceeding, such funded disbursements must be repaid to the Fund as soon as is reasonably practicable, and cannot be used for any other purpose without the consent of the Committee.
3. Where an applicant recovers interim costs as a result of a motion brought or defended during the course of a proceeding (whether by way of court order or a negotiated settlement of such costs), such applicant should separately negotiate and segregate the quantum of such interim costs which reflect funded disbursements which must be returned to the Fund. Such funded disbursements must then be repaid to the Fund.
4. Counsel in funded proceedings should advise any court which is determining the issue of costs the amount which has been funded by the Fund and which will be repaid to the Fund out of any interim costs order.
5. Where it is impracticable for counsel to separately the negotiate and/or segregate the quantum of costs repayable to the Fund at the time of any order or interim settlement of costs, applicants are required to notify the Committee of the total costs awarded or settled and counsel’s best estimate of the amount of such costs which reflect funded disbursements for consideration and determination by the Law Foundation.
6. Applicants must forward to the Committee copies of all Orders made in the proceeding in which costs are awarded, and the details of all interim settlements of costs.

Dated this May 7, 2008.

“original signed by”

Valerie A. Edwards
Chair
Class Proceedings Committee

Appendix G

Class Proceedings Committee Practice Direction #4 Hearings

Section 5(3) of Ontario Regulation 771/92 made pursuant to the *Law Society Act*, R.S.O. 1990, c. L.8, as amended, directs the Class Proceedings Committee to take into account:

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.

In accordance with its desire to ensure that the Fund continues to be self-funding, that sufficient resources are maintained to fund current and future cases as well as potential costs awards, and to ensure that funded cases are approached in a fair and consistent manner, the Committee has determined that the following general approach should be taken with respect to funding applications:

- 1) In accordance with section 3(3) of Ontario Regulation 771/92, all applicants are entitled to make oral submissions to the Committee concerning the applicant's first application.
- 2) Thereafter, all supplementary applications are to be made in writing, in accordance with the Committee's practice to date, unless:
 - a. a supplementary application raises a serious issue about which the Committee has concerns or which requires clarification;
 - b. the additional funding requested, if granted, would result in total funding in the case exceeding \$500,000;
 - c. the matter is approaching trial; and/or
 - d. there are other circumstances related to the funded matter which make it inappropriate to decide the supplementary application by way of a written application.
- 3) In the event that the Committee determines, pursuant to paragraphs 2a), b), c), or d) that a supplementary application cannot be dealt with in writing, then the applicant will be invited to attend an oral hearing to address any factual matters, legal issues, or other concerns which the Committee may have. Prior to the hearing the applicant will be requested to provide such material that the Committee requires for the proper assessment of the matter such as a status report, an updated opinion on the merits or certifiability of the matter, copies of expert reports and any other material which the Committee may determine is necessary.

Dated this 25th of November 2010.

“original signed”

Valerie A. Edwards
Chair
Class Proceedings Committee

Appendix H

Class Proceedings Committee

Funded Disbursement Policy

Dated: April 8, 2010

I. PURPOSE

1. The Class Proceedings Committee provides financial support to class actions plaintiffs for disbursements incurred in respect of class actions in accordance with the provisions of the *Law Society Act*, R.S.O. 1990, c. L.8, as amended (the "Act") and its regulations. Funding may be granted for the following types of disbursements:
 - (a) administrative expenses, inclusive of taxes.;
 - (b) travel expenses, inclusive of taxes;
 - (c) examiner charges, inclusive of taxes;
 - (d) expert fees, inclusive of taxes;
 - (e) notice to class costs, inclusive of taxes; and
 - (f) such other types of disbursements requested by class actions plaintiffs which may be approved by the Class Proceedings Committee in their absolute discretion, inclusive of taxes
2. The purpose of this Policy is to set out:
 - (a) guidelines applicable to awards made by the Class Proceedings Committee;
 - (b) limitations applicable to awards made by the Class Proceedings Committee; and
 - (c) the process applicable to claims made by class counsel and/or the representative plaintiff for payment of funded awards.

II. ALLOWABLE DISBURSEMENTS

3. *Allowable administrative expenses.*
 - (a) The following administrative expenses may be reimbursable as part of a funding award:

- (1) binding costs;
- (2) in-house copying costs at the rate of 10 cents per page;
- (3) the cost of serving and filing court documents;
- (4) courier or other delivery costs;
- (5) in-house fax costs at 25 cents per page;
- (6) telephone charges;
- (7) other costs of communication related to funded actions such as long distance charges;
- (8) any other administrative costs incurred by the representative plaintiff and/or class counsel and approved by the Class Proceedings Committee or their representative in their absolute discretion.

4. Allowable travel, meal and accommodation expenses:

- (a) The following travel expenses incurred by class counsel, the representative plaintiff, experts or other witnesses may be reimbursable as part of a funding award:

- (1) economy class airfares on commercial flights;
- (2) train or bus tickets to the city of destination, including VIA One if travel time is more than four hours;
- (3) taxi fares or limousine to and from destinations within a city and associated tips or, if class counsel wishes and the estimated costs are expected to be less, a rental car in the destination city. However, the size of the rental car must be the most economical and practical required for the task and number of occupants; and
- (4) parking and gasoline charges when a rental vehicle is appropriate.

Class counsel are expected to make advance bookings and to obtain the least expensive fares, having regard to all the circumstances.

- (b) The following accommodation expenses incurred by class counsel, the representative plaintiff, experts or other witnesses may be reimbursable as part of a funding award:

- (1) standard room accommodation. No reimbursement will be made for suites, executive floors or concierge levels;

- (2) within Toronto, reimbursement will be limited to accommodation expenses at Law Society pre-approved hotels at the negotiated rates, in particular, the Toronto Hilton or the Toronto Sheraton, or equivalent;
 - (3) outside of Toronto, reimbursement will be limited to rates at hotels which are reasonably comparable to the Toronto Hilton or the Toronto Sheraton.
- (c) Reasonable meal expenses (not including alcoholic beverages) incurred by class counsel, the representative plaintiff, experts or other witnesses may be reimbursable as part of a funding award, at the following rates inclusive of taxes and gratuities:
 - (1) \$15 per day per person for food and drink for breakfast;
 - (2) \$25 per day per person for food and drink for the secondary meal/lunch of the day; and
 - (3) \$50 per person for food and drink for the main meal/dinner of the day.

5. *Allowable examiner charges*

- (a) Examiner charges at standard rates may be reimbursable as part of a funding award.

6. *Allowable expert fees*

- (a) Reasonable expert fees may be reimbursable as part of a funding award.

7. *Allowable notice to class costs*

- (a) Notice to Class costs incurred in accordance with the direction of the Superior Court of Justice of Ontario may be reimbursable as part of a funding award.

III. PROCESS APPLICABLE TO APPLICATIONS FOR FUNDING

- 8. Applications for funding shall break-down the funding requested into categories as set out in Appendix "A" hereto.

IV. PROCESS APPLICABLE TO PAYMENT OF FUNDED DISBURSEMENTS

- 9. Where the representative plaintiff and/or class counsel seeks payment of funding awarded, he or she is required to furnish to the Class Proceedings Committee the following:

- (a) an itemized list setting out the nature and the amount of claimed disbursements in the form set out in Appendix "A" hereto;
 - (b) a statement signed by class counsel certifying that the above list is complete and accurate and that the claimed disbursements have actually been paid, in the form attached to this policy as Appendix "B" hereto; and
 - (c) copies of all receipts related to claimed disbursement (such receipts indicating the nature of the disbursement, the date, the amount, the purpose and the location) or other proof that such disbursements have been made. These receipts should be organized in such a manner that they correspond to the itemized listing forwarded pursuant to paragraph 9(a) above and should be bound to the itemized listing with Tabs which correspond to the itemized listing.
10. Where there is more than one law firm representing the plaintiff, such law firms are required to designate one of those firms as the firm who will prepare and submit claims for payments of funded disbursements, and advise the Committee of this designation.
 11. Where the representative plaintiff and/or class counsel seeks payment of an award in circumstances where the claimed disbursement has not actually been paid, it is their responsibility to show that there are special circumstances warranting payment of the award without furnishing the above-noted materials, and that the plaintiff would otherwise suffer undue hardship.
 12. The representative plaintiff and/or class counsel are responsible for following this policy, responding to inquiries from the Class Proceedings Committee or its representative about the disbursements submitted, and must act reasonably in any matter which is not specifically referred to in this policy and in respect of which payment is requested.
 13. Where the representative plaintiff and/or class counsel do not follow this policy, funded disbursements may not be approved or paid and/or may be reduced and paid in accordance with any limitations set out in this policy. Further, the Class Proceedings Committee and/or its representative retain the discretion to reject or reduce any submitted expenses which are not reasonable or supportable in the circumstances.

APPENDIX A—STANDARD FORMAT FOR DISBURSEMENT FUNDING REQUEST

Category	Amount Requested (Inclusive of Taxes)	
I. Administrative Expenses	Item	Amount
	1. Binding & Copying	
	2. Service & Filing of Court Documents	
	3. Courier/Deliveries	
	4. Fax & Phone Charges	
	5. Other (please specify)	
	Total:	
II. Travel	Item	Amount
	1. Travel	
	2. Meals	
	3. Accommodation	
	Total	
III. Examiner Charges		
IV. Expert Fees		
V. Notice to Class		
VI. Other—Please specify		
Total		

APPENDIX B: LETTER FROM COUNSEL CERTIFYING DISBURSEMENTS MADE

Enclosed, please find our request for payment of disbursements in the total amount of *[insert amount]* as more particularly set out in the attached disbursement summary. In accordance with section 6(1) (b) of regulation 771/92 made under the *Law Society Act*, we certify that the attached list is complete and accurate, in accordance with the Class Proceedings Committee's Disbursement Policy, and that such disbursements have been made.

Appendix I

THE CLASS PROCEEDINGS COMMITTEE NOTICE TO APPLICANTS FUNDING REQUESTS FOR EXPERT REPORTS, DOCUMENT MANAGEMENT SERVICES, ON-LINE RESEARCH AND SCHEDULING OF HEARINGS AND THE FORM OF APPLICATION MATERIALS

EFFECTIVE: OCTOBER 19, 2016

Expert Fees

The Class Proceedings Committee Funded Disbursement Policy dated April 8, 2010 sets out categories of funded disbursements which the Committee may grant. The Policy indicates that:

‘Reasonable expert fees may be reimbursable as part of a funding award’.

The Committee has been receiving requests for funding of experts without sufficient particulars to allow the Committee to consider whether funding should be granted. This leads to delays as further information is requested and then submitted.

The Committee wishes to remind class counsel that pursuant to section 4 of Regulation 771/92:

4. The Committee shall not award financial support in respect of a particular expert unless the Committee approves the use of the expert and the amount of the disbursements relating to the expert. O. Reg. 771/92, s. 4.

Accordingly, for clarity, the Committee requests that class counsel provide the following information when any request for expert funding is made:

1. The complete name of the proposed expert;
2. The expert’s curriculum vitae
3. The expert’s hourly rate and/or other method of billing
4. A summary of the type of expert assistance the expert will provide, why this expert was chosen and details as to other experts considered
5. An estimate of the number of hours required
6. An estimate of the total fees and disbursements
7. A scope of work which sets out the work which the expert will be doing. We expect that there should be such communication between the expert and class counsel.

