CITATION: Sondhi v. Deloitte Management Services LP, 2018 ONSC 271
COURT FILE NO.: CV-15-523524CP
DATE: 20180116

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
SHIREEN SONDHI	)	*Andrew H. Monkhouse* and *Samuel S. Marr*, for the Plaintiff
Plaintiff	)	
– and –	)	
	)	
DELOITTE MANAGEMENT SERVICES LP, DELOITTE & TOUCHE LLP, PROCOM CONSULTANTS GROUP LIMITED	)	*Patricia D.S. Jackson*, *Rebecca Wise*, and *Davida Shiff*, for the Defendants Deloitte Management Services LP and Deloitte & Touche LLP
Defendants	)	
	)	
	)	
	)	
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: January 5, 2018

PERELL, J.

REASONS FOR DECISION

'The time has come,' the Walrus said,
'To talk of many things:
Of shoes -- and ships -- and sealing wax --
Of cabbages -- and kings --
And why the sea is boiling hot --
And whether pigs have wings.'

[Louis Carroll, *The Walrus and the Carpenter in Through the Looking Glass,* 1872]

A. Introduction

[1] The time has come to talk about putative class members that want nothing to do with a proposed class action under the *Class Proceedings Act, 1992*[1] and are likely to opt out.

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[1] S.O. 1992, c. 6.

[2] The motion now before the court is a continuation of a certification motion in a proposed class proceeding. By decision released on April 13, 2017,[2] Justice Belobaba ruled that Ms. Sondhi was not suitable to be the representative plaintiff, and Class Counsel now seeks to have Tarrie Phillip substituted. However, the Defendants, Deloitte Management Services LP and Deloitte & Touche LLP (collectively "Deloitte"), submit that Mr. Phillip is also unsuitable, because he allegedly does not care that the putative Class Members want nothing to do with a class action that they believe will actually cause them financial harm. Deloitte asks that the certification motion be dismissed without waiting to see if any of the 418 putative Class Members will opt out.

[3] However, for the reasons that follow, I find that all the certification criteria have been satisfied and accordingly, I substitute Mr. Phillip as the representative plaintiff and certify the action as a class proceeding.

B. Factual and Procedural Background

[4] Deloitte and ATD Legal Services, whose assets Deloitte acquired in January 2014, provided document review services undertaken by lawyers. Deloitte retained Procom Consultants Group Limited to provide payroll services for Deloitte.

[5] Ms. Sondhi was one of the document reviewers. She worked less than 70 hours over a two-month period. She never worked more than 44 hours per week, and she never worked on a statutory holiday.

[6] On March 9, 2015, Ms. Sondhi commenced a proposed class action.[3]

[7] Landy Marr Kats LLP and Monkhouse Law are the proposed Class Counsel.

[8] In her Statement of Claim, Ms. Sondhi seeks, among other things, a declaration that the individuals who provided document review services to Deloitte and ATD Legal Services; *i.e.*, the putative Class Members, were employees of Deloitte and or Procom Consultants. Ms. Sondhi alleges that the putative Class Members were entitled to the benefits provided under the *Employment Standards Act, 2000*[4] such as overtime, vacation pay, and holiday pay.

[9] Justice Belobaba heard her certification motion. On the certification motion, but for Ms. Sondhi's singular evidence, the evidence was that the putative Class Members deliberately and calculatedly contracted with Deloitte to be independent contractors because of the perceived advantages to them personally of being an independent contractor and the perceived disadvantages of being an employee.

[10] The certification motion was heard on March 28, and 29, 2017. Justice Belobaba refused to certify the class action as against Procom Consultants, finding that there was no basis in fact for the allegation that the document reviewers were employees of Procom. He refused to certify the proposed common issue that sought to make Deloitte liable for document reviewers who had provided services to ATD, finding that there was no basis in fact for the allegation that Deloitte

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[2] *Sondhi v. Deloitte*, 2017 ONSC 2122.
[3] Her Statement of Claim was amended on on April 13, 2016.
[4] S.O. 2000, c. 41.

was a common employer with ATD.

[11] As against Deloitte, Justice Belobaba held that three of the five certification criteria (cause of action, common issues, and preferable procedure) had been satisfied. In his decision, Justice Belobaba certified the following common issues as against Deloitte:

> 1. Did the actual circumstances of the relationship between Deloitte and the class members constitute an employer/employee relationship such that class members were in fact employees of Deloitte and not "independent contractors"?
>
> 2. If the answer to 1) is "yes", is Deloitte liable to the class for employee benefits pursuant to the *Employment Standards Act* (including unpaid vacation pay and public holiday pay and overtime) and for compensation for improper remittances?
>
> 3. If liability is established, are aggregate damages available?

[12] Justice Belobaba, however, decided that two criteria (prerequisites for certification), the class definition and the representative plaintiff criterion, had not been satisfied. Justice Belobaba adjourned the motion to allow Class Counsel to amend the class definition and to find a replacement representative plaintiff within 60 days.

[13] Justice Belobaba rejected Ms. Sondhi's proposed class definition, which included document reviewers who had worked only at ATD, and ordered that the class definition be narrowed to include only document reviewers who provided their services to Deloitte.[5]

[14] Class Counsel and Ms. Sondhi now propose the following revised proposed class definition, which they submit responds to Justice Belobaba's suggestions:

> All persons having performed or currently performing document review or e-discovery services at Deloitte pursuant to an independent contractor agreement since January 16, 2014 to the date of certification, exclusive of any person who has only ever performed the duties of a Project Manager.

[15] Deloitte does not dispute that this definition would satisfy the class definition criterion for certification. Deloitte estimates that the putative class comprises 418 individuals.

[16] As already noted, Justice Belobaba was not satisfied that Ms. Sondhi was qualified to be the representative plaintiff; he stated:

> 37. The final requirement set out in s. 5(1)(e) of the CPA, a representative plaintiff who can "fairly and adequately represent the interests of the class" may be more difficult to satisfy.
>
> 38. My concern here is not that Ms. Sondhi never worked more than 44 hours per week and is not entitled to overtime. Other class members can make this claim. And all class members can claim for statutory and vacation pay as already noted. The fact that different remedies are sought for different class members is not a bar to certification. And there is no conflict of interest under s. 5(1)(e)(ii) just because some class members may not agree with the action or otherwise may decide to opt out.
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> 39. I am also not overly concerned that Ms. Sondhi has moved to an island in British Columbia

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[5] Justice Belobaba suggested that: (a) the start date for the class definition should be the precise date in January 2014 when ATD was acquired by Deloitte; (b) the end date should be the certification date so that class members can exercise their statutory right to opt out; (c) the sub-classes proposed ought to be abandoned and that a general class definition would be suitable. In his decision, Justice Belobaba stated that if the suggestions were adopted then the class definition criterion would be satisfied.

