Court File No. T-2212-16

FEDERAL COURT

PROPOSED CLASS PROCEEDING

BETWEEN:

JESSICA RIDDLE, WENDY LEE WHITE AND CATRIONA CHARLIE

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

BOOK OF AUTHORITIES OF THE PLAINTIFFS & CLASS COUNSEL (FEE APPROVAL RETURNABLE MAY 11, 2018)

KOSKIE MINSKY LLP
900-20 Queen Street West
Toronto, ON M5H 3R3

Kirk M. Baert
Tel: 416-595-2092 / Fax: 416-204-2889
Celeste Poltak
Tel: 416-595-2701 / Fax: 416-204-2909
Garth Myers
Tel: 416-595-2102 / Fax: 416-204-4924

KLEIN LAWYERS LLP
400-1385 West 8th Avenue
Vancouver, BC V6H 3V9

David A. Klein
Douglas Lennox
Angela Bespflug
Tel: 604-874-7171 / Fax: 604-874-7180

MERCHANT LAW GROUP LLP
2401 Saskatchewan Drive
Regina, SK S4P 4H8

E. F. Anthony Merchant, Q.C.
Tel: 306-653-7777 / Fax: 304-975-1983

Lawyers for the Plaintiffs

TO: **THE ATTORNEY GENERAL OF CANADA**
Department of Justice, National Litigation Sector
50 O'Connor Street
Ottawa, ON K1A 0H8

Catharine Moore
Travis Henderson
Tel: 613-670-6390 / Fax: 613-941-5879

Lawyers for the Defendant

AND TO: **WILSON CHRISTEN LLP**
137 Church Street
Toronto, ON M5B 1Y4
Jeffery Wilson
Tel: 416-360-5952 / Fax: 416-360-1350

MORRIS COOPER
Barrister
Main Flr – 99 Yorkville Avenue
Toronto, ON M5R 3K5

Tel: 416-961-2626 / Fax: 416-961-4000

Lawyers for the Plaintiff
(*Brown v. Canada,* Court File CV-09-00372025-00CP)

Tab	Case
1.	*Abdulrahim v. Air France,* 2011 ONSC 512
2.	*Anderson et al. v. Canada,* 2016 NLTD(G) 179
3.	*Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 (S.C.J.)
4.	*Baxter et al. v. Canada (Attorney General)*, [2006] O.J. No. 4968 (S.C.J.)
5.	*Brown v. Canada (Attorney General)*, 2013 ONSC 5637
6.	*Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686
7.	*Cassano v. Toronto-Dominion Bank*, [2009] O.J. No. 2922 (S.C.J.)
8.	*CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, [2002] O.J. No. 1855 (S.J.C.)
9.	*Clegg v. HMQ Ontario*, 2016 ONSC 2662
10.	*Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada,* [1998] O.J. No. 1891 (S.J.C.)
11.	*Dolmage, McKillop and Bechard v. HMQ*, 2014 ONSC 1283
12.	*Endean v. CRCS; Mitchell v. CRCS* 2000 BCSC 971
13.	*Fontaine et al. v. Canada et al.*, 2006 YKSC 63
14.	*Fontaine v. Canada*, 2006 NUCJ 24
15.	*Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (C.A.)
16.	*Griffin v. Dell Canada Inc.*, [2011] O.J. No. 2487 (S.C.J.)
17.	*Jeffrey v. Nortel Networks*, 2007 BCSC 69
18.	*John Wink Ltd. v. Sico Inc.*, [1987] O.J. No. 5 (H.C.)
19.	*Manuge v. Canada*, 2013 FC 341
20.	*McKillop and Bechard v. HMQ,* 2014 ONSC 1282
21.	*Merlo v. Canada*, 2017 FC 533
22.	*Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.)
23.	*Rideout v. Health Labrador Corp.,* 2007 NLTD 150

Tab	Case
24.	*Smith Estate v. National Money Mart Co.,* 2011 ONCA 233
25.	*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.)
26.	Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministy of the Attorney General, 1982)

CITATION: Abdulrahim v. Air France, 2011 ONSC 512
COURT FILE NO.: 05-CV-294746 CP
DATE: 20110121

ONTARIO SUPERIOR COURT OF JUSTICE

2011 ONSC 512 (CanLII)

RE: **Hussein Abdulrahim and Fadi Abedrabbo,** Plaintiffs

Air France, Greater Toronto Airports Authority, NAV Canada et al., Defendants

BEFORE: G.R. Strathy J.

COUNSEL: *J.J. Camp Q.C.*, for the Plaintiffs

Robert Fenn, for NAV Canada

Timothy Trembley, for Air France

DATE HEARD: January 14, 2011

ENDORSEMENT

(Class Counsel Fee Approval)

[1] This is a motion for approval of the fees of class counsel with respect to the global settlement reached in this action.

[2] The details of the action, and of the settlement, are set out in my endorsement approving the settlement, which is being released this day: *Abdulrahim v. Air France*, 2011 ONSC 398. It is not necessary to repeat the details, save to highlight that the settlement was for the total sum of $20,750,000, inclusive of costs. The settlement will result in compensation to approximately 250 passengers on Air France Flight 358 and some 454 relatives who claim under the *Family Law Act*, R.S.O. 1990, c.F.3.

[3] Class counsel is requesting a fee of $6,225,000, plus disbursements and taxes. This is based on 30% of the settlement amount. The retainer agreement between class counsel and the representative plaintiff provides for a fee of 33%. This is, of course, subject to the review and approval of the court.

[4] Counsel also seek approval of the following costs, all of which I approve:

(a) applicable GST of $311,250.00 on class counsel fees;

(b) a further payment of disbursements from July 16, 2009 to December 31, 2010, in the amount of $154,406.50 plus applicable taxes of $10,768.49 for a total of $165,174.99;

(c) payment of G.S.T. in the amount of $18,403.76 which was overlooked in previously approved class counsel disbursements;

(d) a disbursement of $22,275.00 for payment of expert accounting fees which were deferred pending settlement (as set out in the affidavit of Paul Miller, filed); and

(e) a reserve of $25,000.00 to cover reasonable expenses incurred after January 1, 2011 up to February 28, 2011.

2011 ONSC 512 (CanLII)

[5] In addition, class counsel agreed to protect the accounts of certain medical facilities that provided services to seventeen class members and that agreed to defer their fees pending settlement. The total amount owing is $155,413.70. On presentation of appropriate evidence, I will issue an order directing the administrator to pay the relevant portions of this amount out of the damages awarded to the affected class members.

[6] The right of representative plaintiffs to enter into contingency fee arrangements with class counsel is recognized in the *Class Proceedings Act, 1992*, S.O. 1992 c. 6 (the "*C.P.A.*"). Section 32(1) of the *C.P.A.* provides that an agreement respecting fees and disbursements shall be in writing and shall:

(a) state the terms under which fees and disbursements shall be paid;

(b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

(c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

[7] On January 21, 2010, Madam Justice Lax approved the retainer agreements between class counsel and the representative plaintiffs, and payment of the disbursements sought by class counsel in the amount of $1,155,420.69. The retainer agreement entered into between class counsel and the representative plaintiffs complies with the *C.P.A.* and is approved.

[8] The following factors, among others, may be considered in determining the reasonableness of a lawyer's fee:

(a) the time expended by the lawyer;
(b) the legal complexity of the matters dealt with;

(c) the risks undertaken and the degree of responsibility assumed by the lawyer;

(d) the monetary value of the matters in issue;

(e) the importance of the matter to the client;

(f) the degree of skill and competence demonstrated by the lawyer;

(g) the results achieved; and

(h) the ability of the client to pay and the client's expectation as to the amount of the fee.

See: *Windisman v. Toronto College Park Ltd.* (1996), 3 C.P.C. (4th) 369, [1996] O.J. No. 2897 at para. 8 (Gen. Div.); *Serwaczek v. Medical Engineering Corp.* (1996), 3 C.P.C. (4th) 386, [1996] O.J. No. 3038 (Gen. Div.); *Jones v. American Heyer-Schulte Corp.*, [1998] O.J. No. 6293 (Gen. Div.); *Gariepy v. Shell Oil Co.* (2003), 48 C.P.C. (5th) 340, [2003] O.J. No. 2490 at para. 13 (S.C.J.); *McArthur v. Canada Post Corp.*, [2004] O.J. No. 1406 (S.C.J.); *Cohen v. Kealey & Blaney* (1985), 10 O.A.C. 344, [1985] O.J. No. 160 (C.A.).