Finally, we expect that class counsel will attempt to negotiate the best possible rate with experts, which takes into account economies of scale when the same expert is used in multiple cases.

The Committee reminds counsel that funding awarded is staged and in awarding funding the Committee takes into account numerous factors including the Fund balance and any amounts which might be required to pay costs orders. As such, full funding for all disbursements, including experts, is not guaranteed.

Document Management Services

There has been a growth of document management services utilized by class counsel as a result of the growing size of productions in class actions. The Fund receives many requests for funding of this nature.

The Fund reminds counsel that section 59.3(1) of the Law Society Act provides as follows:

59.3(2) An application under subsection (1) shall not include a claim in respect of the fees of a person practicing law or providing legal services.

Where the document management service utilized by counsel employs or uses lawyers, class counsel must advise the Committee and then exclude from any request for funding any services provided by the document management firm which can reasonably be considered legal services or the practice of law as opposed to hosting or other services. The Committee will not award or pay any disbursements which relate to legal services or the practice of law.

On-line research

Where a request for funding for on-line research is made, the Committee requests counsel to provide the details of its arrangement with the on-line research provider and actual costs incurred with respect to the funded matter. The Class Proceedings Fund will award funding for actual out of pocket expenses related to on-line research only.

Scheduling of hearings

There has been a dramatic growth in the number of applications for funding made to the Class Proceedings Fund. Although hearing dates may be tentatively scheduled after the submission of a Statement of Claim, the Class Proceedings Fund reserves the right to reschedule the any matter where the completed application has not been received or where the Class Proceedings Fund receives urgent applications.

The form of application materials

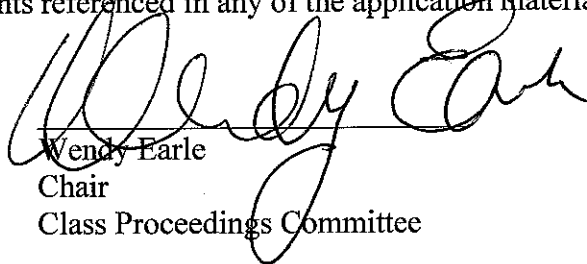
The completed application must be in the form proscribed on our LFO website:
<http://www.lawfoundation.on.ca/class-proceedings-fund/how-to-apply/>

In addition, only 1 electronic copy should be submitted. A PDF submission **MUST** be bookmarked for ease of the CPC's review.

Further counsel are reminded that in order to reduce delays which sometimes result from follow-up questions, they should submit with their completed application:

1. Any Orders or decisions already made in the case;
2. The defendant's statement of defence if available;

3. Copies of any certification materials and facts;
4. Copies of all cases and/or documents referenced in any of the application materials.



Wendy Earle
Chair
Class Proceedings Committee

STANDARD FORMAT FOR DISBURSEMENT FUNDING REQUEST

Application Name

CPC File No.

APPENDIX J

Stage(s) - A statement indicating which stage in the proceeding the application addresses, as set out in paragraphs 1 to 6 of section 2

Category	Amount Requested (Inclusive of Taxes)	
	Item	Amount
I. Administrative Expenses	1. Binding & Copying	-
	2. Service & Filing of Court Documents	-
	3. Courier / Deliveries	-
	4. Fax & Phone Charges	-
	5. Other (please specify)	-
	Total	-
II. Travel	1. Travel	-
	2. Meals	-
	3. Accommodation	-
	Total	-
III. Examiner Charges		-
IV. Expert Fees		-
V. Notice to Class		-
VI. Other (please specify)		-
Total		-

APPENDIX K
Class Proceedings Fund Application Record
(Sample)

TAB 1

Individual Applicant

[If the applicant is an individual, provide his or her name, address, telephone number and fax number, if any.]

TAB 2

Corporate Applicant

[If the applicant is a corporation, provide its name, head office address, telephone number and fax number and a copy of its articles of incorporation.]

TAB 3

Defendant's Name

[Insert each defendant's name.]

TAB 4

Stage in Proceeding

[Insert a statement indicating which of the stages in the proceeding the application addresses, as set out in paragraphs 1 to 6 of section 2 of Ontario Regulation 771/92.]

TAB 5

Pleadings and Court Orders

[Provide a copy of the pleadings and any court orders relating to the proceeding.]

TAB 6

Description of Class

[Insert description of the class and an estimate of the number of members in the class.]

TAB 7

Opinion on the Merits

I. Overview

- *Provide a brief summary of the nature of this litigation*

II. Theory of the Plaintiff's Case

a) The Facts

- *Set out the key facts the plaintiff must and can establish to succeed*
- *Attach extracts from relevant documents*
- *Indicate what facts are uncontroverted, and what facts are in dispute*

b) Statutory Framework

- *Give brief overview of statutory framework or context*
- *Provide text of relevant statutes and regulations*

c) Case Law

- *Set out leading cases plaintiff is relying upon*
- *Provide relevant extracts from cases*

III. Theory of the Defendant's Case

a) Facts

- *Set out the key facts the defendant will be relying upon*
- *Attach extracts from relevant documents*

b) Case Law

- *Set out leading cases the defendant will be relying upon*
- *Provide relevant extracts from cases*

c) Statutory Defences

- *Set out statutory defences available to defendant*
- *What will defendants say is the relevant limitation period?*

IV. Multiple Defendants

- *If there are multiple defendants, is the case against each defendant identical?*

- *If not, how do the cases against each defendant differ?*

V. Opinion

- *Based on counsel's objective assessment of the facts and the law, and all anticipated defences, what is the prospect for success at trial against EACH defendant?*

TAB 8

Statement of Intention to Apply for Certification

The applicant intends to apply for certification of this proceeding. [If applicable, the certification is scheduled to be heard on *** or was heard on ***].

TAB 9

Opinion on Certification

I. The Test

d) Do the Pleadings Disclose a Cause of Action?

- *What is the cause of action underlying the claim?*
- *Will the defence argue there is no cause of action? Why?*

e) Identifiable Class?

- *What is the identifiable class?*
- *Will the defence argue there is no identifiable class? Why?*

f) Common Issues

- *What are the common issues?*
- *What are the uncommon or individual issues?*
- *How will the defence attempt to show that the “common” issues are in fact not common?*

g) Appropriate Representative Plaintiff

- *Does the plaintiff fairly and adequately represent the interests of the class?*
- *Are there any conflicts with or amongst the class?*
- *Does the plaintiff have a cause of action against each defendant?*
- *Will the defendant object to this plaintiff, and on what basis?*

h) Jurisdiction

- *Is there a national class?*
- *Is Ontario the proper forum to hear this class action?*
- *What class action jurisdictional issues exist in this lawsuit?*
- *Does the proposed class include extra-provincial individuals?*
- *Will the defendant object to the jurisdiction of the Ontario Courts?*

II. The Case Law

a) Plaintiff's Cases

- *Are there certification cases the plaintiff will be relying upon which have comparable or analogous facts or issues?*
- *Provide relevant extracts.*

b) Defendant's Cases

- *Are there certification cases the defendant will be relying upon which have comparable or analogous facts or issues?*
- *Provide relevant extracts.*

III. Opinion

- *Based on counsel's objective assessment of the plaintiff's arguments and the defendant's arguments, what is the likelihood that this matter will be certified?*

TAB 10

Support Requested

The applicant requests financial support in the amount of [insert total amount requested], for Stages [insert the Stages as per section 2 of Regulation 771/92] as more particularly set out in the attached Disbursement Budget. [Attach Standard Format for Disbursement Budget with respect to amount which is expected to be required and is requested for the particular Stages to which the application for funding relates].

STANDARD FORMAT FOR DISBURSEMENT FUNDING REQUEST

Application Name

CPC File No.

Stage(s) - A statement indicating which stage in the proceeding the application addresses, as set out in paragraphs 1 to 6 of section 2

Category	Amount Requested (Inclusive of Taxes)	
	Item	Amount
I. Administrative Expenses	1. Binding & Copying	-
	2. Service & Filing of Court Documents	-
	3. Courier / Deliveries	-
	4. Fax & Phone Charges	-
	5. On-line Research	-
	6. Other (please specify)	-
	Total	-
II. Travel	1. Travel	-
	2. Meals	-
	3. Accommodation	-
	Total	-
III. Examiner Charges		-
IV. Expert Fees		-
V. Notice to Class		-
VI. Other (please specify)		-
Total		-

TAB 12

Affidavit of Verification

[Insert Title of Proceeding]

I, [insert plaintiff's name], of the City of [insert] in the Province of [insert] MAKE OATH AND SAY:

1. I am the plaintiff in this action.
2. The information provided by me with respect to this application for funding to the Class Proceedings Committee, and to the best of my knowledge and belief, all other information submitted in support of this application, is true.

SWORN BEFORE ME at the City of
[insert] in the Province of [insert],
on [insert date]

Commissioner for Taking Affidavits

TAB 11

Section 59.3(4)(b) to (d) Matters

(b) Efforts to Raise Funds

[Insert details on the efforts the plaintiff has made to raise funds. If unable to do so, state the reason why.]

(c) Use of Funds

[Insert whether the plaintiff has a clear and reasonable proposal for the use of any funds awarded. If use is expected to be in accordance with Tab 11, then state so.]

(d) Financial Controls

[insert details on how the plaintiff will ensure that funds awarded are spent for the purposes of the award.]

TAB 13

Verification of Authorization

I, [insert name], hereby authorize the Class Proceedings Committee and the Board of Trustees of the Law Foundation of Ontario to verify the information provided in connection with this application.

[insert date]

[plaintiff's signature]

[insert plaintiff's name]

TAB 14

Identification of Applicant's Lawyers

The applicants are represented by:

[list applicant's lawyers]

TAB 15

Lawyer's Statement Regarding Use of Funds

The law firm of [insert the name of applicant's lawyers] will accept payments from the Class Proceedings Fund in connection with the application and will use them for the purpose for which the payments are made.

[date]

[insert law firm]

representative]

Per: [signature of law firm

TAB 16

Information Regarding Lawyers

Participating Lawyers

[List the names of the individual lawyers who will conduct the case on behalf of the representative plaintiff(s) along with a short biography. This could be taken from the law firm website or other material which already exists. Provide a statement of whether or not a contingency fee arrangement has been entered into and an estimate of the number of hours which counsel expects to devote to the case.]

TAB 17

Defendant's Ability to Pay

[Provide known details regarding the defendant's financial status, i.e. from available sources such as financial statements or other materials.]

TAB 18

Litigation Plan

[Attach the litigation plan which will be filed, or has been filed, as part of the certification motion].

TAB 19

Disbursement Budget

[Attach Disbursement Budget for the entire proceeding. Same document as Tab 10, but for the entire proceeding as opposed to the Stage of Funding for which request has been made].