> and no longer practices law. She is still entitled to pursue this action as the representative plaintiff if she can "fairly and adequately represent the interests of the class." The Supreme Court has described the qualities required of a representative plaintiff as follows:
>
> > The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied however, that the proposed representative will vigorously and capably prosecute the interests of the class.
>
> 40. The problem for me is this. I am not satisfied on the record before me that Ms. Sondhi will vigorously and capably prosecute the interests of the class. Or that she will do so in a diligent and responsible fashion.
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> 41. Ms. Sondhi's evidence on this motion was at best unreliable and at worst untruthful. The affidavit provided by Ms. Sondhi in support of this motion, and sworn to be true, contains a number of significant misstatements that were recanted on cross-examination. For example, that every document reviewer worked the same number of hours and that Ms. Sondhi's work hours were pre-determined (she admitted on cross-examination that neither of these points was true); or that she was subject to quotas of documents to review (she admitted on cross-examination that this was not true.) Having recanted this incorrect evidence on cross, Ms. Sondhi nonetheless proceeded to repeat the same misstatements in her factum on this motion.
>
> 42. Even if her affidavit and factum were drafted by class counsel, as is often the case, it is obvious that neither document was reviewed by the plaintiff before it was sworn or filed with the court. Ms. Sondhi also chose not to review the defendants' responding motion records or the timetable for the certification motion. I find in all of this a disturbing level of unreliability, disinterest and even indifference on the part of the proposed representative plaintiff. The proposed class members are entitled at the very least to a representative plaintiff who can be counted on to take her job seriously, review key documents and demonstrate an appropriate level of interest in a class action that is being brought in her name and that is claiming hundreds of millions of dollars in damages.
>
> 43. In sum, I am not persuaded that Ms. Sondhi will "fairly and adequately represent the interests of the class." I direct that the proposed representative plaintiff must be replaced with another within 60 days.

[17] Significant to the discussion below, it should be noted that Justice Belobaba would not have disqualified Ms. Sondhi for the reason that she did not inquire, canvass, or poll the putative Class Members to determine whether they supported the proposed class action. Justice Belobaba stated:

> 31. The fact that several document reviewers filed affidavits saying that they are not employees and prefer to work as independent contractors is not determinative of anything. As the Court of Appeal noted in [*Keatley Surveying Ltd. v. Teranet Inc.*, 2015 ONCA 248] "the representative plaintiff does not have to conduct a referendum to determine how many class members want to sue." If document reviewers wish to disassociate themselves from Ms. Sondhi's allegations and opt out of the class action, they will have every right to do so. In any event, the views or intentions of any given worker, or even a majority of workers, however credible or heart-felt, do not decide the applicability of the ESA.

[18] After the release of Justice Belobaba's decision, Class Counsel recruited Mr. Phillip to replace Ms. Sondhi.

[19] Mr. Phillip is a lawyer. Between June 2015 and September 2016, Mr. Phillip worked as a document reviewer for Deloitte. During this time, he also provided document review services to another document review provider.

[20] Before agreeing to be a representative plaintiff, Mr. Phillip read Justice Belobaba's decision and some material about the responsibilities of a representative plaintiff. He

subsequently, before being cross-examined, read the pleadings and the material filed for the certification motion.

[21] On cross-examination, Mr. Phillip revealed that he has not communicated with any putative Class Member. He made no attempt to communicate despite his understanding that there are numerous document reviewers who provided evidence on the certification motion that they do not want to be declared to be employees. Mr. Phillip stated that he had not considered making inquiries into how the relief sought in the claim would impact him or the putative Class Members. His view was that the proposed class action was in the best interests of the class. He formed this view based on his own assessment of the merits of the claim being advanced.

[22] During his cross-examination, Mr. Phillip testified:

> Q. 147. In your own words, sir, what are you seeking to accomplish in the action?
>
> A. So I think I briefly kind of glossed over this earlier when you asked a previous question. I do think it's important for, especially for young lawyers coming out, to know exactly where they stand, and I don't think that there's enough clarity around the issue. So, I really want this to be set out in such a manner that we can figure out exactly where we stand, like, if we're employed or what the case is, where does the law stand on that. So...
>
> Q. 148. And do you have a position with respect to whether or not the lawyers and document reviewers for Deloitte are employees or independent contractors?
>
> A. Yes, I have a position and that's part of the motivation for me coming forward. I do think that the nature it's very similar to, like, what I do now, for instance, like, you know, the flexibility you have, but where I am now, I am an employee, right? So, I can understand that, you know, at that time I was an employee, but throughout the whole process of just coming out of law school and you're desperate, you need a job, you just kind of go with what they tell you. But, you know, looking at the circumstances, I do think at the time I was an employee with Deloitte. So that's where I stand on that.
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> Q. 149. And at the time that you were providing services to Deloitte, did you think you were an independent contractor or an employee?
>
> A. I wasn't thinking about that, to be honest. I was just trying to get a job to be employed to take care of my, you know, my wife and, you know, for us to take care of each other, that kind of thing.
>
> Q. 150. And what order do you hope the Court will make in this action?
>
> A. I hope the Court would make a favourable order for our side and certify this and, you know, I hope it can go forward and...
>
> Q. 151. And at trial what order do you hope the Court would make?
>
> A. Again, a favourable order for the plaintiff. I don't know specifically, like, what phraseology I want the Court to make but, you know, something favourable for the plaintiffs that, you know, they -- the classes, you're considered an employee based on the nature of the work and the nature of the conditions around the employment with Deloitte.
>
> Q. 152. And why do you think that would be -- that order would be in the best interests of the class that you represent or that you seek to represent?
>
> A. Because I think it's right. That's why.
>
> Q. 153. Can you elaborate on that?
>
> A. It might sound a bit abstract or like -- I think it is the right thing. I think if you're -- for example, if you have to work, right, and you have to be -- you can only work between certain hours, for example, I think that's one of the things that I see as leaning towards you being, you know, an employee. Even though you have flexibility to take, like, lunches and things like that, I can do that right now with my employment. I'm not there now, like, but I'm a salaried employee. So, looking

at those things, it makes me feel like, yeah, maybe Deloitte was trying to, you know, take advantage of some young lawyers just coming out, like, so -- and that is why.

Q. 154. And you think on balance, that it would be in the class members' interest to be retroactively treated as employees rather than as independent contractors?

A. So based on what I said in the previous answer, I think that the right decision would be for them to be labelled as employees, you know, and, yeah, and I think that kind of answers this as well. It would be the right decision, I think.

....

Q. 156. Why are you willing to take on the role of representative plaintiff?

A. I don't want an important decision like this to just fall by the wayside.

Q. 157. Is your understanding that if you weren't putting yourself forward, that there would be no one else who would be prepared to do that?

A. I don't know how many -- I don't know that, the details of that, like, how many people are willing to come forward or whatever the case may be, but I think there would be other people because I know when I was at Deloitte, for instance, a few of my coworkers, they would say, you know, they think it's a good case. They see -- like, people that would be sitting next to me, and so I think there would be other people coming forward for a case like this.

....

Q. 165. You agree that if you are appointed as representative plaintiff, you would be required to fairly and adequately represent the interest of the class?

A. Yes.

Q. 166. And what do you perceive to be the interests of the class?

A. So just to kind of touch on something that I said before, I think the interests of the class is to have this solved so they can understand where they stand as employees and also, to have a favourable sediment in the sense of determining that at that time they were employees based on the nature of the circumstances around the work.

Q. 167. How do you know that is the interest of the class?

A. I don't know, because that's my perception. You asked what I perceived, right? So...

Q. 168. You are aware that a number of current or former document reviewers swore affidavits in the proceeding stating that they did not want to be held to be employees?

