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May 25, 2018

**SENT VIA EMAIL TO: lawcommission@lco-cdo.org
AND SENT VIA COURIER**

Law Commission of Ontario
Osgoode Hall Law School, York University
2032 Ignat Kaneff Building
4700 Keele Street
Toronto ON M3J 1P3

Attn: Nye Thomas, Executive Director

Dear Mr. Thomas:

RE: Submissions for the Class Actions Project

It was a pleasure meeting with you, Ms. Carnerie and Professor Kalajdzicin at our Toronto office on April 19, 2018.

As discussed, the Office of the Public Guardian and Trustee has special experience in serving incapable adults and a number of suggestions to make the class action process more responsive to their needs. We appreciate the opportunity to raise our concerns with you directly and, as promised, are following up with the enclosed written submission.

We would be pleased to address any questions or concerns that you may have with our proposals and thank you once again for consulting with us.

Yours truly,

Kenneth R. Goodman
Public Guardian and Trustee for Ontario



Submission of the Public Guardian and Trustee for Ontario to the Class Actions Project of the Law Commission of Ontario

Summary

The Office of the Public Guardian and Trustee for Ontario (OPGT) has particular experience with the challenges faced by incapable claimants in the class actions process. Changes are suggested to that process in order to increase access to justice for all mentally incapable people, including clients of the OPGT.

Background

The OPGT is a corporation sole established under the *Public Guardian and Trustee Act* (PGTA). We have close to 380 staff in six offices throughout Ontario. Our primary responsibility is to protect the rights and interests of mentally incapable Ontarians who have no one else to assist them. A person is deemed mentally incapable of managing their property when:

- They are not able to understand information that is relevant to making a decision in the management of their property; or,
- They are not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision relating to the management of their property.

At present, the OPGT is the statutory guardian of property for over 12,000 people. In this role, we make all the financial decisions and conduct transactions that they would otherwise handle themselves. This may include, for example, receiving and depositing income, applying for benefits, filing tax returns, and acting in legal proceedings. The only restriction is that we cannot make a Will.

As part of our duties, we monitor class actions and file claims on behalf of clients who are eligible to receive an award from a settlement fund. Although the OPGT is a part of the Ontario Ministry of the Attorney General (MAG), when acting as guardian of property for a mentally incapable person, we represent the interests of that person and may be opposed in interest to other counsel in MAG, who act for a government defendant.

OPGT Experience with Class Actions

The OPGT regularly monitors the case law, the media and other sources to identify class actions as they occur. When a class action potentially affecting our clients is identified, notice is sent throughout our organization in an effort to identify potential claimants. In some cases, we may be able to conduct a data match with external information. When a client is identified as a potential claimant in a settled class action, we gather information relevant to making the claim. We then prepare and submit the claim on behalf of the incapable person. If the claim is successful, we receive the award in trust for the incapable person.

The OPGT has historically experienced significant challenges in managing large class actions. The class actions which have caused the greatest challenges are those known as the Huronia, Rideau and Southwestern Regional Centre ("Huronia") and the Schedule One Facilities ("Schedule 1") class actions.

Huronia

The Huronia class action placed significant pressure on the resources of the OPGT. We were aware of and had been following the class action prior to settlement. As guardian of property for a significant number of potential claimants, we asked counsel for both parties for an opportunity to provide input on any potential settlement. The request was refused because we had no standing and, as a result, we had no input.

The claims process in Huronia required that an application form be completed, which included three sections for descriptions of harm. In the first section, a claimant only needed to sign and swear that they had been harmed while at one of the centres. The second section permitted a claimant to provide further details about how they had been harmed, and the third section permitted a claimant to provide details about severe physical or sexual harm. Claims made under the latter two sections resulted in higher awards from the settlement.

Claimants were able to request their files from the Ministry of Community and Social Services (MCSS). During our initial investigation, we identified 554 clients who may have been eligible to file a total of 578 claims. However, we faced considerable challenges; first, the claims deadline in the settlement agreement did not allow sufficient time to gather and review the files from MCSS, particularly as privacy legislation required that the files be redacted, nor to prepare and file appropriate claims. Second, the OPGT was not able to swear the claims forms in the format provided, as they did not provide an option to swear on the basis of information and belief alone.

Consequently, we sought an extension of the deadline and an amendment of the claims forms. The parties would not consent to any extension or alteration of the claims forms. As a result, the OPGT was required to draft materials and attend Court to speak to the matter. After a protracted hearing, in which class counsel vigorously opposed any extension or alteration to the claims forms, the Court granted an extension of time for all claimants and permitted the OPGT to swear claim forms on the basis of information and belief alone. The Court further ordered that privacy legislation with respect to files

released to the OPGT be waived, to reduce the time spent waiting to receive the files for review.