TAB 20

Executive Summary

[Provide summary of application]

CLASS PROCEEDINGS FUND

SUPPORTING CLASS ACTIONS TO LEVEL THE PLAYING FIELD

The Class Proceedings Fund (CPF) provides financial support for cases in which representative plaintiffs make a common claim on behalf of a larger group. These class actions have resulted in many more claims being heard than would otherwise be likely.

However, class actions can be expensive to pursue and the benefit for each plaintiff can be small. Support from the CPF and indemnification of plaintiffs against potential cost awards can help address these barriers. Applications for support are assessed based on a number of criteria including the strength of the case, the public interest, and the availability of funds in the CPF.

The CPF is administered by LFO. The Class Proceedings Committee, an independent body appointed by LFO and the Attorney General of Ontario, determines which cases to fund.

When an award or settlement is received in a case it has funded, the CPF receives a 10 per cent levy and the return of any disbursements paid, which in turn help fund new cases.

MESSAGE FROM THE CHAIR OF THE CLASS PROCEEDINGS COMMITTEE

In 2013, the Class Proceedings Committee (CPC) successfully helped more Ontarians realize the benefit of class proceedings as an access to justice tool. Financial support, through the carefully managed Class Proceedings Fund (CPF), is a major component of the help we provided.

It was gratifying that the plaintiff Bar continued to use the CPF, even as we saw the rise of third party funders. We were also pleased to see many of the cases we funded certified – seven to be precise – and many cases settled with significant benefits accruing to class members.

The CPC congratulates class counsel for their commitment and tenacity in advocating for their clients over what is often a great many years before positive results are achieved.

The CPF balance increased to \$9,495,618 at the end of 2013 from \$7,820,241 the previous year. This increased fund balance resulted from four major factors.

1. Applications for payment of costs by defendants decreased from \$2,916,515 in 2012 to \$977,397 in 2013. To some extent, 2012 was an anomalous year because the CPF paid over \$1.7 million in one case which was initially successful at trial, but subsequently overturned by the Court of Appeal.
2. Levies in successful cases rose from \$1,911,337 in 2012 to \$2,897,976 in 2013.
3. Disbursements decreased from \$1,466,868 in 2012 to \$464,491 in 2013.
4. We reduced administration costs.

While the overall fund balance has increased, so has the CPF's portfolio of active cases. Because we have more active cases we have a higher overall exposure to rising cost awards. The CPC is mindful of the fact that as its portfolio of cases increases it needs to maintain higher reserves to ensure sustainability.

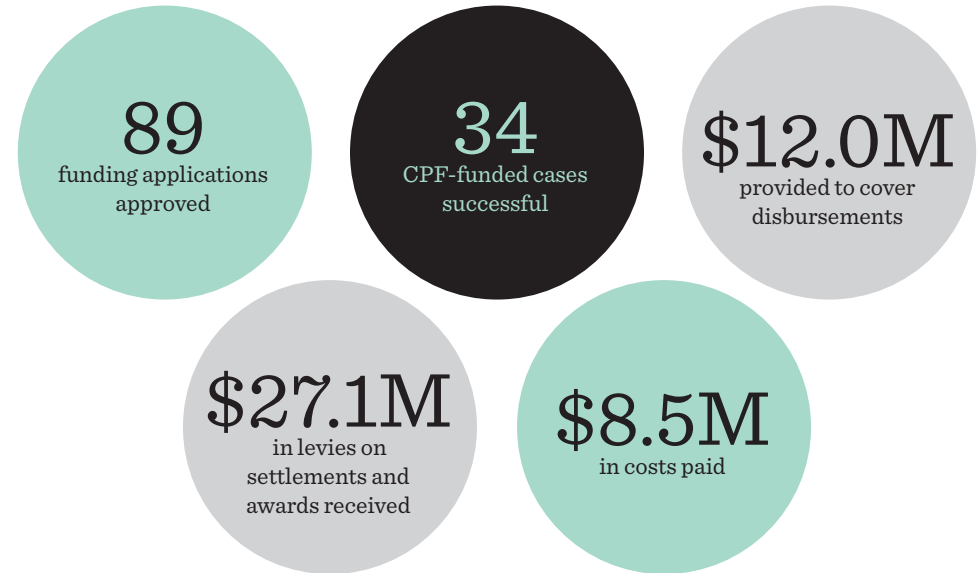
This year, the CPC was pleased to welcome Kim Twohig as a new member who will no doubt bring additional sound judgment to our work. At the same time, we were all very sad to say good-bye to Paul Morrison, a long-standing member of the CPC. Paul's commitment to access to justice and to our work was remarkable and much appreciated.

Finally, I'm proud to share that by the end of 2013 the CPF had provided a cumulative total of more than \$12 million in funding to help Ontarians access justice through class proceedings. We look forward to continuing this important work.



Valerie A. Edwards
Chair, Class Proceedings Committee

THE CLASS PROCEEDINGS FUND 1992 - 2013



Funded Cases Where Class Members Would or Did Receive a Benefit

Case	Nature of Case (Allegations)	Recovery (Before fees and other costs)	Approximate Number of Class Members	Years to Recovery
405341 Ontario Limited v. Midas Canada Inc.	Franchise dispute	\$8,500,000	Unknown	6
Williamson v. Sheila Morrison Schools	Residential schools	\$4,000,000	118	4
Roveredo v. Bard Canada	Defective hernia repair appliance	\$1,375,000	23	2
Cannon v. Funds for Canada Foundation, et al.	Solicitors' negligence and breach of duty	\$28,053,493	7,800	5
Dolmage v. HMQ	Residential schools	\$35,000,000	Unknown	4

New Applications Heard and Approved – 2004-2013

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Hearings Held	11	2	8	3	12	13	9	22	12	13
New Applications Approved	7	1	5	2	9	12	7	15	7	7

To discuss a potential application please contact:

Gina Papageorgiou, Counsel
Class Proceedings Committee
gpapageorgiou@lawfoundation.on.ca
Tel. 416.595.1425

2013 RESULTS
Statement of Financial Position

	For the period from Jan. 1, 2013 to Dec. 31, 2013	For the period from 1993 to Dec. 31, 2013
Opening balance	\$7,820,241	\$500,000
Total funding awarded	(464,491)	(12,008,049)
Funding repaid/cancelled	476,482	3,128,011
Administration costs/expenses	(424,055)	(2,808,874)
Interest received	166,862	2,022,876
10% levies received	2,897,976	27,138,894
Cost awards in favour of defendants	(977,397)	(8,477,240)
Balance as at Dec. 31, 2013	9,495,618	9,495,618

As required by O.Reg.771/92, s.13, we report as follows:

1. Number of new applications, by stage in proceeding, at the time of application.

Stage in the Proceeding	Number of New Applications	
	2013	2012
Pre-certification	11	11
Appeal re: Certification	-	-
Discovery	1	1
Determination of Common Issues	1	-
Appeal re: Common Issues	-	-
Post Common Issue Stage	-	-
Total	13	12

2. New applications granted and refused or pending/withdrawn, by stage in the proceeding, at the time of application.

Stage in the Proceeding	Granted	Refused	Deferred/ Pending*/ Stayed, etc.	Total
2012				
Pre-certification	6	3	2	11
Discovery	1	-	-	1
Other	-	-	-	-
Total	7	3	2	12
2013				
Pre-certification	7	2	2	11
Discovery	-	-	-	-
Other (Common Issues)	-	2	-	2
Total	7	4	2	13

*Carried forward to the next year.

3. In 2013 financial support was awarded for seven (7) new cases under section 59.3(1) of the *Law Society Act* and further financial support was awarded for seven (7) cases which had previously been approved, as a result of supplementary funding applications under section 59.3(5) of the *Act*. In 2012 financial support was awarded for seven (7) new cases under section 59.3(1) of the *Act* and further financial support was awarded for seven (7) cases which had previously been approved, as a result of supplementary funding applications under section 59.3(5) of the *Act*.

4. Total awards, by disbursement type is \$464,491.

Type of Disbursement	Total Amount Awarded 2013
Administrative Expenses	\$ 34,300
Travel	6,000
Examiners' Charges	15,000
Experts' Fees	354,454
Notice to Class	54,737
Other	-
Total	\$464,491

Under regulation 771/92, this section includes only amounts awarded during 2013. Total amounts paid out by the CPF during 2013 may vary as amounts awarded are reimbursed to applicants on an ongoing basis after funded disbursements have been duly incurred and paid by the applicant.

10. Proceedings for which plaintiff was awarded financial support under section 59.3 of the *Act* (these included both newly approved cases and previously approved cases for which supplementary funding was awarded during 2013).

	Administrative Expenses	Travel Expenses	Examiners' Charges	Experts' Fees	Notice to Class	Other	Total
2013	\$	\$	\$	\$	\$	\$	\$
Product liability	-	-	-	20,564	48,737	-	69,301
Pension funds	-	-	-	30,000	-	-	30,000
Residential schools	-	-	-	140,000	-	-	140,000
Product liability	15,000	-	-	-	-	-	15,000
Insurance	1,000	6,000	-	-	-	-	7,000
Pension funds	-	-	-	3,890	-	-	3,890
Medical negligence	-	-	-	30,000	-	-	30,000
Environmental	-	-	-	125,000	-	-	125,000
Price Fixing	100	-	-	-	-	-	100
Product Liability	5,000	-	-	-	-	-	5,000
Securities	1,000	-	-	-	-	-	1,000
Consumer Protection	5,000	-	-	-	-	-	5,000
Solicitors' Negligence	7,200	-	15,000	5,000	6,000	-	33,200
All Cases	34,300	6,000	15,000	354,454	54,737	-	464,491
2012							
All Cases	188,342	227,921	35,055	994,228	11,570	9,752	1,466,868

5. The total amount of money paid from the CPF to applicants under section 59.3 of the *Act*: 2013, \$879,756; 2012, \$404,596; 2011, \$1,914,374. At December 31, 2013, the balance of all awards outstanding which had not yet been paid to applicants was \$1,313,452.

6. In 2013, seven funded proceedings were certified. In 2012, 4 funded proceedings were certified.

7. In 2013, seven applicants who had received financial support settled their proceedings such that the classes involved in these proceedings would receive or will receive a monetary payment.* In 2012, 8 applicants who had received financial support settled their proceedings such that the classes involved in these proceedings would receive or will receive a monetary payment.

* Note that previously, settlements were reported based on the date of the settlement agreement. Beginning with these notes, we will be reporting settlements as of the date of the court's approval as this more accurately reflects the timing of payment to class members. Settlement approvals in 2013 were: 405341 Ontario Limited v. Midas Canada Inc., 2013 ONSC 5714; Williamson v. Sheila Morrison Schools, 2013 ONSC 1528; Roveredo v. Bard Canada, 2013 ONSC 6979; Cannon v. Funds For Canada Foundation, et al., Written Endorsement and Order dated October 18, 2013; Dolmage v. HMQ, 2013 ONSC 6686

8. In 2013, six defendants made applications to the CPF for payment of costs awards made in their favour pursuant to section 59.4 of the *Act*; five applications were received in 2012. This results from the indemnification of plaintiffs against cost awards.

9. In 2013, \$977,397 was paid from the Fund to defendants under section 59.4 of the *Act*. In 2012, \$2,916,515 was paid from the Fund to defendants under section 59.4 of the *Act*. This results from the indemnification of plaintiffs against cost awards.