A. I read some of the affidavits, yeah.

Q. 169. And how do you reconcile those class members' affidavits with the claims being advanced by your counsel?

A. I reconcile it with it's just a fact of life. You never get any situation where a hundred percent of people agree, and the most popular person is never – so that's how I see it. Like, you'll always – they'll always get someone to say that can say otherwise and we can get people that, you know, believe otherwise, but it is my view and I think the view of a lot of the class that, you know, we were employees.

....

Q. 172. You had indicated that you believe that it is the view of a lot of the class that they are employees or were employees and I had asked you what was the basis of your view.

A. Yeah.

Q. 173. Have you given me the full extent of your answer?

A. I mean, there's a lot around that, but I think that is my answer. Like, that's why I think. If you

> look at the full circumstances of, like, how we are employed as in addition to things like on weekends, for instance, if it's a very busy project, you would be encouraged to, you know, come in on the weekends and things like that. The fact that, you know, the office was open, like, from eight till, like, six and you can only, like, work in that time period, things like that, in addition to what I said before, I think that lends to my view on the matter.
>
> Q. 174. So your view is that this action is in the best interests of the class is based on your assessment of relative merits of the claim being advanced by counsel?
>
> A. Yes, I think that's a fair summary.

[23] There is no third-party funding or funding from the Ontario Law Foundation's Class Proceedings Fund, and Mr. Phillip refused to disclose whether he has an indemnity agreement from Class Counsel. He deposed that he has the financial means to be responsible for an adverse costs award but refused to answer any questions about his financial assets or resources.

C. Positions of the Parties

1. Deloitte's Argument

[24] Deloitte argues that Mr. Phillip has failed to conduct reasonable due diligence, agreed to being recruited with little understanding of the litigation and his responsibilities, does not appear to take the job of representative plaintiff seriously, has not properly instructed Class Counsel who have been dilatory in posting or disseminating information about the proposed class action, and has not demonstrated an appropriate level of interest in the action. Further, Deloitte submits that Mr. Phillip has not demonstrated that he has the financial resources to pay costs and prosecute the class action in the best interests of the putative Class Members.

[25] Deloitte submits that Mr. Phillip has failed to ascertain the interests of the putative Class Members and made no inquiries in this regard. Deloitte submits that Mr. Phillip has a conflict with most if not all of the putative Class Members (with the exception of the disqualified Ms. Sondhi) and that Mr. Phillip is indifferent to the facts that: the overwhelming evidence from the putative Class Members is that the class action was not in their best interests; and that the putative Class Members cannot escape being impacted by the proposed class action, because, even if they opt out, they will be bound by the result, since the *Employment Standards Act, 2000* prohibits contracting out.

[26] Deloitte submits that although a proposed representative need not conduct a referendum to determine how many Class Members want to sue, in the face of the evidence adduced on this certification motion, Mr. Phillip ought to have made some inquiry to satisfy himself that there are some proposed Class Members who are in favour of the relief sought.

[27] Deloitte's attack against Mr. Phillip can be categorized under four headings: (1) inadequate attention to responsibilities; (2) inadequate litigation plan; (3) want of financial resources; and (4) conflict of interest, including a conflict of interest between the Class Members and the Class Members that opt out. Deloitte submits that Mr. Phillip is not qualified to be representative plaintiff and, therefore, the certification motion should immediately be dismissed.

2. Mr. Phillip's Argument

[28] Mr. Phillip argues that as a factual matter Deloitte's submissions are false. He submits

that he is eminently qualified to be a representative plaintiff being knowledgeable, motivated, committed, and keenly interested in pursuing the action with or without Ms. Sondhi. He submits that he has the necessary financial resources to prosecute the action, and, in any event, the financial wherewithal of the representative plaintiff is just a factor among other factors to be weighed.

[29] As a legal matter, Mr. Phillip denies that he has any conflict with Class Members and he submits that putative Class Members do not decide the applicability of the *Employment Standards Act, 2000,* and, thus, any argument that Mr. Phillip has a conflict of interest is, as a legal matter, wrong.

[30] Mr. Phillip argues that if some putative Class Members have expressed a desire not to be classified as employees, they can opt out.

[31] Mr. Phillip submits that all of the certification criteria have been satisfied and therefore the court must certify the action as a class proceeding.

D. Discussion and Analysis

1. Introduction

[32] Deloitte takes no objection to the competence of the Class Counsel that recruited Mr. Phillip. Landy Marr Kats LLP has more than adequate class action expertise and Monkhouse Law has expertise in employment law matters. Deloitte does object to Mr. Phillip as a suitable representative plaintiff.

[33] As noted above, Deloitte's attack against Mr. Phillip as a representative plaintiff can be categorized under four headings. In this section of my Reasons for Decision, I shall address Deloitte's attacks on Mr. Phillip's qualifications one by one. However, before doing so, I shall first describe the general law about the representative plaintiff criterion and also the general law about the decertification of a class action.

[34] As will appear from the discussion below, the matter of decertification is a matter related to Deloitte's arguments about the representative plaintiff criterion and to the circumstance that putative Class Members predominately may opt out of the action if it were certified.

[35] After the discussion of the background law and the four grounds of attack, I will conclude the discussion with an analysis of the significance, if any, should it happen that a preponderance of Class Members opt out of the class action.

2. The Representative Plaintiff Criterion

[36] The sole remaining issue on this certification motion is whether Mr. Phillip satisfies the representative plaintiff criterion, which is set out in s. 5(1)(e) of the *Class Proceedings Act, 1992,* which states:

> 5 (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if, ...
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> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of

> advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[37] The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant.[6] Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact.[7]

[38] Section 5(1)(e) of the Ontario *Class Proceedings Act, 1992*, the representative plaintiff criterion, is derived from Rule 23(a)(4) of the *United States Federal Rules of Civil Procedure*. In the United States, section 1 of the 14th Amendment to the *U.S. Constitution* provides, among other things, that no state shall deprive any person of life, liberty, or property, without due process of law. Since class actions involve so called "absent plaintiffs"; *i.e.,* the class members who are represented by the representative plaintiff, United States legislators were concerned that to be constitutionally *infra vires*, class action legislation must ensure that class members received due process; *i.e.,* that they were adequately represented.[8] Thus, Rule 23(a)(4) provides as one of the criterion for certification that "the representative parties will fairly and adequately protect the interests of the class."

[39] This idea from the United States about the adequacy of representation in class proceedings was adopted by the Ontario legislators. The Ontario Law Reform Commission, in its *Report on Class Actions* describes the operation of Rule 23(a)(4) as follows:[9]

> Although the case law in respect of Rule 23(a)(4) is abundant, the principles to be applied thereunder are relatively straightforward. For example, it is generally agreed that, before a court can conclude that the named plaintiff will fairly and adequately represent the class, it must be satisfied that his interests are not antagonistic to those of the class that he seeks to represent. In addition, because of the binding effect of a class action judgment, a court must be convinced that the suit is not the result of collusion between the plaintiff and the defendant. A third ingredient of the adequacy of representation requirement of Rule 23 upon which the courts would seem to be in agreement is a showing that counsel for the class is competent to conduct the litigation on behalf of the class. It even has been suggested by some that the adequacy of the representative plaintiff's counsel is of greater import than the adequacy of the representative plaintiff, since "in fact it is class counsel who protects the interests of the class". On the other hand, there are many cases in

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[6] *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 (S.C.J.) at paras. 36-45; *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (S.C.J.) at para. 40, aff'd [2003] O.J. No. 4708 (C.A.).