[9] In class action litigation, the court must also consider the goals of class proceedings, particularly in terms of access to justice. The fee of class counsel must be both fair and reasonable. It should not only reward counsel for meritorious efforts, but it should also encourage counsel to take on difficult and risky class action litigation. The risk undertaken by the lawyer, and the success achieved, are important considerations in determining the fee: *Maxwell v. MLG Ventures Ltd.* (1996), 30 O.R. (3d) 304, [1996] O.J. No. 2644 (Gen. Div.); *Windisman v. Toronto College Park Ltd.*, above; *Serwaczek v. Medical Engineering Corp.*, above; *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281, [2000] O.J. No. 2374 (S.C.J.).

[10] The courts have recognized that the objectives of the *C.P.A.* – judicial economy, access to justice and behaviour modification – are dependent, in part, upon counsel's willingness to take on class proceedings. This, in turn, depends on the incentives available to counsel to assume the risks and accept the financial burden of carrying class proceedings. A premium on fees is the reward to class counsel for accepting this risk and taking on meritorious but difficult matters: *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 at paras. 59-61 (S.C.J.); *Parsons v. Canadian Red Cross Society*, above, at 287.

[11] In my view, the following factors are particularly significant in determining the fee:

(a) <u>The result</u>

[12] As I observed in my endorsement approving the settlement with NAV, the result of the settlement is an excellent one for every member of the class, who will be indemnified for approximately 80% of his or her compensable damages. Considering that the settlement leaves no individual issues for determination, this is a very significant accomplishment. No class member has objected to the settlement.

2011 ONSC 512 (CanLII)

(b) The contingent fee arrangement

[13] A contingency fee of one-third is standard in class action litigation and has been commonplace in personal injury litigation in this province for many years. It has come to be regarded by lawyers, clients and the courts as a fair arrangement between lawyers and their clients, taking into account the risks and rewards of such litigation. Fees have been awarded based on such a percentage in a number of class action cases.

(c) The time spent by class counsel

[14] The counsel team included J.J. Camp, Q.C. and Mr. Fiorante at Camp Fiorante Matthews, as well as other lawyers at Will Barristers LLP and the firm of Sutts, Strosberg LLP. Class counsel retained French counsel to assist with respect to the law of France, civil procedures in France, and specific issues arising with respect to some of the French passengers, including subrogated claims of various French agencies, and more particularly, the claims associated with Mr. Haddad, Mr. M. Fawaz and Mr. K. Fawaz. Also part of the class counsel team is Laura Bruneau, a bilingual lawyer and class action administrator, who had the primary responsibility for day-to-day contact with the class members as well as the compilation of an electronic file for each class member, which included all relevant hospital, medical, economic, and other reports and data. In addition, she orchestrated the frequent reports by class counsel to the class members and was responsible for management of class members' personal information, communications with class members and design of the claims process.

[15] As of December 31, 2010, the time docketed by all class counsel in this proceeding, including the time docketed on the Haddad and Fawaz Claims, amount to $4,717,155.02 (exclusive of applicable taxes). The time spent by Mr. Camp's firm alone is almost $2.5 million.

[16] It should be noted in this regard that this action was commenced in 2005. Thus, for over five years class counsel has undertaken this action without any remuneration. In the meantime, rent had to be paid, lawyers and staff had to be paid salaries, and expenses were incurred and paid. Without a substantial firm infrastructure and resources, an action of this kind would be an impossible undertaking.

(d) The complexity of the matter

[17] This was complex litigation involving challenging factual and legal issues, including:

- the cause of the crash;
- the application of two international conventions on carriage by air, the *Montreal Convention* and the *Warsaw Convention* (the "*Conventions*");
- jurisdiction under the *Conventions*;

2011 ONSC 512 (CanLII)

- the extent of damages recoverable from the carrier under the *Conventions*;
- contribution and indemnity under the *Conventions:*
- the proper scope of a bar order in the settlement of complex, multi-party litigation;
- the liability of the various defendants other than Air France; and
- individual issues of damages including psychological harm, loss of earning capacity, future care and baggage loss.

[18] In order to address these issues, class counsel were required to:

- conduct extensive discoveries – there were approximately 25 days of oral discovery;
- undertake extensive investigations into the cause of the crash in order to conduct examinations for discovery and prosecute the claim. In particular, class counsel retained and worked with numerous experts to investigate a wide range of liability issues including pilot experts, crash investigation experts, weather experts, air traffic control experts, an airport safety expert, an airport runway expert and human factors experts;
- retain experts, both in Canada and in France, to assist in the analysis and work-up of the individual damages issues including expert physicians, psychiatrists, psychologists, economists and future care experts;
- prepare work-ups based on detailed questionnaires sent to all members of the passenger class. In addition, class counsel conducted interviews, in person and by phone, with virtually all passenger class members in Canada and in France. In most cases, the briefs were extensive and included detailed accounts of each passenger's recollection of the accident, physical and psychological injuries and their impact, symptoms, any income loss, any future care claims, baggage loss, and out-of-pocket expenses. All of this was backed up by hospital records, medical records, loss of earnings records and other expert reports as required; and

2011 ONSC 512 (CanLII)

- perform extensive legal research with regard to a number of complex legal issues arising under the *Conventions*, including jurisdiction and the scope of compensable damages - these issues had a significant impact on the structure of the settlements achieved and the terms of the bar order.

2011 ONSC 512 (CanLII)

(e) Efforts to settle

[19] Class counsel expended considerable effort to settle with all defendants. I have outlined the scope and nature of these settlement discussions in my reasons approving the settlement and it is not necessary to restate them. Suffice to say that these settlements were accomplished as a result of a focused, strategic, well-prepared and arduous process. I am as satisfied as I possibly can be that these efforts led to a superior result which is extremely beneficial to all members of the class.

[20] In considering the approval of counsel's fee, it is appropriate to recognize that, had these efforts to settle been entirely unsuccessful, class counsel would have expended a very large amount of time and resources without bearing any fruit in this litigation.

(f) The skill and diligence of class counsel

[21] I am convinced that this settlement would not have been possible but for the skill and diligence displayed by class counsel, particularly by Mr. Camp, Mr. Fiorante, Mr. Miller and Ms. Bruneau. No doubt others deserve credit. Mr. Camp and Mr. Fiorante have extensive experience in both class action and aviation litigation. Mr. Miller has considerable experience in personal injury litigation and was the lawyer primarily responsible for the work-up of damages. Ms. Bruneau is an experienced lawyer. As I have noted, she was responsible for the creation of the administrative structure that managed the damages documentation and she handled the communication of class members in both French and English. It was the creation of this impressive system that made it possible for class counsel to assess the damages of each class member and to effectively negotiate with the defendants based on a reasoned and persuasive calculation of the damages.

[22] I am also convinced that class counsel pursued these claims aggressively and were able to negotiate favourable settlements because the defendants and their counsel were well aware that if a settlement was not achieved, they would be facing a skilled adversary who was quite prepared to take the case to trial if necessary.

(g) Risks assumed by class counsel

[23] In *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, above, the court recognized that class counsel take on significant risk in undertaking a class proceeding on a contingency basis and that it is important to reward successful lawyers for accepting this risk.

[24] There is a risk in every case that the action will ultimately be unsuccessful. While this risk was mitigated in this case, to some extent, by the liability provisions of the *Warsaw*

Convention pertaining to Air France, it was by no means a sure thing against the other defendants, all of which were substantial entities with significant resources. In taking on a case of this magnitude, class counsel was required to incur and carry disbursements in excess of $1 million. Vast amounts of time have been spent on the case and also carried on the books of counsel's firm.

[25] There was, in this case, a real risk that the action would not be successful against some defendants and that the efforts, time and resources spent by class counsel would go unrewarded.

(g) The progress of the opt-out actions

[26] While not directly relevant to the issue before me, a measure of the success of class counsel, who pursue this matter on behalf of some 700 class members (including passengers and their families), is that some of the opt-out actions, which seek to pursue individual actions on behalf of passengers who opted out of the class action, have not advanced particularly expeditiously – see my reasons dismissing NAV's motion for a common liability trial: *Abdulrahim v. Nav Canada*, 2010 ONSC 5542, [2010] O.J. No. 4660. While some of these actions are barely off the ground, or bogged down in procedural battles, class counsel has successfully managed to prosecute this action to a state of trial readiness and has persistently and successfully orchestrated its complete resolution.

[27] I would add to this that the Fawaz and Haddad claims were languishing until they were taken over by class counsel.

(h) Importance of the matter to the class

[28] It is quite obvious that involvement in a traumatic air crash is an experience from which no one emerges unscathed and obtaining fair compensation for their injuries was vitally important to all passengers on the flight. The settlements will result in substantial monetary compensation to all class members.

(i) Communications with class members

[29] This is a case in which class counsel's communications with members of the class have been exemplary. Class counsel has met at least once with every single passenger class member. This includes two meetings of class counsel, together with local French counsel, with all passengers living in France. Class counsel have had extensive communications with all class members, ranging from personal interviews to periodic reports via e-mails and letters. To date, class counsel have reported to the passenger class members approximately fifteen times.