CLASS PROCEEDINGS FUND

— IN CASES APPROVED BY THE CPC, CLASS ACTION PLAINTIFFS RECEIVE AN INDEMNITY AGAINST ADVERSE COSTS AND FUNDING FOR SOME DISBURSEMENTS.

IN RETURN, 10% OF ANY AWARD OR SETTLEMENT IN THESE CASES GOES TO THE CPF.

MESSAGE FROM THE CHAIR OF THE CLASS PROCEEDINGS COMMITTEE

On June 23, 2015 I stepped down from my role as Chair of the Class Proceedings Committee (CPC) after 15 years of service on the CPC, with 10 years as its Chair. It is with a profound sense of accomplishment that I look back over my tenure in this, my final report.

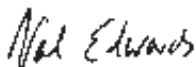
During my time with the CPC I have witnessed the Class Proceedings Fund's (Fund) growth from an unknown part of the class action regime to a significant contributor to access to justice in Ontario.

The Fund has supported numerous public interest cases, such as those involving alleged abuse at residential schools and alleged unpaid overtime, both of which settled in 2014. Many of these cases could not have proceeded without the Fund, which also provided financial support for ground-breaking test cases or those which have established novel principles. Throughout, the CPC has prudently and carefully managed the Fund's finances so that as at the end of December 2014, its balance was a healthy \$19,313,255 – the highest in its history.

2014 was a record year for the Fund. Levies received totalled \$10,350,989. Cost awards made in funded cases were lower in 2014 (perhaps beginning a reversal in the trend towards growing cost awards). And there is a record number of cases in the Fund's current portfolio as at the end of 2014. It is important to note that the results of funding

decisions do not emerge until many years later when the outcome of a funded case is known. The CPC is mindful of this and will continue to rigorously monitor the status of ongoing cases and inform future funding decisions accordingly to ensure the continued sustainability of the Fund.

As Chair of the CPC I have had the pleasure of working with a distinctly talented and dedicated committee. I am grateful for the opportunity to have served alongside this group and am gratified to know that the Fund will continue to thrive with their guidance.



Valerie A. Edwards

Class Proceedings Fund
New Applications Heard and Approved – 2005-2014

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Hearings Held	2	8	3	12	13	9	22	12	13	20
New Applications Approved	1	5	2	9	12	7	15	7	7	11

2014 RESULTS

Statement of Financial Position

	For the period from Jan. 1, 2014 to Dec. 31, 2014	For the period from 1993 to Dec. 31, 2014
Opening balance	\$9,495,618	\$500,000
Total funding awarded	(1,852,595)	(13,860,644)
Funding repaid/cancelled	1,695,592	4,823,603
Administration costs/expenses	(377,585)	(3,186,459)
Interest received	259,986	2,282,862
10% levies received	10,350,989	37,489,883
Cost awards in favour of defendants	(258,750)	(8,735,990)
Balance as at Dec. 31, 2014	19,313,255	19,313,255

As required by O.Reg.771/92, s.13, we report as follows:

1. Number of new applications, by stage in proceeding, at the time of application.

Stage in the Proceeding	Number of New Applications	
	2014	2013
Pre-certification	20	11
Appeal re: Certification	-	-
Discovery	-	1
Determination of Common Issues	-	1
Appeal re: Common Issues	-	-
Post Common Issue Stage	-	-
Total	20	13

2. New applications granted and refused or pending /withdrawn, by stage in the proceeding, at the time of application.

Stage in the Proceeding	Granted	Refused	Deferred/ Pending*/ Stayed, etc.	Total
2013				
Pre-certification	7	2	2	11
Discovery	-	-	-	-
Other (Common Issues)	-	2	-	2
Total	7	4	2	13
2014				
Pre-certification	11	3	6	20
Discovery	-	-	-	-
Other (Common Issues)	-	-	-	-
Total	11	3	6	20

*Carried forward to the next year.

3. In 2014 financial support was awarded for eleven (11) new cases under section 59.3(1) of the Act¹ and further financial support was awarded for nine (9) cases which had previously been approved, as a result of supplementary funding applications under section 59.3(5) of the Act. In 2013 financial support was awarded for seven (7) new cases under section 59.3(1) of the Act and further financial support was awarded for seven (7) cases which had previously been approved, as a result of supplementary funding applications under section 59.3(5) of the Act.

4. Total awards, by disbursement type is \$1,852,595.

Type of Disbursement	Total Amount Awarded 2014
Administrative Expenses	\$269,459
Travel	24,013
Examiners' Charges	28,592
Experts' Fees	1,344,275
Notice to Class	120,000
Other	66,256
Total	\$1,852,595

Under regulation 771/92, this section includes only amounts awarded during 2014. Total amounts paid out by the CPF during 2014 may vary as amounts awarded are reimbursed to applicants on an ongoing basis after funded disbursements have been duly incurred and paid by the applicant.

¹ References are to the *Law Society Act*.

5. The total amount of money paid from the CPF to applicants under section 59.3 of the Act: 2014, \$1,329,046; 2013, \$879,756; 2012, \$404,596; 2011, \$1,914,374. At December 31, 2014, the balance of all awards outstanding which had not yet been paid to applicants was \$1,590,585.

6. In 2014, 5 funded proceedings were certified. In 2013, 7 funded proceedings were certified.

7. In 2014, 5 applicants who had received financial support settled their proceedings such that the classes involved in these proceedings would receive or will receive a monetary payment. In 2013, 7 applicants who had received financial support settled their proceedings such that the classes involved in these proceedings would receive or will receive a monetary payment.

8. In 2014, 4 defendants made applications to the CPF for payment of costs awards made in their favour pursuant to section 59.4 of the Act; 6 applications were received in 2013. This results from the indemnification of plaintiffs against cost awards.

9. In 2014, \$258,750 was paid from the Fund to defendants under section 59.4 of the Act. In 2013, \$977,397 was paid from the Fund to defendants under section 59.4 of the Act. This results from the indemnification of plaintiffs against cost awards.

10. Proceedings for which plaintiff was awarded financial support under section 59.3 of the Act (these included both newly approved cases and previously approved cases for which supplementary funding was awarded).

	Administrative Expenses	Travel Expenses	Examiners' Charges	Experts' Fees	Notice to Class	Other	Total
2014	\$	\$	\$	\$	\$	\$	\$
Product Liability	14,000	5,500	5,500	255,000	-	22,898	302,898
Pension Funds	-	-	-	90,400	-	16,950	107,350
Residential Schools	25,300	6,700	5,600	147,400	-	-	185,000
Medical Negligence	13,509	1,213	492	5,650	-	1,073	21,937
Environmental	-	-	-	80,000	-	-	80,000
Investment/ Securities	27,500	1,600	-	578,825	60,000	22,934	690,859
Consumer Protection	-	-	-	150,000	60,000	-	210,000
Negligence	6,650	5,000	-	-	-	2,401	14,051
Breach of Contract	178,000	-	-	-	-	-	178,000
Crown Wards	3,000	3,000	-	4,000	-	-	10,000
Charter Rights	1,500	1,000	5,000	10,000	-	-	17,500
Employment	-	-	12,000	23,000	-	-	35,000
All Cases	269,459	24,013	28,592	1,344,275	120,000	66,256	1,852,595
2013							
All Cases	34,300	6,000	15,000	354,454	54,737	-	464,491

—THE CPC HAS
GROWN FROM AN
UNKNOWN PART
OF THE CLASS
ACTION REGIME
TO A SIGNIFICANT
CONTRIBUTOR TO
ACCESS TO JUSTICE
IN ONTARIO.

Class Proceedings Fund

MESSAGE FROM THE CHAIR

In June 2015, Valerie Edwards, the Chair of the Class Proceedings Committee (CPC) stepped down after 15 years of service and I became the new Chair.

It has been a profound honour to have worked with Valerie. Her leadership was thoughtful, proactive, and expertly balanced the public interest and fiscal responsibility. I hope very much to continue the same excellent stewardship which Valerie and all past Chairs of the Committee have shown.

The number of applications received by the Class Proceedings Fund (CPF) in 2015 was slightly lower than in 2014 but, in general, consistent with the trend of more and more applications being made to the CPC over the past decade. Funding awards in 2015 were much higher than in past years, largely as a result of significant expenditure on expert reports in funded cases. Cases certified and settled were also lower than in the past several years; however, this is likely due to timing and the usual ebb and flow of how the cases proceed. Costs paid to defendants in 2015 (\$676,520) were moderately higher than in 2014, (\$258,750) but still much lower than in 2012 when the CPC paid a record \$2,916,515 in costs to defendants.

We continue to monitor the implications of growing numbers of applications, the levels of disbursement funding required for these cases, as well as projected successful versus unsuccessful outcomes to ensure the sustainability of the CPF.

In the summer of 2016 we will be holding a retreat with a specific focus on risk management. Our goal is to further improve our processes and procedures so that we can ensure that the important work of the CPC will continue.

As the new Chair of the CPC, I am pleased and honoured to work with the members of the Committee — Paul Evraire, Jasminka Kalajdzic, Kim Twohig, and Scott Hutchison — and our Counsel, Gina Papageorgiou and Legal Assistant Linda Patki. I could not wish to work with a more hardworking, experienced, and capable team who are so deeply committed to the work of the CPC and its goals. I also wish to make a special mention of the Committee's Secretary, Judy Mark, who ensures that the Committee is always up-to-date with the CPF's most current financial information. Her work is and has always been critical to the CPC's success and is greatly appreciated.



Wendy Earle
Chair, Class Proceedings Committee

Class Proceedings Fund financial highlights

NEW APPLICATIONS HEARD AND APPROVED – 2006-2015

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Hearings Held	8	3	12	13	9	22	12	13	20	17
New Applications Approved	5	2	9	12	7	15	7	7	11	12

2015 RESULTS

Statement of Financial Position

	<u>For the period from Jan. 1, 2015 to Dec. 31, 2015</u>	<u>For the period from 1994 to Dec. 31, 2015</u>
Opening balance	\$ 19,313,255	\$ 500,000
Total funding awarded	(3,589,906)	(17,448,955)
Funding repaid/cancelled	610,065	5,432,075
Administration costs/expenses	(360,932)	(3,548,392)
Interest received	339,932	2,622,794
10% levies received	1,114,211	38,604,094
Cost awards in favour of defendants	(676,520)	(9,411,511)
Balance as at Dec. 31, 2015	\$ 16,750,105	\$ 16,750,105

AS REQUIRED BY O.REG.771/92, S.13, WE REPORT AS FOLLOWS:

1. Number of new applications made, by stage in proceeding, at the time of application.

<u>Stage in the Proceeding</u>	<u>Number of New Applications</u>	
	<u>2015</u>	<u>2014</u>
Pre-certification	16	20
Appeal re: Certification		
Discovery		
Determination of Common Issues	1	
Appeal re: Common Issues		
Post Common Issue Stage		
Total	17	20

2. New applications granted and refused or pending/withdrawn, by stage in the proceeding, at the time of application.

Stage in the Proceeding	Granted	Refused	Deferred/Pending* / Stayed, etc.	Total
2014				
Pre-certification	11	3	6	20
Discovery				
Other (Common Issues)				
Total	11	3	6	20
2015				
Pre-certification	11	4	1	16
Discovery				
Other (Common issues)	1			1
Total	12	4	1	17

*Carried forward to the next year.