[7] *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (S.C.J.) at para. 22, leave to appeal granted, [2002] O.J. No. 2135 (S.C.J.), varied (2003), 64 O.R. (3d) 208 (Div. Ct.) at paras. 41, 48, varied [2003] O.J. No. 2218 (C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (S.C.J.) at paras. 71-77; *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (S.C.J.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (S.C.J.) at para. 44.

[8] Ontario Law Reform Commission, *Report on Class Actions Vol. 2,* Toronto, Ministry of the Attorney General, 1982, p. 352.

[9] Ontario Law Reform Commission, *Report on Class Actions Vol. 2,* Toronto, Ministry of the Attorney General, 1982, p. 353.

> which the presence of competent counsel has not been sufficient to satisfy the requirements of Rule 23(a)(4); in these cases, the courts have emphasized the importance of a representative plaintiff capable of playing an active role in the litigation, although the level of understanding required of the representative plaintiff may vary from case to case.

[40] The jurisprudence in Ontario and across Canada is similar to the American case law. The Canadian case law establishes that whether the representative plaintiff can provide adequate representation depends on such factors as: (a) his or her motivation to prosecute the claim; *i.e.,* the court must be satisfied that the proposed representative will vigorously and capably prosecute the interests of the class; (b) the competence of his or her counsel to prosecute the claim; and (c) his or her ability to bear the costs of the litigation.[10]

[41] Adequate representation is based on the notion that the representative plaintiff has a sufficient common interest with the class members and also the motivation and ability to pursue the action for their mutual benefit; however, a representative plaintiff need not share every characteristic of every member of the putative class or be typical of the class.[11]

[42] However, because the plaintiff will have the advice of competent counsel, one should not expect too much or be too demanding in evaluating whether a person can properly serve as a representative plaintiff.[12] If the access to justice concerns of the *Class Proceedings Act, 1992* are to be accomplished, the court should not subject the proposed representative plaintiff to some sort of Class Action Aptitude Test and should be skeptical of the defendant's arguments based on the personality of the candidate.[13]

[43] The court should be skeptical because the defendant's crocodile tears' argument about the adequacy of the representative plaintiff is made out of a desire to devour the class action and have the certification motion dismissed. As I noted in *Berg v. Canadian Hockey League*, defendants are not genuinely interested in ensuring that class members are adequately represented; rather, defendants are genuinely interested in ensuring that there is no class action.[14]

[44] While the court should be skeptical of the defendant's attacks against the qualifications of the representative plaintiff, the court must nevertheless ensure that the proposed representative plaintiff is not a string-puppet of an entrepreneurial champertous class counsel. The proposed representative plaintiff must be a genuine plaintiff with a real role to play and not a placeholder plaintiff recruited to cater to the entrepreneurial interests of class counsel.[15] A proposed representative plaintiff must demonstrate autonomy and a minimum level of general knowledge about the nature of class proceedings and his or her responsibilities to give instructions on behalf

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[10] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 41; *Axiom Plastics Inc. v. E.I. DuPont Canada Co.* (2007), 87 O.R. (3d) 352 (S.C.J.) at para. 174, leave to appeal ref'd [2008] O.J. No. 1973 (S.C.J.); *Defazio v. Ontario (Ministry of Labour)*, [2007] O.J. No. 902 (S.C.J.).

[11] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46; *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.) at para. 44, leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).

[12] *Frey v. BCE Inc.*, [2007] S.J. No. 476 (Q.B.) at para. 7.

[13] *Coulson v. Citigroup Global Markets Canada Inc.*, [2010] O.J. No. 1109 (S.C.J.) at para. 158, aff'd 2012 ONCA 108.

[14] 2017 ONSC 2608 at para. 229.

[15] *Chartrand v. General Motors Corp.*, [2008] B.C.J. No. 2520 at paras. 99-112 (S.C.); *Singer v. Schering-Plough Canada Inc.*, [2010] O.J. No. 113 at paras. 208-29 (S.C.J.).

of the class.[16] Thus, while not necessarily a disqualifying factor, the recruitment of the plaintiff is a relevant factor to be considered in determining whether the proposed representative plaintiff has the necessary interest, independence, and incentive to fulfill his or her duties to the class members.[17]

[45] The proposed representative plaintiff must present a workable litigation plan. The quality of the litigation plan reveals something about the competence of class counsel, although over the years, the profession has developed more or less boilerplate litigation plans. The production of a workable litigation plan assists the court in determining whether the class proceeding is the preferable procedure, and it allows the court to determine whether the litigation itself is manageable in its constituted form.[18] Litigation plans are a work in progress; they are meant to be malleable and subject to revision and adjustment as the litigation progresses.[19]

[46] The financial ability of the representative plaintiff to bear the expense that is necessarily involved for the proper prosecution of a class action is a relevant factor in determining whether he or she is qualified to be a representative plaintiff.[20]

[47] A plaintiff with an interest in conflict with the interests of other class members does not qualify as a representative plaintiff.[21] However, a conflict in interest is not the same thing as there being differences in the circumstances of the representative plaintiff and the class members. To be a disqualifying conflict, the differences between the situation of the representative plaintiff and the class members must impact on the outcome of common issues and the differences must

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[16] *Frey v. BCE Inc.*, 2006 SKQB 328 at para. 86; *Singer v. Schering-Plough Canada Inc.*, [2010] O.J. No. 113 at paras. 208-29 (S.C.J.); *Sullivan v. Golden Intercapital (GIC) Investments Corp.*, 2014 ABQB 212 at paras. 42-62; *Wilkinson v. Coca-Cola Ltd.*, 2014 QCCS 2631; *Horse Lake First Nation v. R.*, 2015 FC 1149 at paras. 83-90.

[17] *Singer v. Schering-Plough Canada Inc.*, [2010] O.J. No. 113 at para. 221. (S.C.J)

[18] *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (S.C.J.) at p. 203, aff'd (1999), 46 O.R. (3d) 315 (Div. Ct.), varied on other grounds (2000), 51 O.R. (3d) 236 (C.A.), application for leave to appeal to the S.C.C. ref'd October 18, 2001; *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (S.C.J.) at paras. 76- 78; *Bellaire v. Independent Order of Foresters*, [2004] O.J. No. 2242 (S.C.J.); *Poulin v. Ford Motor Co. of Canada*, [2006] O.J. No. 4625 (S.C.J.) at para. 100, aff'd [2008] O.J. No. 4153 (Div. Ct.).

[19] *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 95, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (Div. Ct.) at para. 15; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J) at para. 28; *Howard v. Eli Lilly & Co.*, [2007] O.J. No. 404 (S.C.J.); *French v. Investia Financial Services Inc.*, 2012 ONSC 1150 at para. 96; *Ivany v. Financiere Telco Inc.*, 2013 ONSC 6347 at para. 104, leave to appeal ref'd 2013 ONSC 6969 (Div. Ct.).

[20] *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.) at paras. 95-96, rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (S.C.J.); *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110 (S.C.J.) at para. 35, aff'd [2003] O.J. No. 3918 (Div. Ct.); *Mortson v. Ontario Municipal Employees Retirement Board*, [2004] O.J. No. 4338 (S.C.J.) at paras. 91-94; *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (S.C.J.) at paras. 46-47; *MacKinnon v. Ontario Municipal Employees Retirement Board*, [2006] O.J. No. 1892 (S.C.J.); *Allen v. Aspen Group Resources Corp.*, [2009] O.J. No. 5213 (S.C.J.) at paras. 155-158.