Conclusion

[30] In summary, the hard work, outstanding organization, tactical and legal skills, and persistence of class counsel have resulted in an excellent result in this class action. It has achieved real justice for real people who were victims of a very serious aviation accident. It will give them significant compensation through a simple and expeditious claims process. The

2011 ONSC 512 (CanLII)

benefits will begin to flow almost immediately. While the proposed fee is a large one, it was well-earned and it is fair and reasonable in the circumstances.

[31] For these reasons, an order will issue approving the retainer agreement between class counsel and the representative plaintiffs and approving fees in the amount of $6,225,000.00 as well as the taxes and disbursements set out above.

[32] In accordance with counsel's undertaking, these fees will not be paid until the claims of all class members have been paid.

[33] I will remain seized of the matter for the purpose of any issues that may arise with respect to the implementation of the settlement or with respect to class counsel's fees.

G.R. Strathy J.

DATE: January 21, 2011

2011 ONSC 512 (CanLII)

Anderson v. Canada (Attorney General), [2016] N.J. No. 376

Newfoundland and Labrador Judgments

Newfoundland and Labrador Supreme Court

Trial Division - General Division

St. John's, Newfoundland and Labrador

R.P. Stack J.

Heard: September 27 and 28, 2016.

Judgment: November 7, 2016.

Dockets: 200701T4955CCP, 200701T5423CCP,

200801T0844CCP, 200801T0845CCP,

200801T0846CCP

[2016] N.J. No. 376 | *2016 NLTD(G) 179* | *[2017] 1 C.N.L.R. 1* | *273 A.C.W.S. (3d) 251* | *2016 CarswellNfld 431*

Between Carol Anderson, Allen Webber and Joyce Webber, Plaintiffs, and The Attorney General of Canada, Defendant, and Her Majesty in Right of Newfoundland and Labrador, First Third Party (Discontinued), and The International Grenfell Association, Second Third Party (Discontinued) And between Toby Obed, William Adams and Martha Blake, Plaintiffs, and The Attorney General of Canada, Defendant, and Her Majesty in Right of Newfoundland and Labrador, First Third Party (Discontinued), and The International Grenfell Association, Second Third Party (Discontinued) And between Rosina Holwell and Rex Holwell, Plaintiffs, and The Attorney General of Canada, Defendant, and Her Majesty in Right of Newfoundland and Labrador, First Third Party (Discontinued), and The International Grenfell Association, Second Third Party (Discontinued) And between Edna Winters and James Asivak, Plaintiffs, and The Attorney General of Canada, Defendant, and Her Majesty in Right of Newfoundland and Labrador, First Third Party (Discontinued), and The Moravian Church in Newfoundland and Labrador, Second Third Party (Discontinued), and The Moravian Union (Incorporated), Third Third Party (Discontinued) And between Joyce Allen and Dominic Dickman, Plaintiffs, and The Attorney General of Canada, Defendant, and Her Majesty in Right of Newfoundland and Labrador, First Third Party (Discontinued), and The Moravian Church in Newfoundland and Labrador, Second Third Party (Discontinued), and The Moravian Union (Incorporated), Third Third Party (Discontinued)

(122 paras.)

Case Summary

Civil litigation — Civil procedure — Parties — Class or representative actions — Class counsel — Fees — Settlements — Approval — Application by representative plaintiffs to approve settlement and counsel fees allowed — Representative plaintiffs commenced class action on behalf of aboriginal persons who attended schools, dormitories or orphanages from 1949 to 1980 in Newfoundland and Labrador alleging defendants breached duty to protect students from harm — Representative plaintiffs and defendant reached $50 million settlement close to conclusion of common issues trial — Settlement was fair, reasonable, made in good faith and was in best interests of class as a whole — Counsel's fees and disbursements of were fair and reasonable.

Application by the representative plaintiffs to approve the settlement of the class action and counsel's fees and disbursements. The representative plaintiffs commenced a proposed class action on behalf of aboriginal persons

who attended schools, dormitories or orphanages from 1949 until 1980 in the Province of Newfoundland and Labrador. The plaintiffs claimed that by its purpose, operation or management of the facilities, the defendant breached its fiduciary duty to the students who attended those facilities to protected them from actionable physical or mental harm. Close to the conclusion of the common issues trial, the representative plaintiffs and the defendant reached a settlement for $50 million. The plan provided for general compensation payments for years resided at the facility and abuse compensation payments depending on the harm suffered. Any surplus of in the fund would be divided equally among the recipients. In addition, the federal government committed to fun commemorative and healing initiatives. The settlement provided for a confidential paper-based claims process that did not require any claimant to testify or appear in person. Pursuant to the terms of the retainer agreements, plaintiffs' counsel sought approval of fees of $16,665,000, which amounted to a contingency fee of approximately one-third, plus HST of $2,176,259 and disbursements of $1,397,828.

HELD: Application allowed.

The settlement was fair, reasonable, made in good faith and was in the best interests of the class as a whole. There were a number of general and case-specific litigation risks and case-specific faced by the plaintiffs. There was also a change that individual assessment hearings would be ordered instead of aggregate damages, which would increase costs. Completion of trial and any appeals would have delayed obtaining compensation. While individual class members might have faired better if damages were assessed individually, the class members would be treated equally and the settlement was fair to class members as a whole. The settlement was approved by counsel and endorsed by aboriginal groups and no one objected. The representative plaintiffs were entitled to an honorarium payment. They provided access to justice for hundreds of vulnerable individuals. The fees and disbursements of plaintiffs' counsel were fair and reasonable in the circumstances. Counsel devoted 19,930 hours to this litigation. A fee of $16,665,000 represented a multiplier of 1.81, which was at the low end of class actions jurisprudence given the risks, substantive legal hurdles and stage of proceeding at the time of settlement. The action was difficult and plaintiffs' counsel assumed substantial risk over a period of nine years.

Statutes, Regulations and Rules Cited:

Class Actions Act, R.S.N.L. c. C-18, s. 35, s. 35(1), s. 38(1), s. 38(2), s. 40

Rules of the Supreme Court, 1986, S.N.L.. 1986, c. 42, Sch. D, Rule 7A.10(2), Rule 7A.10(3)(a), Rule 19.02

Survival of Actions Act, R.S.N.L. 1990, c. S-32,

Court Summary:

The representative Plaintiffs and the Defendant reached a $50 million settlement close to the conclusion of a long common issues trial. Class members are aboriginal persons who attended schools, dormitories or orphanages from 1949 until 1980 in what is now the Province of Newfoundland and Labrador. The Plaintiffs had claimed that by its purpose, operation or management of the facilities, the Defendant breached a fiduciary duty owed to students who attended the facilities to protect them from actionable physical or mental harm. In class actions, Court approval is required for the implementation of a proposed settlement and for the payment of the fees and disbursements of class counsel. The Court approved the settlement upon being satisfied that it is fair, reasonable, made in good faith, and is in the best interests of the class as a whole. The Court was also satisfied that the fees and disbursements of Plaintiffs' counsel are fair and reasonable in the circumstances and they were approved.

Cases cited:

Verna Doucette v. Eastern Regional Integrated Health Authority, *2010 NLTD 29*.

McIntyre (Litigation guardian of) v. Ontario, *2016 ONSC 2662*.

Fraser v. Falconbridge Ltd., *(2002), 24 C.P.C. (5th) 396*, *33 C.C.P.B. 60* (Ont. Sup. Ct.).

McCarthy v. Canadian Red Cross Society, *(2007) 158 A.C.W.S. (3d) 12*, *[2007] O.J. No. 2314* (Sup. Ct.).

Wilson v. Servier Canada Inc., *(2005), 252 D.L.R. (4th) 742*, *137 A.C.W.S. (3d) 1104* (Ont. Sup. Ct.).

Smith Estate v. National Money Mart Co., *2011 ONCA 233*.

Robinson v. Rochester Financial Ltd., *2012 ONSC 911*.

Garland v. Enbridge Gas Distribution Inc., *(2006), 153 A.C.W.S. (3d) 785*, *56 C.P.C. (6th) 357* (Ont. Sup. Ct.).

Johnston v. Sheila Morrison Schools, *2013 ONSC 1528*.

Dolmage v. Ontario, *2013 ONSC 6686*.

McKillop and Bechard v. Ontario, *2014 ONSC 1282*.

Baker (Estate) v. Sony BMG Music (Canada) Inc., *2011 ONSC 7105*.

Cannon v. Funds for Canada Foundation, *2013 ONSC 7686*.

Cassano v. Toronto-Dominion Bank, [2009] 178 A.C.W.S. (3d) 1015, *79 C.P.C. (6th) 110*, (Ont. Sup. Ct.).

Abdulrahim v. Air France, *2011 ONSC 512*.