3. In 2015, financial support was awarded for twelve (12) new cases under section 59.3(1) of the Act¹ and further financial support was awarded for seventeen (17) cases which had previously been approved, as a result of supplementary funding applications under section 59.3(5) of the Act. In 2014 financial support was awarded for eleven (11) new cases under section 59.3(1) of the Act and further financial support was awarded for nine (9) cases which had previously been approved, as a result of supplementary funding applications under section 59.3(5) of the Act.

4. Total awards, by disbursement type is \$3,589,906.

<u>Type of Disbursement</u>	<u>Total Amount Awarded 2015</u>
Administrative Expenses	\$ 516,446
Travel	152,683
Examiners' Charges	102,811
Experts' Fees	2,347,668
Notice to Class	186,683
Other	283,615
Total	\$3,589,906

Under regulation 771/92, this section includes only amounts awarded during 2015. Total amounts paid out by the CPF during 2015 may vary as amounts awarded are reimbursed to applicants on an ongoing basis after funded disbursements have been duly incurred and paid by the applicant.

1. References are to the *Law Society Act*.

5. The total amount of money paid from the CPF to applicants under section 59.3 of the Act: 2015, \$2,079,284; 2014, \$1,329,046. At December 31, 2015, the balance of all awards outstanding which had not yet been paid to applicants was \$2,855,599.

6. In 2015, 2 funded proceedings were certified². In 2014, 5 funded proceedings were certified.

7. In 2015, 1 applicant who had received financial support settled their proceedings such that the classes involved in these proceedings would receive or will receive a monetary payment.³ In 2014, 5 applicants who had received financial support settled their proceedings such that the classes involved in these proceedings would receive or will receive a monetary payment.

8. In 2015, 7 defendants made applications to the CPF for payment of costs awards made in their favour pursuant to section 59.4 of the Act; four applications were received in 2014. This results from the indemnification of plaintiffs against cost awards.

9. In 2015, \$676,520 was paid from the CPF to defendants under section 59.4 of the Act. In 2014, \$258,750 was paid from the CPF to defendants under section 59.4 of the Act. This results from the indemnification of plaintiffs against cost awards.

2. *Hodge v Neinstein* [2015] O.J. No. 6466 and *Dine v Biomet Inc et al*, 2015 ONSC 7050

3. *Dennis Caponi v The Canada Life Assurance Company, A.P. Symons, D Allen Loney and James R. Grant*. Approved by order dated May 1, 2015.

10. Proceedings for which plaintiff was awarded financial support under section 59.3 of the Act (these included both newly approved cases and previously approved cases for which supplementary funding was awarded during 2015).

	Administrative Expenses	Travel Expenses	Examiners' Charges	Experts' Fees	Notice to Class	Other	Total
2015	\$	\$	\$	\$	\$	\$	\$
Crown liability – Charter infringement	59,000	10,000	20,000				89,000
Crown liability – general breach of duty	8,052	7,197		84,250	36,753		136,252
Crown liability – prisoners' rights	46,000	29,000	5,000	175,000	20,000	25,000	300,000
Investments / Securities	80,126	17,371	12,638	821,931	1,189		933,255
Product liability – medical products	12,220	22,433	4,976	12,119		148,097	199,845
Product liability – drugs						40,433	40,433
Employment	38,000	7,000	5,000	185,000		30,000	265,000
Solicitors' negligence	61,995	133		75,000	741		137,869
Consumer protection – interpretation of contracts	40,000	2,000	25,000	33,000			100,000
Consumer protection – breach of privacy	20,151	2,034	3,955	39,040		5,085	70,265
Competition	27,327	10,360	5,500				43,187
Franchise	5,820		5,640	114,980			126,440
Insurance	15,755	11,655	102	93,906			121,418
Residential schools	102,000	33,500	15,000	713,442	128,000	35,000	1,026,942
Total	516,446	152,683	102,811	2,347,668	186,683	283,615	3,589,906
2014							
All Cases	269,459	24,013	28,592	1,344,275	120,000	66,256	1,852,595

Class Proceedings Committee

The Class Proceedings Committee has five members, one appointed by each of The Law Foundation of Ontario and the Attorney General of Ontario, and three appointed jointly.



Wendy Earle

Chair
Advocate and Arbitrator



Valerie A. Edwards

Chair (until June 2015)
Partner, Torkin Manes LLP



Paul J. Evraire, Q.C.

Special Counsel (Retired), Department of Justice



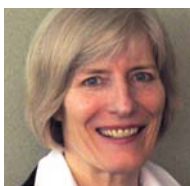
Scott C. Hutchison

Senior Partner, Henein, Hutchison LLP (from June 2015)



Jasminka Kalajdzic

Professor, Faculty of Law, University of Windsor



Kim Twohig

General Counsel (Retired), Ministry of the Attorney General

Class Proceedings Fund
20 Years in Review



Class
Proceedings
Fund

Table of Contents

- 1 Two Decades of Achievement
- 4 A Cross Section of CPF Supported Cases
- 4 Access to Justice
- 6 Behaviour Modification
- 8 Test Cases / Novel Principles
- 10 Public Interest
- 11 Judicial Economy
- 13 Statistics Regarding Number of Applications for Funding Made,
and Awards by the Class Proceedings Committee
- 16 Cases Resulting in Awards or Settlements
- 19 Statement of Financial Position: 1993 – Dec. 31, 2012
- 20 Class Proceedings Committee Members

Two Decades of Achievement

In 1990, “The [Attorney-General’s Advisory Committee on Class Action Reform] recognized that private litigants could face significant problems financing class actions, that many would not be prepared to underwrite the cost of bringing a class proceeding even if they had significant assets, and many would not be prepared to accept the cost consequences of an unsuccessful action....” – Cullity J. in *Martin v. Barrett*

In response to these concerns, in 1992 the Class Proceedings Fund (the “CPF”) was created, and in 1993 it received a \$500,000 endowment from the Law Foundation of Ontario. Funding covers approved disbursements and adverse cost awards, and is provided based on several factors including the strength of both the claim and the public interest involved.

Over the last twenty years, the CPF has received a growing number of applications and has funded more than 82 cases*. While this represents 10 per cent of all class actions in Ontario to date, 30 per cent of those that have gone to trial in the province have been CPF-supported – underscoring its importance in enabling plaintiffs to fully pursue their claims.

Many CPF-supported claims serve as test cases, often establishing novel legal principles and contributing to the evolution of class-proceedings jurisprudence. They have consistently raised issues of broad public importance, and many would not have proceeded without the CPF.

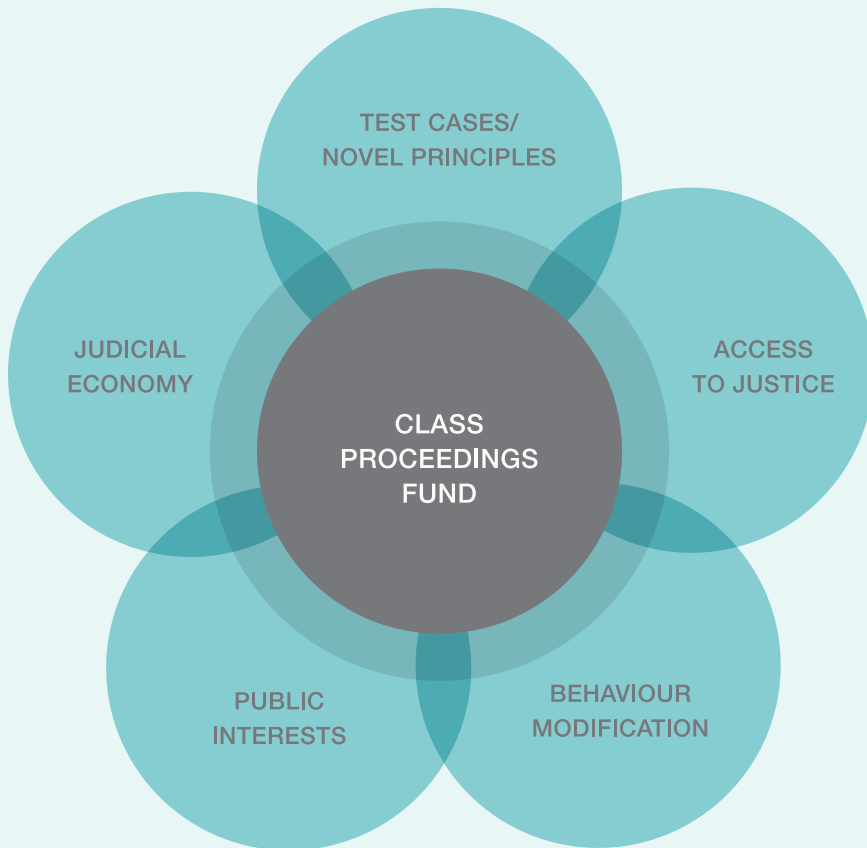
* All statistics and references to the status of cases are current as of December 2012.

Under the leadership of senior members of the bar, the CPF has helped to more fully realize the vision embodied in the *Class Proceedings Act* of improved access to justice, behavior modification, and efficient use of judicial resources in Ontario. Class members have also received settlements or awards in a large proportion of CPF-supported cases.

On this 20-year anniversary, this publication overviews a cross section of the cases the CPF has supported and their impact.

“The *Class Proceedings Act* and the Fund enable potential plaintiffs and defendants in class action lawsuits to bring and defend actions which they would not otherwise have the financial resources to support. The Fund is only one of several ways in which legislation makes the justice system financially accessible to parties.”

Winkler J. in *Garland v. Consumers Gas Co.*



All CPF-supported cases advance the objectives set out in the *Class Proceedings Act* and the jurisprudence decided pursuant to the *Act*. Each represents enhanced access to justice and judicial efficiency, and advances one or more public interest, often including the added benefits of behavior modification and the establishment of new legal principles.

A Cross Section of CPF Supported Cases

Access to Justice is the most fundamental objective of class proceedings, and as the Attorney General's Advisory Committee recognized, it risked being undermined without the existence of a costs-assistance fund.

Markle and Horsely v. City of Toronto –

A group of retirees alleged unilateral denial of pension coverage that they argued had vested at the time of their retirement. Their benefits were reinstated through settlement of the action.

Plaunt v. Renfrew Power Generation and Wrigley v. Parker Canada –

Both claims drew upon principles established in the *Pearson* certification (see page 8) to allege property devaluation resulting from environmental contamination. *Wrigley* has been settled, with the 12 homeowners receiving \$18,000 each.

Monkton v. Canada Business College –

Students alleged that the defendant misrepresented the accreditation of its dental hygienist program. There were two mediation attempts, four days of argument and multiple re-attendances. An eventual settlement provided the class members with tuition refunds and other compensation.

Givogue v. Burke –

A group of 200 retired bus drivers alleged negligent management of their under-funded pension plan. They sought CPF support for their certified action after eight years of litigation, mediation and settlement attempts had failed. They ultimately recovered two-thirds of their benefits through settlement.