[21] *MacDougall v. Ontario Northland Transportation Commission*, [2006] O.J. No. 5164 (S.C.J.), aff'd [2007] O.J. No. 573 (Div. Ct.), motion for leave to appeal ref'd, (C.A.), July 31, 2007; leave to appeal to S.C.C. ref'd [2007] S.C.C.A. No. 491; *Paron v. Alberta (Environmental Protection)*, [2006] A.J. No. 573 (Q.B.); *T.L. v. Alberta (Director of Child Welfare)*, [2008] A.J. No. 157 (Q.B.), aff'd [2009] A.J. No. 512 (C.A.); *6323588 Canada Ltd. v. 709528 Ontario Ltd. (c.o.b. Panzerotto Pizza and Wing Machine)*, 2012 ONSC 2985.

affect the representative plaintiff's ability to adequately and fairly represent the class.[22]

[48] It may be possible to address the possibility of a conflict developing between a representative plaintiff and the members of a class by creating a subclass or it may be necessary to decertify the proceeding if the conflict cannot be resolved.[23]

3. Decertification

[49] The *Class Proceedings Act, 1992* provides for decertification where it appears that the conditions for certification are not satisfied. Section 10 of the *Act* provides:

> *Where it appears conditions for certification not satisfied*
>
> 10. (1) On the motion of a party or class member, where it appears to the court that the conditions mentioned in subsections 5 (1) and (2) are not satisfied with respect to a class proceeding, the court may amend the certification order, may decertify the proceeding or may make any other order it considers appropriate.
>
> *Proceeding may continue in altered form*
>
> (2) Where the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties.
>
> ....

[50] Where the conditions for certification no longer exist because of changed circumstances a party may apply to have the action decertified or to have the certification order amended.[24] The same criteria relate to certification and decertification, and the question is whether the conditions for certification have been satisfied or not.[25]

[51] If further evidence demonstrates that the litigation would be unmanageable, or that issues previously held to have commonality cannot in fact be decided on a class-wide basis; the statutory objectives of the *Class Proceedings Act, 1992* – access to justice, judicial economy and behavioural modification – would not be advanced by allowing the action to continue under the *CPA* in such cases, and the action may be decertified.[26] In *Pearson v. Inco Ltd.*,[27] Justice Cullity stated:

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[22] *Hoy v. Medtronic*, [2001] B.C.J. No. 1968 (S.C.), aff'd [2003] B.C.J. No. 1251 (C.A.); *Endean v. Canadian Red Cross Society*, [1997] B.C.J. No. 1209 (S.C.), rev'd in part (1998), 157 D.L.R. (4th) 465 (C.A.), leave to appeal granted but appeal abandoned, [1998] S.C.C.A. No. 260; *T.L. v. Alberta (Director of Child Welfare)*, [2008] A.J. No. 157 (Q.B.), aff'd [2009] A.J. No. 512 (C.A.); *Reid v. Ford Motor Co.*, [2003] B.C.J. No. 2489 (S.C.).

[23] *1176560 Ontario Ltd. v. Great Atlantic and Pacific Co. of Canada* (2004), 70 O.R. (3d) 182 (Div. Ct.), aff'g (2002), 62 O.R. (3d) 535 (S.C.J.), leave to appeal granted, (2003), 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.); *Peppiatt v. Royal Bank of Canada* (1996), 27 O.R. (3d) 462 (Gen. Div.); *Dhillon v. Hamilton (City)*, [2006] O.J. No. 2664 (S.C.J.).

[24] *LeFrancois v. Guidant Corp.*, [2009] O.J. No. 2481 (S.C.J.); *Silver v. IMAX Corp.*, 2013 ONSC 1667.

[25] *Peppiatt v. Royal Bank of Canada* (1996), 27 O.R. (3d) 462 (Gen. Div.); *Lacroix v. Canada Mortgage and Housing Corp.*, [2001] O.J. No. 6251 (S.C.J.), aff'd [2004] O.J. No. 4348 (Div. Ct.), leave to appeal ref'd [2005] O.J. No. 484 (C.A.), leave to appeal to S.C.C. ref'd [2005] S.C.C.A. No. 164.

[26] *Pearson v. Inco Ltd.*, [2009] O.J. No. 780 (S.C.J.); *LeFrancois v. Guidant Corp.*, [2009] O.J. No. 2481 (S.C.J.), leave to appeal ref'd [2009] O.J. No. 4129 (Div. Ct.); Ontario Law Reform Commission, *Report on Class Actions Vol. 2*, Toronto, Ministry of the Attorney General, 1982, p. 434.

[27] [2009] O.J. No. 780 (S.C.J.) at para. 26.

> .... [Section 10] recognizes that the case-managed procedure under the CPA is necessarily somewhat fluid and that certification motions are decided at an early stage of the proceeding and before discoveries. In consequence, certification orders are not intended to be cast in stone and, whether or not they have been entered, they can be, in effect, revoked, or amended from time to time. It is not in the public interest - or in that of the litigants or the class - that a case should be permitted to proceed to trial if further evidence demonstrates that the litigation would be unmanageable, or that issues previously held to have commonality cannot in fact be decided on a class-wide basis. The statutory objectives of the CPA - access to justice, judicial economy and behavioural modification - would not be advanced by allowing the action to continue under the CPA in such cases.

[52] Except perhaps in an extreme case, the size of the class does not undermine the evidence satisfying the certification criteria and the class proceeding will continue regardless of the diminished size of the class.[28]

4. Inadequate Attention to Responsibilities

[53] I now turn to Deloitte's arguments that Mr. Phillip is not qualified to be representative plaintiff beginning with the argument that he has shown inadequate attention to his responsibilities as a representative plaintiff.

[54] With respect to Ms. Sondhi, the case at bar is one of the rare examples, where a defendant is able to show that the proposed representative plaintiff's promise to do right by the class is a hollow promise and that the proposed representative plaintiff is no genuine representative of the class or is incapable of adequately representing the class. *Sullivan v. Golden Intercapital (GIC) Investments Corp.*,[29] *Frey v. BCE Inc.*[30] *Wilkinson v. Coca-Cola Ltd.*,[31] and *Horse Lake First Nation v. R.*,[32] are other examples of an essentially clueless representative plaintiff candidate not qualifying to be a representative for the class.

[55] Justice Belobaba disqualified Ms. Sondhi, but he gave Class Counsel the opportunity to recruit an adequate representative plaintiff. The issue then is whether Mr. Phillip is to suffer the same fate as Ms. Sondhi because, among other things, he has allegedly demonstrated a disinterest and a lack of due diligence for the class he is to represent.

[56] The representative plaintiff does play a very important role in class actions, but, truth be told, the faraway greater responsibility to fairly and adequately represent the interests of the class by vigorously and capably prosecuting the action falls on class counsel. In some cases, truth be told, a representative plaintiff is a fungible, because there will be many potential candidates to be a plaintiff seeking compensation for a mass wrongdoing. Sometimes a proposed class action is the pure invention of class counsel and sometimes the proposed class action is class counsel's opportunistic response to a disaster, a product recall, a corrective disclosure, or a regulator's discovery of a conspiracy. While there is an air of ambulance chasing, there is also an air of class

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[28] *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2013 ONCA 279; *1176560 Ontario Limited v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.) at para. 44, leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).
[29] 2014 ABQB 212.
[30] 2006 SKQB 328.
[31] 2014 QCCS 2631.
[32] 2015 FC 1149.

counsel being the champion for access to justice for the many victims of a mass wrongdoing, and thus in the case at bar neither proposed Class Counsel nor Mr. Phillip need be embarrassed by the circumstance that a representative plaintiff has been recruited.