Rideout v. Health Labrador Corp., *2007 NLTD 150*.

Gagne v. Silcorp Ltd., *[1998] 167 D.L.R. (4th) 325*, *27 C.P.C. (4th) 114* (Ont. C.A.).

Slark (Litigation guardian of) v. Ontario, *2013 ONSC 6686*.

Statutes, regulations and rules cited:

Class Actions Act, S.N.L. 2001, c. C-18.

Survival of Actions Act, R.S.N.L. 1990, c S-32.

Rules of the Supreme Court, 1986, S.N.L. 1986, c. 42, Sch. D., rr. 19.02, 7A.10(2), 7A.10(3)(a).

Counsel

Kirk Baert, Celeste Poltak, Steven Cooper, David Rosenfeld and Ches Crosbie, Q.C., Appearing on behalf of the Plaintiffs.

Jonathan Tarlton, Paul Vickery and Catherine Moore, Appearing on behalf of the Attorney General of Canada.

REASONS FOR JUDGMENT

R.P. STACK J.

INTRODUCTION AND BACKGROUND

1 This decision brings to an end these long-standing, complex and historic class actions between the Plaintiffs and the Defendant, the Attorney General of Canada ("Canada"). The Plaintiffs and Canada have reached a settlement that I have already formally approved. These are my reasons for doing so.

2 Class members are aboriginal persons who attended schools, dormitories or orphanages (collectively, the "Facilities") from 1949 until 1980 in what is now the Province of Newfoundland and Labrador (the "Province"). The Plaintiffs claim that by its purpose, operation or management of the Facilities, Canada breached a fiduciary duty owed to students who attended the Facilities to protect them from actionable physical or mental harm.

3 The common issues trial arising out of these five class actions commenced on September 28, 2015. Following the conclusion of the Plaintiffs' case on February 1, 2016, the parties requested adjournment of the trial so that they could explore the possibility of a settlement. On April 26, 2016 the Court was advised that a settlement (the "Settlement") had been achieved.

4 By section 35 of the *Class Actions Act*, S.N.L. 2001, c. C-18 (the "*Act*"), Court approval is required for the implementation of a proposed settlement in a class action and for payment of the fees and disbursements of class counsel. For the reasons detailed below, I have approved the Settlement. I am satisfied that it is fair, reasonable, made in good faith, and is in the best interests of the class as a whole. I am also satisfied that the fees and disbursements of Plaintiffs' counsel are fair and reasonable in the circumstances and ought to be paid. Let us see why.

SETTLEMENT APPROVAL

The Terms of the Proposed Settlement

5 Because of the historic nature of the Settlement for the aboriginal class members, I will detail its provisions. The Settlement provides for an all-inclusive fund of $50,000,000 (the "Compensation Fund") to provide compensation to class members in accordance with a plan proposed by the Plaintiffs that includes a residence-based payment and compensation for more serious abuse (the "Distribution Plan"). Out of the Compensation Fund will also be paid the cost of notice to class members of the hearing to approve the settlement, legal fees and disbursements of Plaintiffs' counsel, and the costs of providing notice of settlement approval and of administering the settlement process.

6 The key terms of the Settlement include:

1) the $50,000,000 Compensation Fund;

2) notice costs, administration costs, and legal fees and disbursements, to be paid from the Compensation Fund;

3) General Compensation Payments ("GCP") for years resided at a Facility;

4) Abuse Compensation Payments ("ACP") depending on the harm suffered;

5) a paper-based claims application process; and

6) a commitment by Canada to fund mutually agreeable commemoration and healing initiatives with class member input, over and above the Compensation Fund.

The Proposed Distribution Plan

7 The Settlement provides for claims-based compensation with two streams for compensation -- a GCP and, for those eligible, an ACP.

General Compensation Payment

8 A GCP will be paid to an eligible class member who resided at a Facility for any length of time during the class period. To qualify for a GCP claim, a claimant must only have resided at a Facility and need not provide evidence of abuse. GCP payments of $15,000 are to be made to those who resided at a Facility for less than five academic years or parts thereof and $20,000 to those who resided at a Facility for five or more academic years or parts thereof.

9 The GCP is the primary component of compensation in the Settlement and is to be paid out in full before any ACPs are made.

10 If there are insufficient funds in the Compensation Fund to pay the GCPs in full after payment of legal fees, disbursements, notice costs and administration costs, then a determination will be made by the claims administrator in consultation with Plaintiffs' counsel on how to distribute the GCP payments. The intention is to pay GCP on a *pro rata* basis.

Abuse Compensation Payment

11 ACP claims require a claimant to provide details of the harm or abuse suffered by him or her while attending the Facilities. The claimant need not have resided at a Facility to make an ACP claim. An ACP will be awarded based on the severity of the harm suffered in accordance with a schedule of incidents of abuse as follows:

Level	Description	Compensation Amount
1	• One or more incidents of fondling or kissing. • Nude photographs taken of the Class member. • The act of an adult exposing themselves. • Any touching of a student, including touching with an object, by an adult which exceeds recognized parental contact and which subjectively violates the sexual integrity of the Class member. • One or more incidents of simulated intercourse. • One to three incidents of masturbation.	$50,000.00
2	• One to three incidents of oral intercourse. • One to three incidents of digital anal or vaginal penetration. • One to three incidents of attempted anal or vaginal penetration. • Four or more incidents of masturbation. • One or more physical assaults causing a physical injury that: o led to or should have led to hospitalization or serious medical treatment by a physician o caused permanent or demonstrated long-term physical injury o impaired or disfigured o caused loss of consciousness o broken bones o caused serious but temporary incapacitation requiring bed rest or infirmary care for several days. Examples include severe beating, whipping, and second-degree burning.	$100,000.00
3	• One to three incidents of anal or vaginal intercourse. • Four or more incidents of oral intercourse. • One to three incidents of anal or vaginal penetration with an object.	$150,000.00
4	• Four or more incidents of anal or vaginal intercourse. • Four or more incidents of anal or vaginal penetration with an object.	$200,000.00

12 The claims administrator will review the claims submitted and assign the necessary compensation.

13 ACPs will only be made if there are funds remaining after payment of all approved GCP claims. In the event that there are insufficient monies in the Compensation Fund to pay all ACP claims as evaluated, the ACP claims will be paid *pro rata* based on the amount of each ACP awarded.

Eligibility

14 Class members are "All persons who attended [the Facility], located in [community], between March 31, 1949 and the date of closure of the [the Facility]". To be eligible for compensation a claimant must:

1) be a class member;
2) be alive as of November 23, 2006;
3) for a GCP, to have resided (as defined in the Settlement) at one of the Facilities during the "Class Period";
4) for an ACP, to have either resided at or attended one of the Facilities during the "Class Period" and to have suffered compensable abuse; and
5) have been under twenty one (21) years of age at the time of residence at one of the Facilities or when the compensable abuse was suffered.

15 The Settlement permits class members who became deceased after November 23, 2006 to be eligible for compensation.

16 "Class Period" is defined in the Settlement for each of the Facilities as follows:

Makkovik - April 1, 1949 to June 30, 1960

Cartwright - April 1, 1949 to June 30, 1964

Nain - April 1, 1949 to June 30, 1973

St. Anthony - April 1, 1949 to June 30, 1979

Northwest River - April 1, 1949 to June 30, 1980.

Paper-based Claims Process

17 The Settlement provides for a confidential paper-based claims process that does not require any claimant to testify or appear in person. This is designed to alleviate any hesitancy among class members about coming forward. Plaintiffs' Counsel has advised the Court that they have acted in a number of class proceedings involving systemic abuse at residential schools and other similar institutions. Class members often convey to class counsel that they are reluctant to be involved because they are embarrassed, ashamed or do not want what happened to them to be publicly known.

18 The proposed paper-based claims process will not require class members to testify. The claim form will require the claimant to swear that the information provided is true. Claimants will be assumed to be acting honestly in completing and swearing their forms. Only if deemed necessary in consultation with the claims administrator, will a claimant be subject to the audit or verification process put in place to ensure the validity of claims made.

19 Only if a claim has been rejected, in whole or in part, can a claimant request a hearing before a hearing officer. The claimant may be questioned under oath and the hearing officer may request documents or other evidence to validate a claim. The hearing officers appointed for this role will be former adjudicators in the Indian Residential Schools Settlement. There is no opportunity for Canada to respond to, cross-examine on or otherwise contest the claims.

Oversight of Claims Process

20 The Honourable Mr. Frank Iacobucci has agreed to serve as the overseer of the claims administration process. Mr. Iacobucci, with Crawford Class Action Services ("Crawford") as the administrator, will create protocols and

procedures for the oversight of the claims review process pursuant to the Settlement.