After further investigation, the OPGT filed 341 claims for clients, of which 325 were approved. A total of \$3,225,900 was received in compensation. However, in order to review, prepare, and file claims on behalf of clients, the OPGT incurred significant costs, a portion of which was charged back to our clients who had a successful claim.

OPGT staff spent over 1,600 hours reviewing records. Additional time, of approximately one hour per file, was spent making phone calls to clients, their family members, or their support workers to gather information. This was necessary in order to make thorough and accurate claims, as many of our clients are challenged in remembering and communicating events from their pasts. Multiple staff members were pulled from their regular duties. Had we not taken these actions, most of our clients, being the most vulnerable members of the class with no other person willing to assist them, would have been left out of the settlement process entirely.

Schedule 1

Schedule 1 was very similar to Huronia. The OPGT was aware of and was following the class action prior to settlement and sought an opportunity to provide input. In particular, we discussed with counsel for the parties the difficulties faced in the claims process for Huronia, as well as the costs. We asked the parties to consider alternatives to assist incapable claimants, such as the use of claims facilitators. While there was some appreciation of our concerns, ultimately the action settled without an opportunity for the OPGT to provide input and without any provisions addressing the costs for filing claims on behalf of incapable clients.

However, perhaps as a result of our discussions with counsel, a more appropriate deadline for claims was selected. Towards the end of the claims period, the deadline was extended by two months to allow all class members to file claims. Furthermore, all parties consented to our suggested amendments to the claim form, to allow the OPGT to swear claim forms on behalf of our clients on the basis of our information and belief alone.

The OPGT was able to retain an outside class actions firm, under the guidance of external counsel, to assist in reviewing and preparing claims on behalf of incapable clients. The claims process for Schedule 1 was the same as for Huronia. The OPGT filed 323 claims, of which only four were ineligible or withdrawn. We lost authority over six class members (because they died) before the claims were adjudicated. In total, the OPGT received \$3,080,600 in compensation for the 313 claims which had been accepted and for which we retained authority after adjudication of the claims.

Once again, in reviewing, preparing, and filing claims in this class action, the OPGT incurred significant costs, including disbursements for the claims administrator and for in-house claims review and preparation. A portion of these costs were charged back to the clients who had successful claims. Costs for Schedule 1 were higher than in Huronia because the files reviewed were larger and because the evidence was more

challenging to locate, since the institutions covered by this class action had been closed a decade earlier than the institutions in Huronia. As in Huronia, our vulnerable clients would have been left out of the settlement process had we not made these efforts.

Other Class Actions

The OPGT has filed claims for clients in the Indian Residential Schools Settlement (IRSSA), Zyprexa, Vioxx, Fosamax, Hepatitis C, the General Motors Pension, and the Ross MacDonald School for the Blind ("Ross MacDonald") class actions.

In both the IRSSA and Zyprexa class actions, the OPGT needed additional time to complete the claims process. In IRSSA, the federal government extended the claim deadline for class parties. In Zyprexa, all parties agreed to an extension in the claim deadline to allow the Public Guardians and Trustees in both Ontario and in Alberta to complete the research required to determine eligible claimants.

The OPGT routinely conducts matches with the Ministry of Health and Long Term Care (MHLTC) for major drug class actions, such as for the Fosamax class action. However, this step is time-consuming, often taking more than a month, and does not always produce results. It further does not identify whether a potential claimant suffered an adverse reaction from the drug, which is normally required for compensation. The cost of obtaining further medical records, which may be held by a third party, can be prohibitive.

Issues

As an institutional guardian, the OPGT has identified a number of challenges when filing claims in class actions on behalf of incapable claimants.

1. There is no requirement that the OPGT be served with notice of a class action and, as a result, there is a risk that some class actions may not be identified.
2. OPGT clients, many of whom suffer serious disabilities, are normally unable to self-identify.
3. Without a clear right to participate, it may be difficult for the OPGT to obtain information and cooperation from counsel for the parties.
4. Without input from the OPGT, claims deadlines may not allow sufficient time for the additional investigation the OPGT requires to make a claim on behalf of an incapable person.
5. Managing class actions, particularly large class actions, is costly and, without special arrangements, there is no recourse for recovering OPGT costs other than from the amounts awarded to claimants.

1. Notification of Class Actions

The OPGT does not receive direct notice of class actions and, as a result, significant time is spent each month monitoring the case law for new certification decisions and settlement approvals, reviewing class action firm websites for updates on particular class actions, and monitoring the news media for large scale class actions. On occasion, we will receive a Notice of Certification or Notice of Settlement through mail redirection if one of our clients has previously been identified by class counsel.

