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CIVIL SEXUAL ASSAULT AND PERSONAL INJURY

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The Problem with Class Actions for Historical Sexual Abuse Cases

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Loretta is one of the few lawyers in Ontario who has substantial experience in dealing with abuse and harassment in civil lawsuits and employment cases. She understands and cares about abuse survivors, recognizing that coming forward, being heard and acknowledged as well as gaining a sense of justice and closure, in addition to the amount of a settlement, are what matter to her clients.

In Ontario, class actions are governed by the *Class Proceedings Act*, 1992, S.O. 1992, c.6 (the "CPA"). Class actions allow an individual to advance a legal claim on behalf of two or more persons where common issues exist. The goals of class actions are judicial efficiency, improved access to justice for those whose claims might not otherwise be pursued, and behaviour modification (by those whose actions affect large numbers of people). The CPA came into force in Ontario on January 1, 1993. The CPA provides the procedural framework for the prosecution of these claims including rules regarding notice, settlement, lawyers' fees, etc. The CPA also outlines the test for certification of a claim as a class action: 1) a valid cause of action, 2) an identifiable class of two or more people, 3) common issues, 4) a representative plaintiff, and 5) the Court must be satisfied that a class proceeding is a preferable procedure for resolving the common issues.

Class action legislation developed as a result of a product liability case. The CPA provides an effective procedure to obtain a remedy for a product liability claim that affect many people, particularly where the individual claims are small as compared to the significant cost of legal fees in a lawsuit. More recently, there have been several cases in which class actions have been certified for claims arising out of historical sexual abuse and, in particular, sexual abuse claims against private schools, religious organizations, and

government run facilities. While there are certainly advantages to pursuing historical sexual abuse claims by way of a class action, there are also distinct disadvantages.

In a class action, class members (other than the representative plaintiff) have a very minor role to play and are not involved in instructing the lawyers or making decisions about how the case proceeds. Class members are usually not involved until the last stage of the case where their individual damages are determined. Conversly, in an individual action the client is the one making decisions and instructing the lawyer. For sexual abuse survivors, legal cases are usually about more than just money. They are about coming forward, being heard and acknowledged, holding people to account, as well as gaining a sense of justice and closure. In a class action these goals can get lost. Also, in sexual abuse class actions the quantum of damages is usually much lower than the recovery in an individual action. So, to the extent that a sexual abuse survivor wants to maximize their financial recovery, an individual action is usually a better option.

Class actions are commenced by a representative plaintiff bringing a motion to the court to have the class action certified. Once this is done, the court sets a procedure for other members of the class to be notified and given the right to "opt out" by coming forward and saying they do not want to be part of the class action. A time limit is set and if class members do not opt out by the specified date, they are deemed to be included in the class. Next, there is a trial of the common issues (often liability or legal responsibility is a common issue) and after the trial of the common issues, there are individual damages trials. It is at this point class members need to come forward and pursue their individual claims for damages. If they fail to do so, they are forever prevented from pursuing an individual claim. The only way they can pursue an individual claim, is if they come forward before the opt out deadline and follow the procedures set out by the Court for opting out within the opt out deadline at the begining of the class action.

Sexual abuse survivors usually suffer serious psychological problems as a result of their abuse in childhood. There are also well established links between childhood sexual abuse and substance abuse problems, problems with education and employment and criminal activity in later life. Many abuse survivors become homeless, move around the country or are "off the grid". In addition to the long passage of time in historical abuse cases, these other problems can make it difficult, if not impossible, to reach significant numbers of class members when notice is given. If a class member does not receive notice he or she has no opportunity to "opt out".

Even if class members do get notice of the class proceeding, the "opt out" procedure in class actions is especially troublesome in historical sexual assault cases. It often takes abuse survivors 20, 30, or 40 years or even longer to come forward. There are many reasons why sexual abuse survivors do not come forward including misplaced shame, guilt and fear of coming forward, or simply a desire to avoid thinking

about and confronting the horrendous pain they suffered. The importance of allowing abuse survivors to come forward in their own time was recently acknowledged by the Ontario government when it enacted Bill 132 amending the *Limitations Act*, 2002 to eliminate limitation periods for cases based on sexual assault. This amendment is a clear message to abuse survivors that their claims are important and should not be stopped simply because it has taken them time to be ready to address the issue legally. The elimination of limitation periods provides more access to justice for abuse survivors. Conversely, class actions for historical sexual abuse claims require survivors to come forward and opt out or risk forever having their claims extinguished. In my view, any law or rule that requires an abuse survivor to come forward at a particular time is potentially harmful and contrary to the public interest expressed by the Ontario government in amending the *Limitations Act*.

Class actions based on historical sexual abuse cases can be helpful particularly where there are very large numbers of people involved and relatively minor claims. One way to reconcile the difficulty presented by the opt out provision with the benefit of a class proceeding would be to have an "opt-in" provision. In this way, potential class members who are notified of the class proceeding would have the choice of either coming forward, opting in and becoming part of the class action or staying silent and not having their claims extinguished. If the abuse survivor was not ready to come forward, he or she could stay silent and still preserve their right to pursue an individual action at a future time should they become ready to do so.

Arguably, a legislative amendment is necessary to provide for an "opt-in" provision. In the interim, at a minimum class counsel should be required to advice potential class members to get independent legal advice (ILA) before making a decision whether or not to "opt-out". The notice should contain a statement that most personal injury lawyers work on contingency and give free consultations. Adding such a provision to the notice will not help abuse survivors who do not receive the notice or those who get the notice but are still as yet unable to speak about the abuse, but it may help people who are ready to come forward to better understand the advantages and disadvantages of class actions vs. individual lawsuits. The notice should also provide information about the new program whereby sexual abuse survivors who are 16 years of age, were assaulted in Ontario and live in Toronto, Ottawa or Thunder Bay are eligible for a certificate for 4 hours of free legal advice. For more information on the new program, click here.