[57] At the beginning of a class action, there is little for the representative plaintiff to do but give the instruction to prosecute the action invented or opportunistically discovered by class counsel for the benefit of the victims of a mass wrongdoing. In the case at bar, Mr. Phillip was recruited, but he cannot be faulted for any want of due diligence or disinterest at the outset of this proposed class action.

[58] And, if further truth be told, for the certification hearing, in order to satisfy the representative plaintiff criterion, class counsel prepares a standard form template affidavit attaching a standard form litigation plan where the plaintiff deposes to his or her virtues as a representative plaintiff and the virtues of his or her champion, class counsel. Truth be told, the affidavit is a kind of a standard form promise or ritual more than a proof of anything. In the case at bar, Mr. Phillip has made the ritualistic promises and the truth of those promises will be in the doing not the telling at the time of the certification motion.

[59] And if the truth be told, the major qualities of the representative plaintiff are independence and loyalty to the class and the major responsibility of the representative plaintiff is to ensure that class counsel does not improvidently settle the action sacrificing access to justice and behaviour modification to the entrepreneurial motivations that encouraged class counsel in the first place to take on the enormous risks attendant on class action litigation. At this juncture, there is no reason to doubt that Mr. Phillip will be loyal to the putative Class Members that do not opt out of the action.

[60] Given these truths, it is understandable that it is rare that a plaintiff will be disqualified from being a representative plaintiff for alleged inadequate attention to his or her responsibilities. Turning again to the case at bar, in my opinion, Deloitte has not succeeded in showing that Mr. Phillip cannot or will not fulfill his responsibilities as a representative plaintiff.

[61] Mr. Phillip is not a placeholder plaintiff. He has a genuine claim that he wishes to pursue. He worked for Deloitte for approximately 16 months and has a personal interest in succeeding with his declaratory and monetary claims. He believes in the merits of his claims, and given his legal background, he has more than a layman-plaintiff's knowledge of the nature of the employment law claims that underlie the common issues of the proposed class action.

[62] It is crocodile tears to denigrate him for not studying up before agreeing to be Ms. Sondhi's replacement. Clients are not expected to study their own cases; that's what lawyers are supposed to do. Clients just need to believe that they may be entitled to legal redress for having suffered some harm.

[63] If one takes a step back and compares class actions to regular litigation, it is an oddity or aberration of the test for certification, which is not designed to be a merits test, that a defendant gets to test the sincerity of a plaintiff in his or her belief that they have a meritorious claim. In any event, in my opinion, Deloitte has not proven that Mr. Phillip has not nor that he will not keep his promise to adequately carry out his responsibilities as a representative plaintiff.

5. Inadequate Litigation Plan

[64] There is no merit to Deloitte's argument about the litigation plan, which argument largely

focuses on the delay it took Class Counsel to update the class about the status of the certification motion and Mr. Phillip's failure to supervise the implementation of the plan.

[65] In my opinion, any questions about the adequacy of the litigation plan that could be raised by Deloitte were spent once Justice Belobaba determined that the cause of action, common issues, and preferable procedure criteria were satisfied and the class definition criterion could be satisfied. Thereafter, the litigation plan became a work in progress whose inadequacies, if any, will be addressed by the court's case management of the action.

6. Want of Financial Resources

[66] That a representative plaintiff needs to demonstrate some financial capability to prosecute a class action - which is not the same thing as demonstrating that he or she is capable of paying costs - is another oddity of class action procedure in contrast to regular litigation, where save for the defined circumstances where security for costs may be ordered, a plaintiff is not required to show their ability to pay for the litigation or to pay an adverse costs award.

[67] In the case at bar, if Mr. Phillip does not have an indemnity agreement from Class Counsel, then, no doubt, he understands that he may be responsible for an adverse costs award if the class action fails or is decertified.

[68] The conventional wisdom is that class counsel do agree to indemnify representative plaintiffs, but there is nothing in the *Class Proceedings Act, 1992* that requires it, although it would be professionally irresponsible and negligent to not advise a representative plaintiff of the risks he, she, or it is exposed to by taking on the role of a representative plaintiff. I say "or it" because more frequently large institutions act as representative plaintiff, and I see no reason why they should expect an indemnity agreement from their lawyers, but like all clients, the institutional client should be advised about the downsides of litigation.

[69] But even in the class action context, a plaintiff's want of financial resources is just a factor and not a determinative one as to whether a plaintiff qualifies to be a representative plaintiff. And, in the context of a class action, examining the financial resources of the plaintiff is more about protecting the class members' interest in access to justice than it is about protecting the defendant from a judgment-proof plaintiff unable to pay costs.

[70] With these thoughts in mind, in my opinion, for the immediate case, there are no grounds for disqualifying Mr. Phillip based on any want of financial resources to adequately prosecute the class action. In the case at bar, Mr. Phillip need not undergo a judgment debtor examination about his financial resources. Class Counsel will bear the brunt of marshaling the resources to prosecute the action.

7. Conflict of Interest with the Class Members that Opt Out

[71] The most serious knock against Mr. Phillip is Deloitte's argument that Mr. Phillip has a disqualifying conflict of interest.

[72] Under s. 5(1)(e) of the *Class Proceedings Act, 1992*, to qualify as a representative plaintiff, the plaintiff must "not have, on the common issues for the class, an interest in conflict with the interests of other class members." In the immediate case, Deloitte submits that Ms.

Sondhi and Mr. Phillip have a conflict of interest because most of the putative Class Members do not wish to be declared to be employees, which is the thrust and purpose of Mr. Phillip's class action.

[73] Now, typically, it is not a conflict for the representative plaintiff that some of the class members may not desire to pursue the claim because they will have the right to opt out of the action,[33] and even class members that do not opt out are not compelled to take-up their share of any settlement fund. However, Deloitte submits that in the case at bar, there is no avoiding a conflict because the right to opt out or the right to not opt into a settlement are illusory because s. 5(1) of the *Employment Standards Act, 2000* provides that an employee cannot contract out of or waive any employment standard. Section 5(1) states:

> *No contracting out*
>
> 5 (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

[74] Deloitte's argument that the putative Class Members' rights to opt out or to not opt into a settlement are illusory, however, is mistaken. The fallacy of the argument follows from the legal fact that the determination of the common issues is only binding on the class members who do not opt out.

[75] Under the *Class Proceedings Act, 1992*, there are no positive or negative issue estoppels with respect to class members that opt out. A person who has opted out is not bound by the judgment on the common issues, and a person who has opted out cannot claim the benefit of a judgment against the class action defendant. In the case at bar, both Deloitte and the putative Class Members that opt out are lawfully entitled to carry on as independent contractors.