Aside from being a time-consuming process, each of these methods carries a risk of missing a potential claim if used as a primary method of identifying a class action or identifying the stage of a class action.

- Many cases, particularly for procedural motions, are not reported in the case law. Even when reported, the decisions are often released several weeks after the Order and, in the case of settlement approval, these delays can prejudice a client because the OPGT may not be able to prepare a claim in the remaining time.
- While most class action firms provide listings of their current class actions on their websites, these websites are not usually up to date.
- Although a few class actions are widely reported in the media, most are not.
- On some occasions, the OPGT receives a formal notice sent to a client through our mail redirection system. However, since such notice is usually directed to the claimant's last known address, which may not be known to us, we receive very few redirected notices. For example, in *Ross MacDonald*, we only received two notices even though we identified nine clients with potential claims.

In preparing this submission we have had discussions with representatives of the Public Guardians and Trustees in British Columbia, Alberta, Yukon, Manitoba, Saskatchewan, and New Brunswick. We understand that they face similar challenges in identifying and tracking class actions on behalf of incapable claimants.

2. Identification of Claimants

Once a class action is identified, it can be extremely difficult to identify claimants. On some occasions, such as with *Huron*, *Schedule 1*, and *Ross MacDonald*, class counsel is able to provide a list of class members. While this method can be effective, depending on the accuracy and extent of information provided, the OPGT requires at minimum three pieces of unique identifying information to make an accurate match, typically the first name, last name, and date of birth. Class counsel in both *Huron* and *Schedule 1* were able to provide an adequate list of class members.

Even with the assistance of class counsel, identifying claimants can be challenging. In *Ross MacDonald*, the OPGT received a class list that was comprised of names and last known addresses. However, since the last known address was often not consistent with

our records, it was not helpful as an identifier. As a result, a rough data match using only first and last name was used. Initially 48 matches were identified, but after investigation, only nine clients were found to have been eligible for the class action, and only five claims were ultimately filed.

Where class counsel is either unwilling or unable to provide a list of class members, the OPGT often has little recourse to identify class members. With respect to drug class actions, we can run a prescription match with the MHLTC. This is often time-consuming and limited to the past decade. Furthermore, since most drug class actions require proof of an adverse effect, the cost of obtaining further medical evidence to establish adverse effect can be prohibitive.

We rely heavily on the knowledge of our caseworkers. A summary of the class for each identified class action is sent throughout the organization and any caseworker who believes they have a client with a claim is requested to identify that person. While this produces some results, caseworkers will not always have sufficient information to know whether a client meets the criteria for a claim. A further complicating factor is that we often gain or lose clients throughout the claims process.

3. Co-operation of Class Counsel

The OPGT relies heavily on the co-operation of class counsel to keep us informed about the progress of a class action. Many class action firms are receptive to providing information and assistance in an effort to ensure that the interests of incapable claimants are protected. However, there is no requirement that firms respond to our inquiries and many firms do not. It is not unusual for the OPGT to hear about a settlement after the settlement approval hearing, leaving limited time to identify claimants or file claims.

While class counsel can be extremely helpful, without a right to participate, there is little incentive to engage with the OPGT in a class proceeding. Class counsel may even oppose efforts of the OPGT to ensure adequate time to advance claims for the incapable.

4. Claims Deadlines

In the usual course, a settlement is approved without notice to or input from the OPGT. We usually have difficulty in meeting the claims deadlines first set out in settlement agreements and often require additional time, for the following reasons:

- Without notice, it can be several weeks before the OPGT learns about the class action, or about the approved settlement for a class action.
- It often takes a month or more for the results of a data search to return from other Ministries with relevant records, such as the MHLTC or the MCSS.

- Once a list of potentially claimants has been identified, further investigation is required to determine whether they are actually eligible, which often requires ordering additional medical or other records, reviewing other evidence, and or contacting family and support workers.
- Since OPGT clients are mentally incapable, they are often unable to provide information regarding the claim, and may not have family members with knowledge of their histories to assist. As a result, we rely on a review of medical or institutional records to prepare a claim, which requires additional time for review.

5. Costs

The OPGT has the authority to charge fees for services rendered, in accordance with s 8 of the *PGTA*. In some cases, due to a lack of resources, we may also need to retain others to do work on some large class actions, incurring costs. We incurred substantial costs in *Huron* and Schedule 1. A portion of these costs were charged back to our clients and taken out of the awards that they received.