Priority of Payments from the Compensation Fund

21 The Settlement provides for an all-inclusive Compensation Fund. The priority of payments out of the Compensation Fund is as follows:

1) notice costs, administration costs, and approved legal fees and disbursements of Plaintiffs' counsel;
2) GCP to all eligible class members;
3) ACP to all eligible class members;
4) Late claims (as defined in the Settlement); and
5) Surplus funds payable to GCP recipients.

22 This last item is important - any surplus in the Compensation Fund after all other claims have been paid shall be divided equally among GCP recipients. There will be no reversion of monies to Canada.

Commemoration and Healing Benefits

23 In addition to the Compensation Fund, Canada has agreed to pay for mutually agreeable healing and commemoration initiatives with input from the class members.

24 Representatives from three indigenous organizations, the Nunatsiavut Government ("NG"), the Innu Nation and NunatuKavut Community Council ("NCC")[1], participated in a commemoration and healing *ad hoc* group. The Court is advised that based on the meetings held to the date of the application for settlement approval, it is anticipated that commemoration will be manifested in the following ways:

1) a logo design contest among notable indigenous artists from Labrador with the logo being incorporated into commemorative pins and on informative plaques to be located in Happy Valley Goose Bay and in each of the five communities in which a Facility was located;
2) an archivist will be hired to identify, collect, catalogue, preserve and digitize material relevant to the residential school legacy in Newfoundland and Labrador. Part of this mandate will be to identify archival material located outside of Canada and, in collaboration with the Government of Canada and the appropriate indigenous organizations, attempt repatriation of those materials where appropriate. The archivist will also be directed to prepare a mobile historical display based on the information found to better educate the public about the residential school system in Newfoundland and Labrador; and
3) a prominent Labradorian will be engaged to conduct community visits to receive and memorialize, both publicly and privately, stories tendered by those connected with the residential school system, including but not limited to the class members. The mandate will include receiving information and advice on appropriate healing processes and will result in a formal report.

25 It is also anticipated that the healing component of the Settlement will be addressed by payments made to the individual indigenous organizations with a portion set aside for class members who do not identify with any of those organizations.

26 All commemoration and healing proposals remain subject to Canada's approval in accordance with the Settlement.

The Proposed Claim Form

27 The proposed claim form is intended to be a plain-language communication that will be simple and straightforward to complete. It is expected that the claim form will be translated into Inuktitut and Innu-aimun, the languages of the Inuit and the Innu, respectively.

Proposed Notice Materials

28 The Plaintiffs intend to provide significant notice of the Settlement to class members, which will include, among other things, direct mailings to class members, direct mailings to third parties, dissemination of a short form notice in various media, and direct community outreach and meetings. The proposed notice materials are intended to be simple and easy to read and understand.

The Statutory and Regulatory Regime

29 The *Act* governs the conduct of class actions in the Province. By section 35(1), a class action may be discontinued "only with the approval of the court on terms the court considers appropriate". Section 35 also addresses the basis upon which a settlement can be approved by the Court.

30 Section 40 of the *Act* provides that the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D, apply to class actions to the extent that the rules do not conflict with the *Act*.

31 Because the common issues trial is underway, it cannot be discontinued without leave of the Court (Rule 19.02).

32 Although section 35 of the *Act* provides that a settlement agreement in a class action must be approved by the Court to be binding on class members, it is Rule 7A.10(2) that sets out what materials and information must be included in an approval application:

> **7A.10.** (2) An application to court for approval of a settlement of a class action shall include:
>
> (a) a brief history of the proceeding;
>
> (b) a brief statement of the facts that form the basis of the settlement;
>
> (c) a discussion of the relevant issues of law;
>
> (d) the terms of the settlement and its amount;
>
> (e) a statement of the form of payment of the settlement;
>
> (f) the method of quantifying individual claims and the distribution of the settlement funds to class members;
>
> (g) the total amount of legal fees and disbursements and their impact on the settlement;
>
> (h) details of unresolved claims, if any, including their number and how they are to be resolved;
>
> (i) a plan of action for resolving individual claims;
>
> (j) a statement of any differences in the manner of treatment of class members;
>
> (k) the procedure for disbursing unclaimed funds;
>
> (l) information of related class or representative proceedings in other jurisdictions; and
>
> (m) the form of a notice proposed to be sent to class members.

33 By Rule 7A.10(3)(a), in considering whether to approve a settlement in a class action, the Court is to consider whether it is fair, reasonable and made in good faith.

34 The approval application was made by Plaintiffs' counsel. I am grateful for the comprehensive nature of the material provided. It comprised well over 1000 pages of submissions, affidavits, exhibits and authorities, thus enabling me to consider all of the relevant factual matters and the applicable law so that I may render a fully informed decision.

The Position of Canada

35 Canada's position on the application was succinctly put. It consented to the approval application and to the form of order requested by Plaintiffs' counsel except in respect of honoraria proposed to be paid to the representative Plaintiffs and the other class members who testified during the trial. Canada raised no objection to this latter aspect of the application, which I will address later in these Reasons. Canada provided no submissions on the approval sought for the payment of fees to, and reimbursement of disbursements paid for by, Plaintiffs' counsel.

36 Counsel for Canada advised the Court that reconciliation with its aboriginal persons is a high priority for the federal government. It settled the matter for $50 million with that in mind. Although Canada left to the Plaintiffs the manner of distribution of the Settlement among the class members, it supports the application for approval based upon the proposed Distribution Plan. The Settlement was reached following receipt of advice from independent actuaries and was contingent on amounts being paid to both resident class members and day students. It was also important for Canada that legal fees and administration costs be paid out of the Compensation Fund. Importantly, says Canada, the commemoration and healing components of the Settlement are an additional step towards reconciliation.

How the Court Approaches Settlement Approval

37 In **Verna Doucette v. Eastern Regional Integrated Health Authority**, *2010 NLTD 29*, this Court approved a settlement in a class action. Thompson, J., at paragraphs 7 to 9, canvassed authorities from across Canada and provided a helpful summary of the various principles considered when approving a class action settlement. His starting point was that a settlement may be less than perfect:

> [7] Settlements are a product of compromise and are not held to a standard of perfection. As Schulman J. held in *Semple*, *[2006] M.J. No. 498* a proposed settlement need only fall within 'a zone of reasonableness' to be approved. Similarly, Chief Justice Brenner of the B.C. Supreme Court in *Sawatzky v. Societe Chirugicale Instrumentarium Inc. [1999] B.C.J. No. 1814* wrote: 'All settlements are the product of compromise and a process of give and take and settlement rarely gives all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows a range of possible resolutions. A less than perfect settlement may be in the best interest of those affected by it when compared to the alternative of the risks and costs of litigation'.

38 Given that a settlement may be less than perfect, better becomes the enemy of good. Consequently, the Court's role in reviewing a settlement in a class action is to approve it or to reject it. The Court cannot modify it:

> [8] A court has the power to either approve or reject a settlement agreement. It may not substitute its own terms. Schulman, J. specifically cautioned that a court should be reluctant to attach conditions on approval lest the settlement be lost: '[T]he court should also consider whether the refusal of approval or attaching of conditions to approval, puts the settlement in jeopardy of being unraveled. It should be remembered that there is no obligation on parties to resume negotiations, that sometimes parties have reached their limit in negotiation, resile from their positions or

abandon the effort'.

39 Thompson, J. sets forth the factors to be considered in evaluating a settlement:

> [9] Rule 7A.10(3)(a) stipulates that 'in considering whether to approve a settlement of a class action, the court shall consider whether the settlement is fair, reasonable and made in good faith.' Courts in Canada have held the test to be whether the settlement is 'fair and reasonable and in the best interests of the class as a whole.' Courts have identified the following factors that may assist in making this determination:
>
> * likelihood of recovery, or likelihood of success;
> * amount and nature of discovery evidence;
> * settlement terms and conditions;
> * recommendation and experience of counsel;
> * future expense and likely duration of litigation;
> * recommendation of neutral parties, if any;
> * number of objectors and nature of objections;
> * presence of good faith and absence of collusion;
> * degree and nature of communications by counsel and Plaintiff with class members during the litigation;
> * information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiation; and
> * the risk of not unconditionally approving the settlement.

40 We saw above that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions (**Verna Doucette** at paragraph 12). It is an objective standard that allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation.

41 Later, at paragraphs 15 to 17 of **Verna Doucette**, Thompson, J. provided further guidance to a judge considering whether to approve a settlement in a class action:

> The parties proposing the settlement bear the onus of satisfying the court that it ought to be approved ... On an application to approve a settlement in a class proceeding, all parties and their counsel are obliged to provide full and frank disclosure of all material information. ... The court is entitled to sufficient evidence to permit the judge to exercise an objective, impartial and independent assessment of the fairness of the proposed settlement. [Authorities omitted]

42 In early stage class action settlements there may not be a "strong initial presumption of fairness" (**McIntyre (Litigation guardian of) v. Ontario**, *2016 ONSC 2662* at paragraph 3). But in cases such as this, where the Settlement was negotiated and pursued at arm's-length by experienced class counsel after a long and difficult court process, I am satisfied that the following applies:

> Where the parties are represented -- as they are in this case -- by highly reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation.
>
> [**Serhan (Trustee of) v. Johnson & Johnson**, *2011 ONSC 128* at paras. 55- 56.]