[76] That a common issues decision is binding only on class members who do not opt out is made clear by s. 27 of the *Class Proceedings Act, 1992*, which states:

> *Judgment on common issues*
>
> 27 (1) A judgment on common issues of a class or subclass shall,
>
> (a) set out the common issues;
>
> (b) name or describe the class or subclass members;
>
> (c) state the nature of the claims or defences asserted on behalf of the class or subclass; and
>
> (d) specify the relief granted.
>
> *Effect of judgment on common issues*
>
> (2) A judgment on common issues of a class or subclass does not bind,
>
> (a) a person who has opted out of the class proceeding; or
>
> (b) a party to the class proceeding in any subsequent proceeding between the party and a person mentioned in clause (a).

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[33] *Kranjcec v. Ontario* (2004), 69 O.R. (3d) 231 (S.C.J.) at para. 68; *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Minister of Agriculture and Lands)*, 2010 BCSC 1699 at para. 131, rev'd on other grounds 2012 BCCA 193; *Chapman v. Benefit Plan Administrators Ltd.*, 2013 ONSC 3318 at para. 58.

Idem

(3) A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that,

(a) are set out in the certification order;

(b) relate to claims or defences described in the certification order; and

(c) relate to relief sought by or from the class or subclass as stated in the certification order.

[77] In the case at bar, for the class members that opt out, there will be no determination whether or not they are employees, which is a prerequisite for s. 5(1) of the *Employment Standards Act, 2000*, to operate. There will be no declaration of the status of the persons who opt out, be that status employee or independent contractor. Thus, the premise of Deloitte's conflict argument is false, and this argument is a not a reason to disqualify Mr. Phillips. The general rule is that it is not a conflict for the representative plaintiff that some of the class members may not desire to pursue the claim applies.

[78] The general rule is that the proposed representative plaintiff need not conduct a referendum to determine how many class members support the class action. In *Keatley Surveying Ltd. v. Teranet Inc.*,[34] Justice Sharpe stated for the Court of Appeal:

> 72. .... It is in the very nature of class actions that many, if not most, individual class members lack the motivation or the will to commence proceedings. The access to justice and behavior modification goals of class proceedings will often depend upon a representative plaintiff taking the initiative in circumstances where other members of the class would be ignorant of their loss or acquiesce because of disinterest, lack of resources or fear of an adverse costs award. If multiple claims exist, the representative plaintiff does not have to conduct a referendum to determine how many class members want to sue. Ontario's class action regime features an opt-out procedure which affords class members who do not wish to have their claims advanced the right to disassociate themselves from the action. There is no corresponding requirement to establish a willing class.

[79] In *1250264 Ontario Inc. v. Pet Valu Canada Inc.*,[35] discussed below, Chief Justice Winkler stated that once a class member has opted out of the class proceeding, he or she is a stranger to the lawsuit and has no standing before the court, and thus, the person who has opted out has no say about how the action is conducted or whether or not it will continue to go forward.

[80] Nevertheless, relying on *Boucher v. Public Service Alliance of Canada*;[36] *MacDougall v. Ontario Northland Transportation Commission*;[37] and *Paron v. Alberta (Environmental Protection)*;[38] Deloitte, however, argues that Mr. Phillip has a conflict of interest because the putative Class Members predominately do not wish a class action declaring them to be employees.

[81] In the immediate case, in my opinion, there are no conflicts of the type that existed in

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[34] 2015 ONCA 248 at para. 72, aff'g 2014 ONSC 1677 (Div. Ct.), rev'g 2012 ONSC 7120.
[35] 2013 ONCA 279 at para. 52.
[36] [2005] O.J. No. 2693 (S.C.J.), aff'd (2006), C.C.P.B. 18 (Ont. Div. Ct.).
[37] [2006] O.J. No. 5164 (S.C.J.), aff'd [2007] O.J. No. 573 (Div. Ct.), motion for leave to appeal ref'd, (C.A.), July 31, 2007; leave to appeal to S.C.C. ref'd [2007] S.C.C.A. No. 491.
[38] [2006] A.J. No. 573 (Q.B.).

Boucher, MacDougall, and *Paron.* In the immediate case, the interests of Mr. Phillip are precisely the same as the interests of the Class Members that do not opt out. He is not a representative for the putative Class Members that opt out and has no relationship with those Class Members.

[82] In *Boucher,* the plaintiffs sought to certify an action against their employer who administered a pension plan. The plaintiffs alleged that the defendant employer had wrongfully appropriated the surplus by taking a contribution holiday and providing new retirees early retirement incentives including pay equity payments while excluding the plaintiffs and others from the benefits. Justice Charbonneau, for a variety of reasons, refused to certify the action as a class proceeding, including the reason that the plaintiffs proposed to represent claimants with a conflicting interest because they were differently affected depending on what relief the plaintiffs sought. In the case at bar, all the Class Members are similarly situated; if the class action is successful, they will all receive the benefits of the employment standards legislation. The putative Class Members that opt out will receive no benefits and they are not bound by the outcome of the class action.

[83] In *MacDougall*, the plaintiffs sought to certify an action to challenge, among other things, amendments to a pension plan that provided for a contribution holiday, an early retirement program and enhanced retirement benefits. Justice Hennessy refused certification. She held that if the litigation was successful and the amendments were invalidated, the active employees in the class could face adverse consequences since the amendments actually benefited them and they would lose the contribution holiday, the early retirement program, and the enhanced retirement amendments. There was a direct link between the successful outcome of the litigation and the adverse consequences to the active employees. In the immediate case, a successful outcome of the litigation is not adverse to the Class Members that do not opt out because these Class Members support being classified as employees. The Class Members that do opt out are not affected at all by the class proceeding.

[84] *Paron* was a class action about the water level of a lake. In *Paron,* the plaintiffs sought an order to raise the water level of the lake by 18 inches, which would permanently submerge portions of the lands of the putative class members who owned lower-lying properties. In that case, some putative class members would be helped and others would be harmed by the remedy sought regardless of whether they opted in or opted out of the litigation. In the immediate case, the remedy of the minimum protections of employment standards legislation causes no harm at all to the Class Members who do not opt out and the outcome of the litigation does not bind the putative Class Members who do opt out.

[85] Deloitte, however, argues that whatever the legal reality may be about the non-binding effect of a judgment on the common issues, nevertheless, the practical reality is that if Mr. Phillip succeeds at the common issues trial and the Class Members are declared to be employees, then Deloitte and apparently the administrators of the *Employment Standards Act, 2000,* will have no choice in the future but to treat the putative Class Members that opted out as employees. Thus, Deloitte submits that, practically speaking, Mr. Phillip has a conflict of interest with the putative Class Members that opt out and therefore he is disqualified as a representative plaintiff.

[86] Deloitte submits that practically speaking the conflict of interest is inherent and unavoidable. Although the relationship between a worker and his or her manager, be it an employment relationship or an independent contractor relationship, is a contractual relationship,

where freedom of contract governs. Deloitte submits that in the case at bar, there is nothing more that can be done to create an independent contractor relationship with document reviewers. Deloitte submits that if Mr. Phillip succeeds, then all the document reviewers must be treated as employees in the future and there is nothing that they or Deloitte can do about this.

[87] I do not accept this *in terrorem* argument. Assuming that the court were to determine in the case at bar that the Class Members are employees, it is likely that the court will also explain why the Class Members are classified as employees and this explanation will infuse Deloitte with the knowledge of what they need to do in the future to amend their retainer contracts. Standard form contracts and boilerplate provisions in contracts are frequently amended to respond to court rulings. I certainly do not accept the notion that a court ruling in the case at bar will declare *in rem* that all document reviewers are employees or that Deloitte's adroit lawyers will be unable to fashion the bullet proof independent contractor contract.