Hickey-Button and Potter v. Loyalist College –

Former students alleged misrepresentation regarding the college's relationship with a university nursing program. Admission of liability came after 12 years of litigation. Six members have now been compensated and the remaining 59 claims are being adjudicated through individual assessments.

Jeffery and Rudd v. London Life –

The representative plaintiffs alleged in this case that funds belonging to insurance policyholders had been improperly used to finance a corporate takeover. The trial court ordered that the defendant repay \$285 million to the defendants' participating accounts. This is currently under appeal.

Wright v. United Parcel Service –

This case, which is under appeal, involved an additional charge levied on goods shipped from the United States. The plaintiffs alleged that the \$40 charged to the representative plaintiff was undisclosed, unauthorized and in breach of consumer protection legislation. The matter has been certified and partial summary judgment granted.

As noted by Justice Rosenberg in *Pearson v. Inco*, **Behaviour Modification** is aimed at “ensuring that actual and potential wrongdoers do not ignore their obligations to the public.” Many CPF cases have resulted in defendants and their peers taking steps to better safeguard the interests of others.

Cannon v. Funds for Canada Foundation –

This certified case arose from a complex arrangement claiming to enhance support for charities while reducing tax liability. Class members are pursuing various causes of action. The case has spotlighted a type of program that the Canada Revenue Agency has concluded does not benefit charitable causes and which is now widely seen as discredited.

Krajewski v. Ticketmaster –

A claim of conspiracy and unjust enrichment was made based on business practices relating to the re-sale of event tickets. In addition to providing compensation for 49,000 class members, the defendant changed its online sales practices and agreed to various re-sale restrictions.

Smith v. Money Mart, Mortillaro v. Cash Money and Mortillaro v. Unicash —

This trio of cases involved allegations that payday loan companies were charging usurious rates of interest to vulnerable people. In addition to settlements in each of these cases, in 2008, Ontario passed the *Payday Loans Act* which now includes provisions for better disclosure to and protection of payday loan consumers.

Gilbert v. CIBC, Meretsky v. BNS, Cassano v. TD Bank —

This trio of breach of contract claims involved allegations of inadequate or non-disclosure of charges on foreign currency transactions on credit card accounts. Millions of class members and cy-près award recipients benefitted from settlements totaling about \$100 million. Class counsel believe the outcome has influenced bank disclosure practices.

“(T)his action and other class actions involving consumer loans have achieved the goal of behavior modification by bringing about changes in the regulatory landscape.”

Strathy J. in Mortillaro v. Unicash

CPF funded cases often break new ground through **Test Cases** or by establishing **Novel Principles**. The CPF supported three of the five Ontario class actions that resulted in important judgments from the Supreme Court of Canada.

Garland v. Consumers Gas –

This novel claim sought to establish that late payment penalties on hydro bills violated interest rate provisions in the *Criminal Code*. Ultimately settled for \$22 million, it resulted in a definitive and expansive interpretation of section 347 by the Supreme Court of Canada which has become the basis for many other consumer protection actions.

Hollick v. The City of Metropolitan Toronto –

This claim related to alleged pollution from a landfill, and while unsuccessful it opened the door to environmental class proceedings. The Supreme Court of Canada underscored the importance of claims based on environmental harm, held that they could be certified, and validated the notion of a geographically defined class.

Pearson v. Inco –

Following shortly after *Hollick*, this case related to alleged property devaluation due to airborne emissions and was the first environmental class action certified in Ontario. While the claim was ultimately unsuccessful, the Court of Appeal took an expansive view of behavior modification when it certified the case. In deciding costs, the trial court also concluded that this case provided important guidance relating to environmental claims. The defendants are seeking leave to appeal the trial court's findings relating to costs.

Robertson v. Thomson –

In what Justice Cullity termed a “breakthrough” decision, the Supreme Court of Canada determined that consent is required for further electronic distribution of published materials purchased from freelance writers. The case resulted in a significant settlement and has influenced industry practices in the context of an increasingly important type of author-publisher relationship.

Taylor v. Canada (Attorney General) –

This claim involves alleged regulatory negligence on the part of Health Canada in connection with a jaw implant. The Court of Appeal provided important clarity on the nature of the “proximity” that can give rise to Crown liability.

Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc. –

This case opens the door to relief for shareholders from the strict application of a limitation period pertaining to alleged secondary market misrepresentation. The common law “special circumstances” doctrine was held to provide the necessary discretion. An appeal of this and a case coming to a contrary finding on this point is pending.

“To suggest that these issues should be resolved by individual suits by each creator of copyright material is, from a practical perspective, to suggest that the issues should never be resolved.”

Sharpe J. in Robertson v. Thomson

While all CPF supported cases engage **Public Interests**, the following are a few illustrations of claims that have a special significance for our society at large, and that are directed towards improving the situation of people in vulnerable circumstances.

McCracken v. Canadian National Railway –

Thousands of railway employees sought redress for alleged unpaid overtime. Although ultimately unsuccessful, the Court of Appeal confirmed that public interests were at stake in the case, since it involved employees of a federally regulated company and raised the issue of whether their classification for employment purposes could be the subject of a class proceeding.

Ruffolo v. Sun Life. –

A pensioner under a long-term disability plan argued that the insurer improperly deducted Canada Pension Plan benefits received by his children from his disability payments. Although ultimately unsuccessful, the court concluded that there was a strong public interest factor in this case.

Williams v. City of Toronto –

Class members in this case are residents of low-income housing, and allege the city breached a statutory duty to notify them of an entitlement to rent reductions. Justice Perell concluded that “the matter of a municipality’s liability for failure to send notice of rent reductions has a considerable public interest component.”

Class proceedings enable parties and courts to deal with what might otherwise become large numbers of separate claims as a single proceeding, greatly improving **Judicial Economy** and reducing the demands on scarce resources.

Crisante v. Slotec, Parker v. Pfizer, Schick v. Boehringer –

These three cases – the latter two of which have been certified – are among a number supported by the CPF that involve pharmaceutical or medical product liability. Allegations relate respectively to hip implant failure; and to links between prescription drugs and each of suicidal ideation and gambling.

Good v. Toronto Police Services Board –

The 1,000 members of this class are looking for redress for what they allege was unlawful arrest and detention during the G20 Summit in Toronto in the summer of 2010.

Bechard v. Her Majesty the Queen, Dolmage v. Her Majesty the Queen, Seed v. Her Majesty the Queen –

Each of these certified cases involves allegations of abuse at residential facilities housing children with some form of disability.

“I wouldn’t have proceeded without funding from the Class Proceedings Fund because I would have been solely responsible; and as a young person and young professional I would not have put myself in that position.”

Jill Hickey-Button, Representative Plaintiff in Hickey-Button v. Loyalist College

“I think the defendants took us more seriously because of the Class Proceedings Fund support.”

Robert Givogue, Representative Plaintiff in Givogue v. Burke

“My class action was a smaller case, but I would have been financially devastated if I’d had to pay the college’s costs. And I’m glad that some of our settlement will go to funding other cases like our own.”

Thea Monkton, Representative Plaintiff in Monkton v. Canada Business College

Statistics Regarding Number of Applications for Funding Made, and Awards by the Class Proceedings Committee

Since its establishment, the CPF has received more than 130 applications and 82 of them have been approved for funding. To date, 30 CPF-funded cases* have resulted in settlements or awards in favour of class members.

The 10 per cent levies on these awards and settlements are, in turn, what has enabled the CPF to be financially self sustaining.

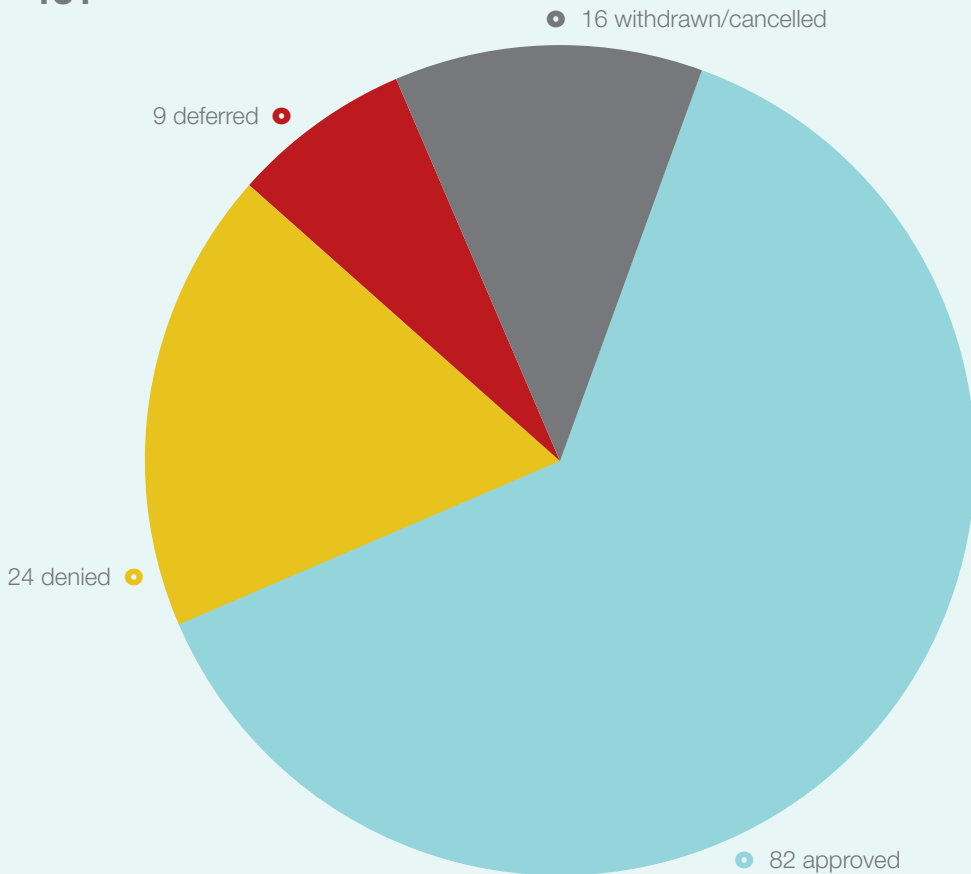
All CPF-supported cases, even those that do not result in a levy, increase access to justice.

* All statistics and references to the status of cases are current as of December 2012.