43 Consequently, in the circumstances of this case it would take convincing evidence to the contrary for me not to approve the Settlement.

Rule 7a.10(3)(a) Factors

44 Rule 7A.10(3)(a) stipulates that "in considering whether to approve a settlement of a class action, the court shall consider whether the settlement is fair, reasonable and made in good faith." I must also be satisfied that the Settlement is in the best interests of the class as a whole. As we look at each of the factors to be considered, we will see that they all militate towards approving the Settlement.

1. Likelihood of Recovery, or Likelihood of Success

45 Settlement in this matter was made close to the end of the common issues trial after the Plaintiffs had closed their case but before Canada adduced any evidence. Although I did not have the advantage of hearing all of the proposed evidence and the parties' respective closing submissions, I did receive and review extensive pre-trial briefs comprised of more than 700 pages of material. The relative strengths and weaknesses of the positions asserted by the parties were well understood by me by the time the Settlement was achieved.

46 Not having heard the complete case it would be inappropriate for me to comment in depth on the likelihood of success. Nevertheless, Plaintiffs' counsel has identified the following litigation risks, with which I cannot disagree.

General Litigation Risks

47 There are a number of general litigation risks that the Plaintiffs faced in the common issues trial, including:

1) Risk of historical claims -- This class action involved allegations concerning events that occurred between 35 to 65 years ago and spanned a 30 year period. Hundreds of class members and former staff of the Facilities are now of advanced age; many have passed away. Risks associated with continuing the common issues trial included fading memories of elderly witnesses, incomplete document retention, and a potential inability to adduce evidence because of a lack of witnesses.
2) General litigation risks -- As with all actions, there existed the risks of witnesses not providing sufficient evidence, the documentation not being sufficient, and the uncertainty associated with the Court making findings of fact.
3) Consolidated action risks -- Litigation risks are amplified in this proceeding, which concerns five Facilities with differing class periods, but litigated together. This increased the risk of failing to prove the existence or breach of a fiduciary duty over the years for one or more of the Facilities; and
4) Class action litigation risks -- as with many class actions, there was the risk that I would find there to be insufficient evidence or inferences necessary to find liability for the entire class across the entire class period for each of the Facilities.

Uncertain Results

48 In addition, case-specific litigation risks resulted in the following uncertainties:

1) the Plaintiffs could be unsuccessful in proving that a fiduciary duty existed;

2) the Plaintiffs might establish the existence of a fiduciary duty, but be unsuccessful in proving the duty was breached in common across the class over the entire class period for each of the five Facilities;

3) the Plaintiffs might succeed in establishing a breach of fiduciary duty but not be awarded aggregate damages resulting in the Court ordering individual assessment hearings; and

4) the Plaintiffs might succeed in proving a breach of fiduciary duty but some or all class members' claims may be barred by virtue of the application of a limitation period.

Potential Individual Hearings

49 If individual assessment hearings were ordered instead of aggregate damages, such hearings:

1) would likely be adversarial in nature, which could require legal representation resulting in increased costs for class members;

2) would require significant time to complete, resulting in prejudice to the aging class and a denial of timely access to justice;

3) may require class members to testify, forcing a traumatic recounting of the abuse they suffered;

4) may require significant travel by elderly class members, causing barriers to participation for some; and

5) would likely limit recovery to those class members who are willing to come forward and be cross-examined about their difficult childhood experiences.

Delays Associated With Trial and Appeals

50 At the conclusion of the common issues trial, I would have likely reserved my decision and, given the complexity of the issues, it would have been at least several months before a decision would be filed. There would then be the inevitable appeals. Consequently, even if the Plaintiffs were successful at the common issues trial, there would likely be a significant delay in obtaining compensation.

51 Although those of us involved in the administration strive to resolve matters as quickly as possible, Plaintiffs' counsel reasonably estimate that they faced at least one and a half to two years before a final determination of the common issues trial and appeal, with no guarantee of success. This estimate does not include a possible appeal to the Supreme Court of Canada

52 In addition, in the event that the Plaintiffs were unsuccessful in their claim for an aggregate award of damages, individual assessments of the class members could take years given the size of the class and the nature of the claims being made.

53 I agree with Plaintiffs' counsel that these inherent delays would result in additional prejudice to the aging class members, and accordingly, a denial of access to justice.

2. Amount and Nature of Discovery or Trial Evidence

54 As mentioned, on February 1, 2016, after 35 days of trial, the Plaintiff concluded presenting their evidence, including the introduction of 700 historical documents, and the testimony of 29 class members and 5 expert witnesses. Canada advised the Court that it required less than a week to present its evidence. Before Canada presented its evidence, however, a requested postponement was granted and the Settlement was reached. Consequently, the Court and the parties had the advantage of having heard most of the trial evidence prior to settlement being reached.

55 Furthermore, I am aware that there had been extensive discoveries, not only of representatives of the parties and their experts, but also of representatives of third parties against whom proceedings were discontinued during the course of the trial. Documentary production was exhaustive (if not complete given the historical nature of the claims). In addition, the parties' extensive pre-trial briefs set forth in detail the nature of the evidence that they expected to come out at trial and their respective legal argument for and against the relief sought.

56 As a result of the foregoing, the parties were in a very good position to evaluate the totality of the evidence and the current state of Canadian law on the matters at issue in order to assess the prospects of success.

3. Settlement Terms and Conditions

57 This is an historic settlement. It is for this reason that I have set out its terms in detail. Not only does it provide $50 million for class members (including paying the administration cost of the settlement and the fees and disbursements of Plaintiffs' counsel) but also meaningful commemoration and healing initiatives to be funded entirely by Canada. This latter benefit is the creature of the Settlement and could not be imposed by the Court. Furthermore, the Settlement provides a much more stream-lined claims process than did the Indian Residential Schools settlement. Finally, all of the net settlement proceeds will go to class members, with none reverting to Canada.

58 There is no doubt that there is an inherent arbitrariness to the Distribution Plan. For example, a survivor who resided at a Facility for four years will be paid the same GCP as a person who only resided there for one year. In addition, the compensation chart relating to ACPs brings many individuals with different experiences into a single compensation category. But, a settlement does not have to be perfect and it does not have to treat every survivor equally (**Fraser v. Falconbridge Ltd.**, *[2002] 24 C.P.C. (5th) 396*, *33 C.C.P.B. 60* (Ont. Sup. Ct.) at paragraph 13; **McCarthy v. Canadian Red Cross Society**, *(2007) 158 A.C.W.S. (3d) 12*, *[2007] O.J. No. 2314* (Sup. Ct.), at paragraph 17).

59 Individual class members may have fared better had the case been won and they had their damages assessed individually. But such an outcome was far from certain -- reaching it was fraught with risk, cost and delay. I am satisfied that the class members will be treated equitably, if not equally, and that the terms of the Settlement are fair and reasonable for the class members as a whole.

4. Recommendation and Experience of Counsel

60 The Plaintiffs were represented by three experienced class action law firms, based, respectively, in Newfoundland and Labrador, Ontario and Alberta. The experience of Plaintiffs' counsel, both in this jurisdiction and elsewhere, militates towards approving the Settlement. This is particularly so where a number of the lawyers involved have been associated with the Indian Residential Schools settlement and other cases of alleged institutional abuse.

5. Future Expense and Likely Duration of Litigation

61 We have already speculated as to the time it would take for this litigation to come to a final conclusion. Had the trial proceeded to judgment, Plaintiffs' counsel estimate that they would have devoted additional time with a value of approximately $300,000 to $400,000 and likely would have incurred an additional $50,000 in disbursements, primarily for expert fees and travel. In addition, say Plaintiffs' counsel, an appeal to the Court of Appeal of the common issues trial decision would have required additional professional services with a value of approximately $250,000, plus disbursements of approximately $50,000. An appeal to the Supreme Court of Canada would likely have cost as much again.

6. Recommendation of Neutral Parties, if Any

62 I am advised by Plaintiffs' counsel that the NG, NC and ITK have all endorsed the Settlement Agreement and Distribution Plan. Although these are not neutral parties, representing as they do the broader interests of most of the class members, they are one step removed from the proceeding itself and their perspectives are therefore valuable.

63 The Innu Nation has not provided any statements for or against the Settlement, although they have identified that they have 30 class members. They have been represented by legal counsel, one of whom attended the community meeting in Happy Valley Goose Bay. They have also been actively involved in the commemoration and healing components of the Settlement.