[88] I also do not accept the notion that on a certification motion, the court should find the representative plaintiff has a conflict of interest because of what the administrators of the *Employment Standards Act, 2000* may do in the future in response to a court ruling that does not bind negatively or positively the putative Class Members that opted out of the class action.

[89] In short, in the case at bar, Deloitte has not established that Mr. Phillip has a disqualifying conflict of interest.

8. The Significance of a Preponderance Opt Outs

[90] The conclusion that Mr. Phillip does not have a conflict of interest, however, begs the question of whether there is any significance to the feature of the immediate case that a preponderance of Class Members may opt out. The discussion so far reveals that the potential of many opt outs is not a bar to certification, but the discussion leaves open the question of what significance, if any, there is to the circumstance that there may be a preponderance of opt outs. The answer to this question lies in the territory of decertification.

[91] In the immediate case the answer is that it is premature to consider the significance of a preponderance of opt outs. If this action is certified and it turns out that the preponderance of the Class Members do opt out that in and of itself would not be a basis for decertifying the action. The Class Members who do not opt out are entitled to access to justice and the representative plaintiff is duty bound to advance their common interest.

[92] However, a large number of opt outs may expose the action to decertification if the certification criteria are no longer satisfied. In the case at bar, it remains to be seen how many Class Members will opt out and the point to emphasize and to clarify is that the number of opt outs does not in itself provide a basis for decertifying a class action. And the potentiality of opt outs is not a reason to not certify an action in the first place.

[93] In *1250264 Ontario Inc. v. Pet Valu Canada Inc.*,[39] Chief Justice Winkler explained that certification is not akin to labour arbitration nor is it a political process of voting for or against the class action. It that case, the case management judge, Justice Strathy, as he then was, out of

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[39] 2013 ONCA 279.

concern that the opt out process had been politicized, invalidated the opt-out notices. The Court of Appeal, however, reversed the decision, and Chief Justice Winkler explained that the class action would proceed notwithstanding a diminished class size. He stated at paragraphs 48, 51:

> 48. If by the survival of the class action the motion judge was referring to the prospect of de-certification, he did not explain why the number of class opt-outs could undermine the evidence satisfying the certification criteria. Indeed, other than perhaps in the most extreme cases, I fail to see any reason why the number of opt-outs would be a basis for decertification. Alternatively, if he meant the viability of the class action somehow depends on the number of remaining class members, there is no basis for this concern. A certified class proceeding will continue regardless of the diminished size of the class and the correspondingly diminished damages award or settlement amount that might follow therefrom.
>
> ....
>
> 51. Given these misconceptions about the nature of the opt-out process, I think it is important to emphasize that the *CPA* does not contemplate the politicization of the opt-out process. The opt-out process is not analogous to the labour context where majority support or opposition is required to certify or decertify a union. Within the statutory framework of the *CPA*, there is no legitimate purpose that can be achieved by politicizing the opt-out process. As explained in *A&P* [*1176560 Ontario Limited v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.)] at para. 32, certification motions are not determined through a referendum of the class members. Nor is the viability of the class action dependent on majority support. Just as the percentage of support amongst class members is not an element of certification, opting out cannot stop a class action. The number of opt-outs does not in itself provide a basis for decertifying a class action.

[94] In *1176560 Ontario Limited v. Great Atlantic & Pacific Co. of Canada Ltd.*,[40] the proposed representative plaintiffs were franchisees, and the franchisor argued that they were disqualified because certification of the action would upset the existing arrangements with the franchisees and cause the franchisor to revisit each of these arrangements. On the certification motion, the franchisor proffered evidence from franchisors that opposed certification because they felt they had more to lose than to gain and they did not want a class proceeding brought that would upset the existing relationship between them and the franchisor. Justice Winkler, as he then was, rejected the argument and stated at paragraphs 32, 45-46:

> 32. .... To adduce evidence from individual class members as to the desirability of a class proceeding is to assume, as an underlying proposition, that certification motions are somehow determined through a referendum of the class members. Such is not the case. The legislature has spoken with respect to class proceedings in this province. The provisions dealing with opt outs and de-certification show that it was clearly alive to the prospect that not all members of a proposed class would wish to participate in a class proceeding or, alternatively, that a sufficient number of defections from the class would render a class proceeding unnecessary. Conversely, there are no provisions that expressly or implicitly mandate, or even suggest, that the suitability of a class proceeding is to be determined by a polling of the class prior to the certification motion.
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> ....
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> 45. I find no merit in the contention that the independence of the plaintiffs disqualifies them as representatives. The fact that their circumstances may be different from some or all of the balance of the class does not represent a conflict "on the common issues" as that term is used in s. 5(1)(e) of the *CPA*. Nor do their different circumstances mean that they cannot fairly and adequately

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[40] (2002), 62 O.R. (3d) 535 (S.C.J.) at para. 44, leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).

represent the class. In fact, the evidence is to the contrary.

> 46. A&P also contended that there is a conflict because certification of the action would upset the existing arrangements with the franchisees and cause A&P to revisit each of these arrangements. In my view, this is effectively an argument that there should be no litigation at all rather than an attack on either the adequacy of the plaintiffs as representatives or the preferability of a class proceeding as opposed to individual actions. Through this argument, A&P implies that if the plaintiffs are successful, that success entails a risk for the other franchisees. However, as counsel for A&P candidly admitted, a successful individual action would have the same effect with respect to the existing arrangements. The purpose of class proceedings legislation is to make the justice system accessible. To this end, the court must consider alternative procedures. However, as noted in [*Hollick v. Toronto (City)*, 2001 SCC 68] at para. 16, the certification analysis is concerned with the "form of the action". Arguments that no litigation is preferable to a class proceeding cannot be given effect. If there is any basis to this argument, it is subsumed in the cause of action element of the test for certification.

[95] In the case at bar, as already noted several times above, the points to emphasize are that the potential number of opt outs is not a reason not to certify an action and the actual number of opt outs does not in itself provide a basis for decertifying a class action. The number of opt outs, however, may reveal that the class action no longer satisfies the certification criteria, which is the true basis for the decertification of a class action. For instance, in the case at bar, it remains to be seen whether a class action would remain the preferable procedure to the alternatives of individual actions or a joinder of claims or test cases if some large proportion of the 418 Class Members opted out. A large number of opt outs may mean that the synergies of the common issues are lost or that a class action is not the preferable procedure. On the other hand, a large number of opt outs may have no effect on whether the certification criteria remain satisfied.

[96] This said, the question now before the court is that of certification, not decertification, and Mr. Phillip's action satisfies all the certification criteria.

E. Conclusion

[97] For the above reasons, I certify this action as a class proceeding.

[98] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Mr. Phillip's submissions within 20 days of the release of these Reasons for Decision followed by Deloitte's submissions within a further 20 days.

Perell, J.

Released: January 16, 2018

CITATION: Sondhi v. Deloitte Management Services LP, 2018 ONSC 271
COURT FILE NO.: CV-15-523524CP
DATE: 20180116

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

SHIREEN SONDHI

Plaintiff

– and –

DELOITTE MANAGEMENT SERVICES LP, DELOITTE & TOUCHE LLP, PROCOM CONSULTANTS GROUP LIMITED

Defendants

REASONS FOR DECISION

PERELL J.

Released: January 16, 2018