Statistics Regarding Number of Applications for Funding Made, and Awards by the Class Proceedings Committee

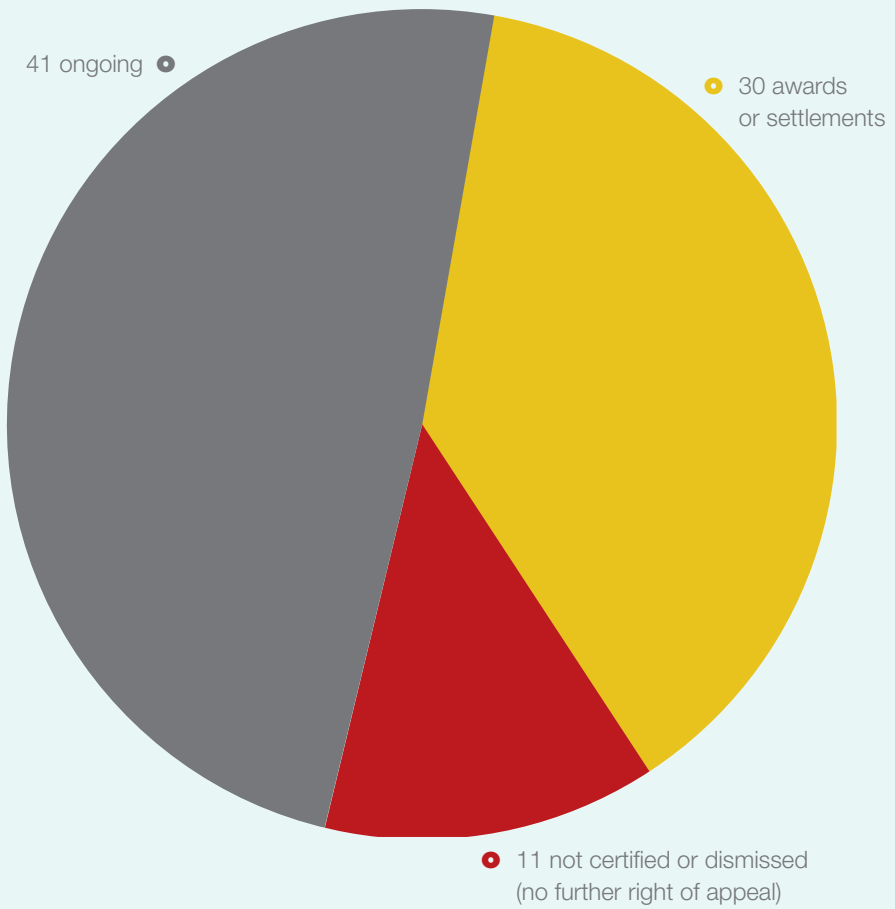
Total Applications

131



Approved Applications

82



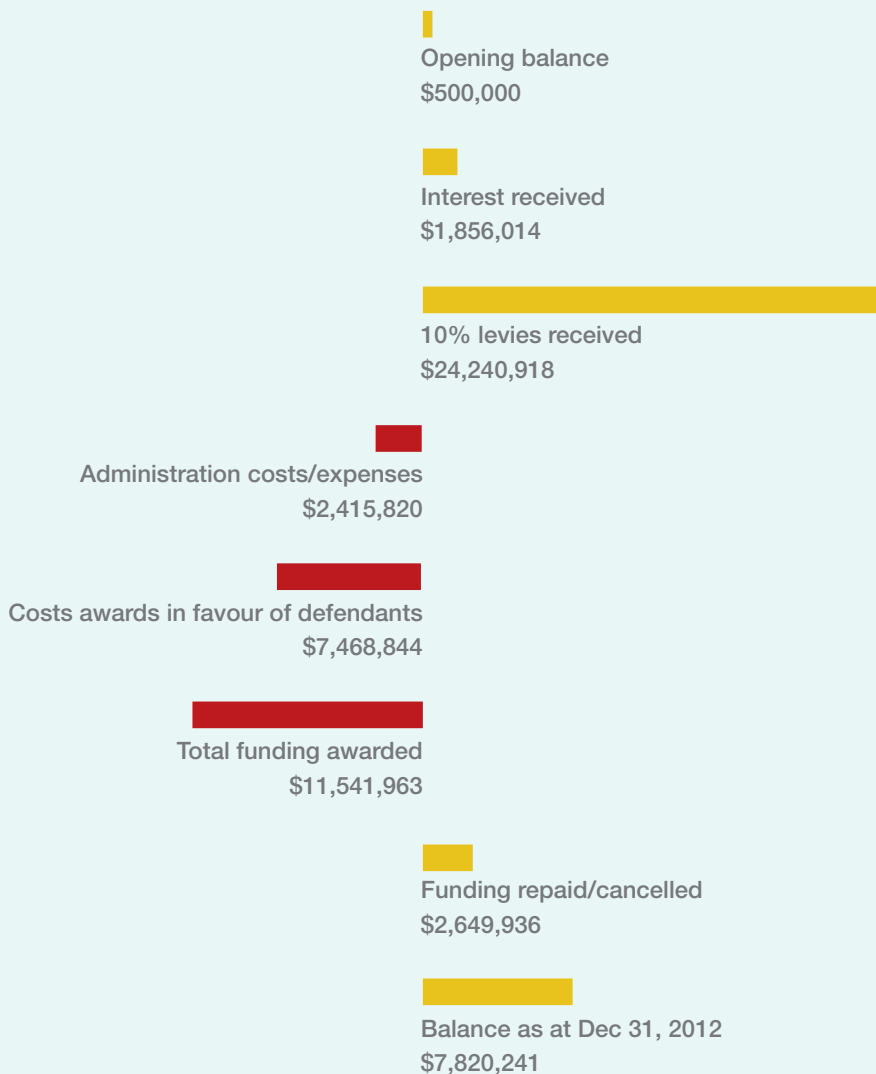
Cases Resulting in Awards or Settlements

	Class Members (approximate)	Recovery (\$)	Years To Recovery
Environmental			
1. Mangan v. Inco (alleged damages caused by sulphur dioxide spill)	10,000	2,552,071	5
2. Wrigley v. Parker Canada (alleged environmental contamination)	12	275,000	5
Copyright			
3. Robertson v. Thomson (alleged copyright infringement when work published in print media was disseminated electronically)	837	11,000,000	14
4. Robertson v. Canwest (alleged copyright infringement when work published in print media was disseminated electronically)	837	7,871,894	9
Pension			
5. Markle & Horsely v. City of Toronto (alleged unilateral denial of pension benefits to retirees)	600	\$200,000 cash plus health care spending accounts	4
6. Martin v. Barrett (alleged negligence related to pension investments)	2,400	13,926,195	5
7. Sutherland v. Scott (alleged breach of trust related to pension plan windup)	2,000	8,500,000	7
8. Givogue v. Burke (alleged negligence and breach of duty related to pension plan)	200	2,900,000	11
Medical Devices/Products/Negligence			
9. Anderson v. Wilson (alleged infection of hepatitis B at medical clinic after medical tests)	18,000	27,500,000	6
10. Heward v. Eli Lilly (alleged deficiencies in drug used to treat various mental illnesses)	575,000	17,750,000	6
11. Serhan v. Johnson & Johnson (alleged defective glucose monitors)	Thousands	4,000,000	10

	Class Members (approximate)	Recovery (\$)	Years To Recovery
Competition			
12. Knowles v. Arctic Glacier (alleged price fixing in ice industry)	Hundreds	2,000,000	Ongoing
Securities			
13. Lawrence v. Atlas Cold Storage (alleged misrepresentation in securities prospectus in violation of s.130(1) of <i>Securities Act</i>)	Thousands	40,000,000	6
Corporations			
14. Jeffery & Rudd v. London Life (alleged misappropriation of participating policyholder surplus and various breaches of statute)	1,800,000	\$284,675,000 ordered to be repaid to defendants' participating accounts	Ongoing (under appeal)
Consumer Protection			
15. Garland v. Consumers Gas (alleged criminal rates of interest)	Millions	22,000,000	14
16. Walker v. Union Gas (alleged criminal rates of interest as a result of late payment penalties)	650,000	9,227,500	6
17. Nehme v. Civil Service Co-op (alleged breach of contract re mortgage prepayment provision)	Unknown	147,329	3
18. Gilbert v. CIBC (alleged non-disclosure of foreign transaction currency fees on credit cards)	Millions	19,500,000	8
19. Meretsky v. BNS (alleged non-disclosure of foreign transaction currency fees on credit cards)	1,500,000	24,200,000	12

	Class Members (approximate)	Recovery (\$)	Years To Recovery
20. Cassano v. TD Bank (alleged non-disclosure of foreign transaction currency fees on credit cards)	Millions	55,000,000	12
21. Smith v. Money Mart (alleged criminal rates of interest charged on payday loans)	306,714	\$57.5 million in credits and cash plus \$56,000,000 debt forgiveness	8
22. Mortillaro v. Cash Money (alleged criminal rates of interest charged on payday loans)	315	432,711	7
23. Mortillaro v. Unicash (alleged criminal rates of interest charged on payday loans)	Thousands	155,000	8
24. Markson v. MBNA (alleged criminal rates of interest related to credit card advances)	625,000	8,000,000	9
25. Speevak v. CIBC (alleged disclosure of personal information)	20	118,250	6
26. Krajewski v. Ticketmaster (alleged breaches related to fees charged on tickets)	49,000	5,000,000	4
27. Monkton v. Canada Business College (alleged misrepresentation related to dental hygienist program)	18	115,000	6
28. Hickey-Button v. Loyalist (alleged misrepresentations relating to nursing program)	66	Individual damage assessments pending	Ongoing (13 years to date)
29. Potter v. Loyalist		Consolidated with Hickey-Button	
30. Williamson v. Sheila Morrison School (alleged abuse at privately run facility for children with disabilities)	Hundreds	4,000,000	Ongoing

Statement of Financial Position: 1993 – Dec. 31, 2012



Class Proceedings Committee Members

The Class Proceedings Committee has five volunteer members, one appointed by each of the Law Foundation of Ontario and the Attorney General of Ontario and three appointed jointly.

Current Members



Valerie A. Edwards (chair)
Partner, Torkin Manes Cohen
Arbus LLP
Appointed 2000



Wendy J. Earle
Partner, Borden Ladner
Gervais LLP
Appointed 2006



Paul Evraire, QC
Special Counsel,
Department of Justice
Appointed 2008



Jasminka Kalajdzic
Professor, Faculty of Law,
University of Windsor
Appointed 2011