7. Number of Objectors and Nature of Objections

64 Notwithstanding the broad notice to and consultations made with class members about the Settlement, the Distribution Plan and the fees and disbursements being sought by Plaintiffs' counsel, not a single voice was raised in objection, either before or at the approval hearing.

8. Presence of Good Faith and Absence of Collusion

65 Given the public nature of the Defendant and the value of the Settlement for the Plaintiffs and class members, there is no hint of bad faith or collusion.

9. Degree and Nature of Communications by Counsel and Plaintiff with Class Members during the Litigation

66 Notice of the Settlement approval hearing, along with a notice of community meetings was mailed to the 520 individuals listed on Plaintiffs' counsel's client database and later emailed to 88 additional individuals. As new class members were identified, this information was provided to them. As of the hearing date, more than 700 class members have personally received this material.

67 NG widely disseminated information about the Settlement and the community meetings to its membership. NCC shared the Notice of Settlement and notice of community meetings with 26 members of their staff to be distributed to their membership. The Notices were also posted to their Facebook page.

68 CBC Newfoundland & Labrador broadcast a recorded public service announcement with all relevant information for the community meetings to be played in advance of and on each morning of the community meetings.

69 Mr. Cooper attended information meetings in the following communities and noted the attendance numbers:

1) June 11, 2016 -- Ottawa - 5 people attended
2) June 13, 2016 - Nain -- 71 people attended
3) June 13, 2016 - Natuashish -- 3 people attended
4) June 13, 2016 - Hopedale -- 48 people attended
5) June 15, 2016 - Cartwright -- 41 people attended
6) June 15, 2016 - Goose Bay -- 140 people attended
7) June 16, 2016 - Postville -- 16 people attended
8) June 16, 2016 - Makkovik - 11 people attended
9) June 16, 2016 - Rigolet - 23 people attended

10) June 16, 2016 - Black Tickle - 3 people attended.

70 Community meetings were also held in these communities as follows:

1) July 6, 2016 - Edmonton -- 9 people attended
2) July 16, 2016 - St. John's -- 15 people attended
3) July 17, 2016 - Halifax - 15 people attended
4) July 18, 2016 - Moncton - 5 people attended.

71 Almost all attendees identified themselves as class members, but a small percentage were there on behalf of deceased class members or as companions of the class members.

72 At each meeting Mr. Cooper explained the Settlement and Distribution Plan in detail, including the procedure for objecting to the Settlement, the procedure for opting in or opting out of the class, and the fees being sought by Plaintiffs' counsel.

73 Of the anticipated 800 or so eligible class members, Plaintiffs' counsel currently have an active database of 763 class members with whom they are in regular mail and email contact. Mr. Cooper advises that he has personally responded to approximately 75 phone calls and 110 emails from class members since May 10, 2016 answering a variety of questions primarily around eligibility and potential timing of payments.

74 From discussions that Mr. Cooper has had with those who attended community meetings, be believes that those class members not located in Newfoundland and Labrador are likely to receive notification of the Settlement. For example, a class member in Cartwright indicated that his three sisters live in the United States and that they were regularly in contact with him. A further example is an email exchange Mr. Cooper had with a class member in the United Kingdom. Her sibling told her of the Settlement. Similarly, in Hopedale, a class member confirmed that she had a sister in the United States who was receiving the Settlement material.

10. Information Conveying to the Court the Dynamics of, and the Positions Taken by the Parties, During the Negotiation

75 In this case I need not rely solely upon the parties describing to me the dynamics of, and the positions taken by the parties during, the negotiations. Beginning in December of 2013 I was assigned as trial judge and managed the proceeding as it approached trial. I received extensive materials maintained by the previous case management judges and reviewed all of the decisions rendered by them and the two decisions of the Court of Appeal. From September 28 of last year I have presided over the trial.

76 From my review of the materials that predate my involvement through my personal participation in the proceeding, I have seen each side resist almost every move by the other in an adversarial manner. I was aware that the parties had attempted to reach a settlement without success on several occasions, notwithstanding the assistance of a retired justice of this Court.

77 Mildly put, this was a hard fought case with no ground conceded by either side. That is until sometime in early 2016 when Canada received instructions to seek an out of court resolution.

11. The Risk of Not Unconditionally Approving the Settlement

78 Although, as stated, I have a sense of the dynamics between the parties, I was not present in the room when the Settlement was negotiated. I do not know what points were conceded and what principles were held on to dearly. Most importantly, I do not know at what point a good settlement could be lost in a search for the better. I accept, however, that it would be imprudent for the Court to weigh into the process to try to impose or broker a

different deal.

Honorarium Payments to the Representative Plaintiffs and the Survivor Witnesses are Appropriate

79 On an application for settlement approval, I have jurisdiction to grant a request for honorarium payments to the representative Plaintiffs, paid out of the settlement fund (**Wilson v. Servier Canada Inc.**, *[2005] 252 D.L.R. (4th) 742*, *137 A.C.W.S. (3d) 1104* (Ont. Sup. Ct.) at paragraph 95 (S.C.J.); **Smith Estate v. National Money Mart Co.**, *2011 ONCA 233* at paragraphs 133-136). Class counsel seeks approval of honorarium payments of $10,000 for each of the representative Plaintiffs and $1000.00 to each of the non-Plaintiff survivors who testified at the trial. The representative Plaintiffs' accomplishments in this case far exceed their respective individual interests and payment is appropriate to recognize those accomplishments and provide some indemnity for their time and effort devoted to prosecuting the actions. So, too, is a largely symbolic payment appropriate for the other survivors who had the courage and fortitude to relive in Court the abuses they suffered in the Facilities.

80 Although honorarium payments are infrequently made, the factors to be considered include a plaintiffs' involvement in the "initiation of the litigation and retainer of counsel", "significant personal hardship or inconvenience in connection with the prosecution of the litigation", and "participation at various stages in the litigation, including discovery, settlement negotiations and trial" (**Robinson v. Rochester Financial Ltd.**, *2012 ONSC 911* at paragraphs 26-43). It is in the last two respects that honoraria are also appropriate for the witnesses who are not Plaintiffs.

81 Representative Plaintiffs and other survivor witnesses in systemic abuse cases are exposed in a way most other class members are not: their very personal experiences became matters of public record. Each of them was required to: describe the abuse they alleged in the statement of claim; swear affidavits in support of certification; endure cross-examinations on those affidavits; participate in examinations for discovery; participate in preparations with counsel for all such attendances; and, finally, travel to St. John's and testify at the common issues trial. This is one of those special cases where their contribution has gone well beyond the call of duty, warranting separate recognition (**Garland v. Enbridge Gas Distribution Inc.**, *[2006] 153 A.C.W.S. (3d) 785*, *56 C.P.C. (6th) 357* (Ont. Sup. Ct.)).

82 In **Johnston v. Sheila Morrison Schools**, *2013 ONSC 1528*, at paragraph 43, Justice Perell approved $5,000.00 honorarium payments to the two representative plaintiffs in an institutional abuse action, reasoning that "the honorarium is not an award but a recognition that the representative plaintiffs meaningfully contributed to the class members' pursuit of access to justice". Similarly, in **Dolmage v. Ontario,** *2013 ONSC 6686*, and **McKillop and Bechard v. Ontario**, *2014 ONSC 1282*, the settlement approval judges approved honorarium payments of $15,000.00 and $5,000.00, respectively, to the representative plaintiffs.

83 It is noteworthy that none of the above three cases went to trial and each of them was conclusively resolved in about five years. While those plaintiffs were examined for discovery, they did not confront the emotionally gruelling experience of giving *viva voce* testimony and being cross-examined about exceedingly personal details at a public trial.

84 The Plaintiffs and other witnesses have provided access to justice for hundreds of vulnerable individuals in a historic case. The largely symbolic honoraria are appropriate small tokens of recognition for that effort and are approved.

Disposition of the Application for Approval of the Settlement

85 On the first day of trial, a year to the day before I approved the Settlement, Plaintiffs' counsel came into the historic Courtroom #1 in downtown St. John's seeking $50 million as compensation for the losses suffered by their Inuit and Innu clients. Both sides are to be congratulated on settling the litigation for exactly that amount. It is admitted by Plaintiffs' counsel that they likely could not have fared better had they completed the trial and been totally successful there and on appeal. But the Plaintiffs and Canada have achieved even more -- they have also

chosen to implement, at Canada's cost, a process of commemoration and healing that would have been beyond the jurisdiction of the Court to award. These meaningful measures of commemoration and healing, it is hoped, will also be important steps towards reconciliation.

86 The Settlement will take some time to fully implement. Because the Court remains interested in the matter until it is finally concluded, I have ordered that Plaintiffs' counsel report to the Court as they deem appropriate, but not less than twice a year and again when the Distribution Plan has been completed.

