

COMMITTEE: Ethics Committee

DATE: May 11, 2006

3. CHAPTER 6: WHETHER COUNSEL IS IN A CONFLICT IF ALL MATTERS SAVE FEES ARE SETTLED IN A CLASS PROCEEDINGS ACTION

A lawyer represents a group of plaintiffs in an action under the *Class Proceedings Act*. Settlement discussions are currently ongoing but the lawyer anticipates that he could encounter a situation where all aspects of the proceeding are settled except counsel fees. He is concerned that if that situation does occur he would be placed in a conflict of interest that would require his withdrawal from the matter.

The lawyer asked whether the role of the Case Management Judge may alleviate the concerns he has about a potential conflict. He says:

The solution which we are proposing in this situation is to provide in the proposed settlement agreement that legal fees are to be agreed between counsel and if agreement cannot be reached, fees are to be settled by the Case Management Judge who has been appointed. In this way, we are able to settle all issues relating to the class members and if counsel fees cannot be agreed to, there is provision for that issue to be dealt with by an impartial adjudicator, the judge who has been appointed to oversee and manage the litigation.

The Committee observed that Section 38 of the *Class Proceedings Act* gives the Court wide authority to determine a lawyer's fees and disbursements in class proceedings and noted, in particular, that an agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court. In these circumstances it was the Committee's view that the lawyer would not be placed in a conflict if all matters save fees are settled in the action.

JO/
May 11, 2006.