F. Paul Morrison
Partner, McCarthy Tétrault LLP
Appointed 2004

Past Committee Members

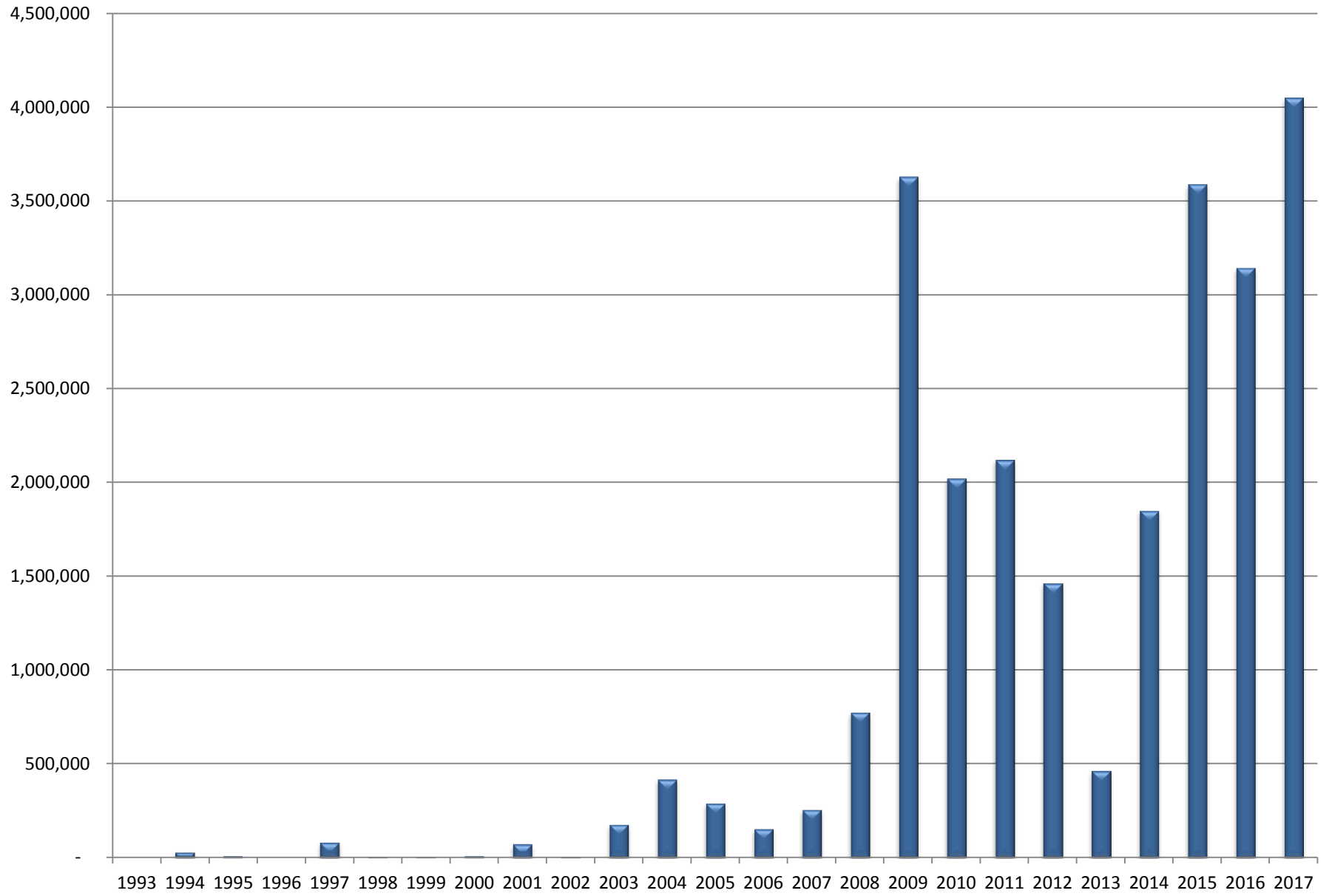
Bellmore, Brian	2000 to 2006
Fisher, Stanley G.	1993 to 1999
Foulds, Jim	1992 to 1995
Girard, Michael	2000 to 2003
Goldberg, Elizabeth	1999 to 2004
Kirby, Ian	1996 to 1999
Leach, Mark	2004 to 2007
McGowan, Michael	1992 to 1995
Merritt, Ann	1992 to 1995
Minor, Janet	2010 to 2011
Molloy, Anne	1992 to 1995
Mullins, Anne M.	1996 to 2000
Munroe, Robert	1997 to 2006
Sossin, Lorne	2007 to 2010
Vigmond, James	2007 to 2008
Watson, Garry D.	1996 to 2000

For more information visit
www.lawfoundation.on.ca/cpcabout.php

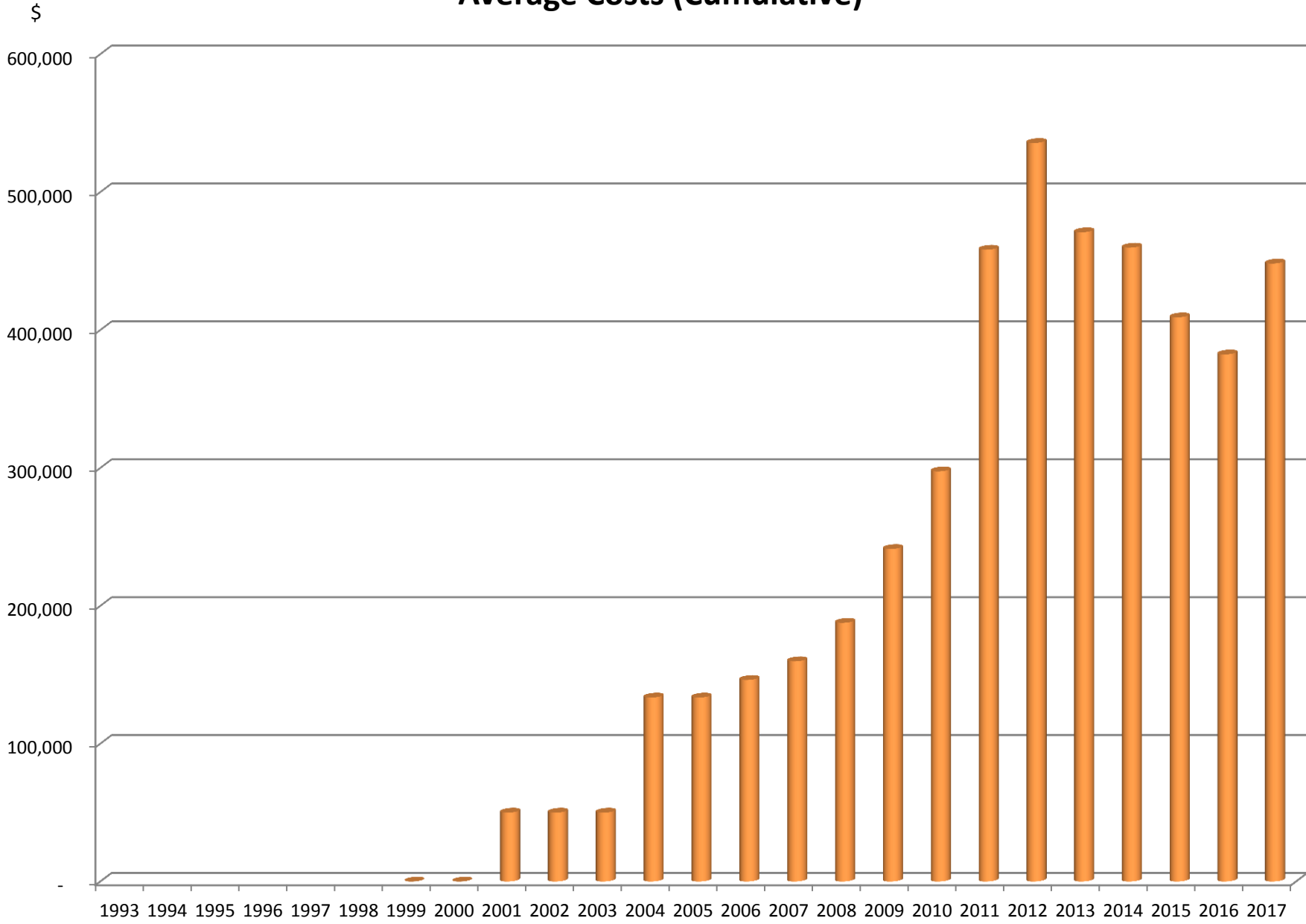
**To discuss a potential application
please contact:**

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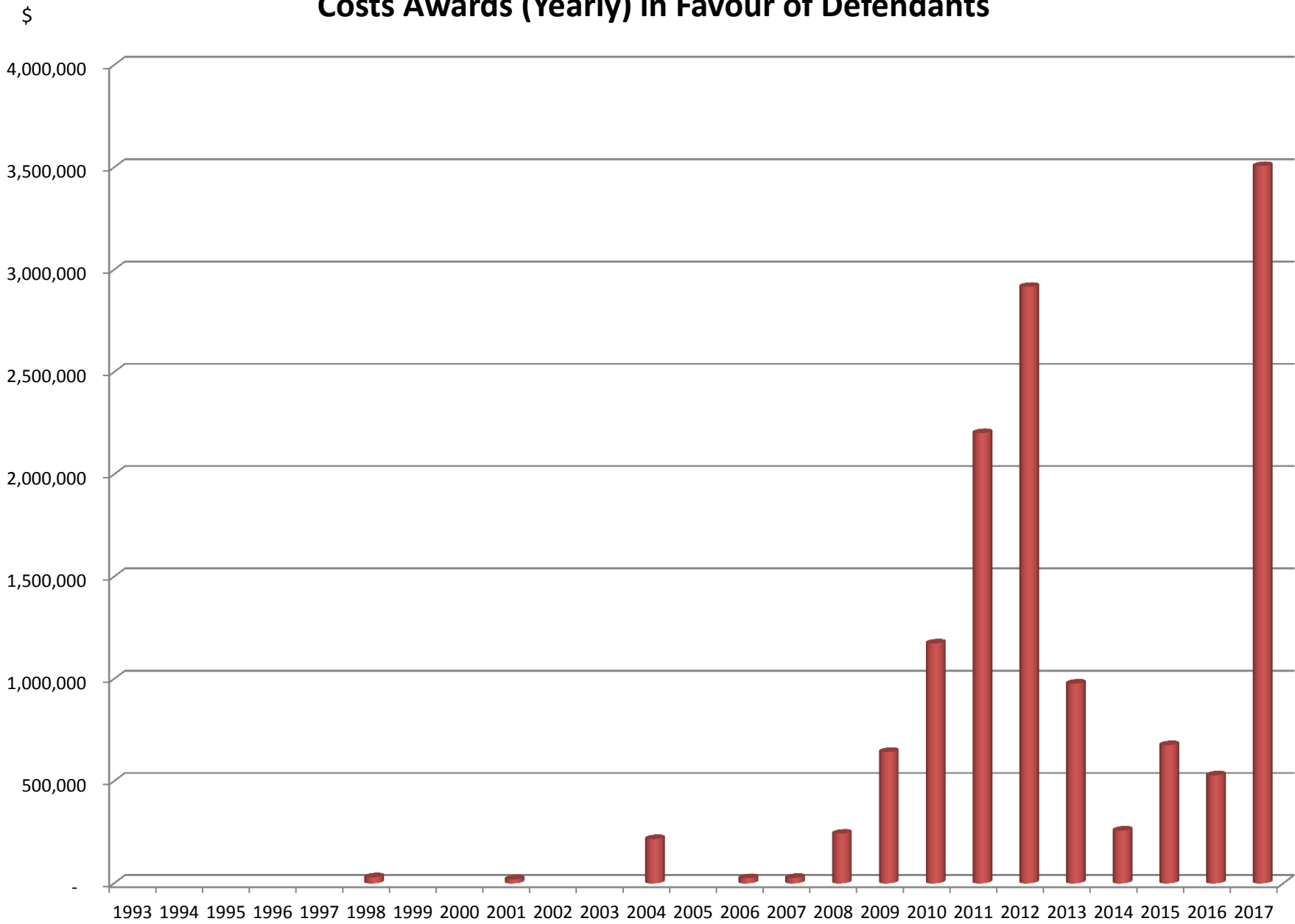
Total Funding Awarded



Average Costs (Cumulative)



Costs Awards (Yearly) in Favour of Defendants



Total Applications and Funding Awarded - Cumulative