A mentally capable claimant has the ability to identify their interest and file a claim on their own. They are better able to remember the harm that was caused to them. They are able to request assistance from a social service agency or community organization in completing a claim form. A mentally capable client can also decide whether he or she wishes to independently retain counsel to prepare a claim and would be capable of negotiating an appropriate rate for such a retainer.

By contrast, a mentally incapable claimant is unable to file their own claim, as they are either unable to understand information relevant to making the decision to file the claim, or to appreciate the reasonably foreseeable consequences of any decision. They are less likely to be able to provide the information required for a claim and, therefore, we need to contact others. As we are the guardian of property of last resort, many of our clients do not have a consistent person in their lives to provide that information. A mentally incapable person under the guardianship of the OPGT consequently has no choice but to incur the extra costs of having the OPGT prepare their claims. No provision has been made in recent settlements to cover these extra costs.

Proposed Solutions

To promote access to class actions for incapable persons we recommend the following amendments to the *Class Proceedings Act (CPA)*, that:

- 1) The OPGT be given notice of certification and notice of settlement of a class action (s. 17).
- 2) The OPGT has the right to participate in a class action without a Court order (s. 14).

- 3) Reversion shall occur only with a Court order, where it is likely that vulnerable class members have been left out. An Order will be made when the Court is satisfied that all reasonable efforts have been made to identify class members, including members of the class who may be considered vulnerable (ss. 26(10)).

1. Notice Provision

Notice to the OPGT, under s. 17 of the *CPA*, will reduce the risk that the OPGT will miss a class action and, therefore, fail to file claims for which our clients may be eligible. This is similar to our role in other areas of law, as there are already situations in which the OPGT is required to be served with notice of an action:

- Pursuant to s. 69 of the *Substitute Decisions Act*, the OPGT is served with all applications for the appointment of a guardian of property or of the person, as well as any applications and motions to terminate or vary a guardianship order.
- Pursuant to Rules 74.04 and 74.05 of the *Rules of Civil Procedure*, the OPGT is to be served in an application for a Certificate of Appointment as Estate Trustee, either with or without a Will, where a mentally incapable person without either a guardian or attorney for property has an interest in the estate.
- Pursuant to Rule 74.18 of the *Rules of Civil Procedure*, the OPGT is required to be served in an application for a passing of accounts relating to the property of a mentally incapable person.
- Pursuant to s. 242 of the *Ontario Business Corporations Act*, the OPGT shall be served with any writ or other document commencing an action, suit, or other proceeding against a dissolved corporation.

2. Right of Participation

A right of participation under s. 14 of the *CPA* will assist the OPGT in drawing attention to issues relating to incapable persons. For example, we can assist in ensuring that the proposed deadlines allow adequate time to investigate and prepare claims on behalf of incapable persons.

Where the class action is anticipated to have a significant number of mentally incapable claimants, the OPGT will also be able to advocate for alternative arrangements for costs. While such arrangements were not made in *Huron* or Schedule 1, the costs of claims preparation have been addressed in other class actions:

- In the *IRSSA*, claimants who had legal representation in the Independent Assessment Process were given an additional 15% in their awards, as well as reasonable disbursements, if they were represented by counsel, as a contribution to their legal expenses.

- In the Hepatitis C class action, some costs were reimbursable from the settlement fund for expenses incurred in filing a claim, e.g. costs of swearing an affidavit, or a long-form birth certificate.
- In the Nova Scotia Home for Coloured Children class action, the settlement agreement provided that each claimant would be assigned a Claims Facilitator to assist through an Independent Assessment Process. Each Claims Facilitator would be entitled to remuneration at a rate set by the Claims Administrator.

3. Reversion with Court Order

Finally, the OPGT proposes that s. 26(10) of the *CPA* be amended to protect class members who may be incapable of identifying and advancing their own interests. Where it is likely that they may have been left out of a settlement, a reversion should occur only with a Court Order and only if the Court is satisfied that all reasonable efforts have been made to identify vulnerable class members.

We note from your consultation paper that the class take up rate is a general concern. Based on our experience with incapable persons, we are concerned that these are the people most likely to be left out of any settlement process unless specific measures are taken to protect their interests. We understand that there were reversions in both Schedule 1 and in Ross MacDonald.

This proposed amendment would provide an additional level of protection to ensure that vulnerable persons are able to access a settlement fund before any funds are returned to the party against whom the class action was brought. It would also signal a legislative intention that particular attention shall be paid to protecting those who are incapable of identifying and advancing their own interests.

Furthermore, provision can be made allowing a Court to seek the opinion of the OPGT on whether all reasonable efforts have been made to protect the vulnerable. A similar power is found in R. 7.08(5), of the *Rules of Civil Procedure*, by which a Court can require an opinion on a proposed settlement for an incapable party.