87 On the basis of the foregoing, therefore, I am pleased to approve the Settlement because it is fair and reasonable, was made in good faith, and is in the best interests of the class as a whole.

FEES AND DISBURSEMENTS OF PLAINTIFFS' COUNSEL

The Legal Test for Retainer Agreement and Fee Approval

88 In determining whether to approve the Retainer Agreements and the corollary legal fees, I must determine whether those fees are fair and reasonable in all the circumstances. An example of the factors to be taken into account is set out in **Smith Estate v. National Money Mart Co.** at paragraph 80, as follows:

1) the legal and factual complexities of the action;
2) the risks undertaken, including that the action might not be certified;
3) the degree of responsibility assumed by class counsel;
4) the monetary value of the matters at issue;
5) skill and competence demonstrated by class counsel;
6) the results achieved;
7) ability of the class to pay and the class expectations of fees;
8) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation.

89 Each case will turn on its facts and the factors listed above from **Smith** provide a guide only. A key factor will be at what point in the course of the litigation the proceeding settles - whether before or after certification, before or after discoveries, or before or after trial. Depending on the circumstances, therefore, a court may look at different or other factors. There will be occasions when some of the factors are self-evident -- for example, in this case the monetary value of the matters at issue and the results achieved are obvious from the fact that the case opened with Plaintiffs' counsel seeking $50 million on behalf of class members and it closed with them obtaining $50 million for the class members. I have, therefore, organized my analysis of whether the fees sought here are fair and reasonable in a slightly different manner than in **Smith**, but with the same focus on the risk, skill, competence and dedication assumed by Plaintiffs' counsel in the advancement of the class actions.

The Retainer Agreements

90 Pursuant to section 38(1) of the *Act*, an agreement respecting fees and disbursements between a solicitor and representative plaintiff must be in writing and, by section 38(2), must be approved by the Court. The Retainer Agreements have been filed with the Court, along with the internal consortium agreement among Plaintiffs' counsel outlining how the fees shall be split among them.

91 The relevant portions of the Retainer Agreements provide as follows:

8. Legal fees shall be paid only in the event the Class Action is successful in obtaining judgment on the common issues in favour of some or all Class Members or in obtaining a settlement that benefits one

or more Class Members (defined herein as "Success"). The legal fees shall be paid by a lump sum payment out of the proceeds of such judgment or settlement under the Act.

...

10. In the event of Success, The Firm shall be paid an amount equal to any disbursements not already paid to them by the Defendants as costs, plus applicable taxes, plus interest thereon in accordance with subsections 38(4) and (5) of the Act, plus the greater of:

    (a) The usual class action hourly rates of the legal professionals (e.g. lawyers, law clerks or students) who perform work on the case multiplied by the number of hours worked by each such professional (the "Base Fee") increased by a multiplier of four (4), less the fee portion of any recovered costs already paid to the Firm, plus applicable taxes; or

    (b) If the Class Action is settled before the commencement of the examinations for discovery, twenty-five percent (25%) of the recovery less the fee portion of any costs already paid to the Firm, plus applicable taxes, or

    (c) If the Class Action is settled after completion of the oral portion of the examinations for discovery excluding consideration of refusals and undertakings, thirty-percent (30%) of the recovery less the fee portion of any costs already paid to the Firm, plus applicable taxes; or

    (d) If the action is settled after the commencement of trial of the Common Issues or determined by judgment after the trial, thirty-tree and one third percent (33 1/3 %) of the recovery, including any amounts awarded under section 28 or 29 of the Act, excluding any amount separately identified or specified as costs and/or disbursements, less the fee portion of any costs already paid to the Firm, plus applicable taxes. [emphasis added]

    ...

16. From any recovery, the Firm shall be paid for all the disbursements they reasonably incurred in relation to the Class Action. Recoverable disbursements shall include all amounts reasonably incurred in connection with the Class Action, the trial of the Common Issues, the settlement of the Class Action, the assessment of and recovery of damages for the Class Members, any appeals relating to or arising out of the Class Action, including but not limited to expenses incurred for investigation, court fees, duplication, travel, lodging, long distance phone calls, the cost of a toll-free hotline, specialized computer equipment and software, computer consultants, couriers, postage, facsimile, expert witnesses and agents retained by or at the direction of The Firm.

17. If, during the course of the Class Action, the court awards costs to the Client on a motion/application or other interlocutory proceeding and such costs are paid by Canada, the Firm may apply such costs against its accumulated fees or disbursements incurred to the date of payment.

18. The Client acknowledges that time spent by the Firm prior to the date of execution of this agreement is to be included in the Base Fee.

...

21. The Client acknowledges that, in view of the nature of the Class Action, the Firm may require the assistance of additional lawyers or law firms to work on the common issues and class wide issues in the contemplated Class Action. The Client hereby authorizes the Firm to assemble and maintain a consortium of lawyers or law firms to conduct the Class Action. The Firm shall have overall responsibility for the conduct of the Class Action. The Firm may change the composition of the consortium and assign tasks among consortium members, as they consider advisable from time to time. The fees for the consortium shall be treated as part of the Firm's fees and shall be determined as set out above."

92 Pursuant to the terms of the Retainer Agreements, Plaintiffs' counsel seek approval of fees of $16,665,000.00, which amounts to a contingency fee percentage of just slightly less than the 33 1/3 % provided for.

93 I am satisfied that the terms of the Retainer Agreements are consistent with other retainer agreements that have been approved in class actions. Retainer agreements in class actions usually provide for a contingency fee in the range of one-fifth to one-third of recovery.

94 Although a fee agreement reached between a representative plaintiff and class counsel should not be blindly accepted by the Court, it also should not be easily rejected or ignored. It has generally been recognized that the fee agreement entered into between the client and counsel should be the starting point of the court's "fair and reasonable" analysis:

> This is not to fix a fee either by a reconsideration of all the evidence and the application of judgment or arbitrarily, however one characterizes such a process, but rather to decide whether the agreement operates reasonably in the context... With all this in mind, the court must then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession? In other words, I think the amount payable under the contract is the starting point for the application of the court's judgment.
>
> [**Commonwealth Investors Syndicate Ltd. v. Laxton**, *[1994] B.C.J. No. 1690* (B.C.C.A.) at para. 47]

95 Contingency fee agreements based upon a percentage of recovery are common in litigation, especially for personal injuries and in class actions. Another approach is to apply a multiplier to the normal fee based upon the hours expended by class counsel. In my view, the "multiplier" approach is less satisfactory because of its reliance on a statement by counsel of the time expended which is then multiplied by hourly rates that are also set by counsel. There is no real way to test the former and the latter may or may not reflect the going rates for similarly experienced lawyers in the jurisdiction where the class action is brought. This explains why courts have found that the "contingency fee approach to class counsel compensation is much more principled than the 'multiplier' approach and should be the preferred method for class counsel compensation" (**McIntyre (Litigation guardian of)**, at paragraph 42).

96 Personal injury litigation conducted across Canada has long allowed counsel to work on a contingent basis with counsel receiving a premium on fees based on contingency agreements upwards to 33%. In such litigation, awarding counsel a premium on her fees in exchange for a contingency agreement is generally considered to reflect a fair allocation of risk and reward as between lawyer and client. As Justice Strathy (as he then was) determined in **Baker (Estate) v. Sony BMG Music (Canada) Inc.**, *2011 ONSC 7105*, at paragraph 64:

> There should be nothing shocking about a fee in this range...It serves as an inducement to the lawyer to maximize the recovery for the client and it is regarded as fair to the client because it is based upon the 'no cure, no pay' principle. The profession and the public have for years recognized that the system works and that it is fair. It allows people with injury claims of all kinds to obtain access to justice without risking their life's savings.

97 In **Cannon v. Funds for Canada Foundation**, *2013 ONSC 7686* at paragraphs 3 and 10, Belobaba, J. approved a fee award of 33% of the settlement amount, declaring such a percentage "presumptively valid" pursuant to the terms of the retainer agreement. In **Cassano v. Toronto-Dominion Bank**, (2009), 178 A.C.W.S. (3d) 1015, *79 C.P.C. (6th) 110*, (Ont. Sup. Ct.) at paragraph 63, Justice Cullity approved the terms of the contingency fee retainer finding:

> They had accepted their retainers on the basis of a fee calculation that would vary directly according to the degree of success that was achieved. The percentage of recovery to be applied was not unreasonable, the risks were considerable, the degree of success was substantial.

98 In Justice Cullity's view, contingency fee agreements ought to be *prima facie* accepted as appropriate and reasonable, unless there was something "in the manner in which the proceeding was conducted to justify a refusal to approve the fee determined in accordance with the terms of which the fees were accepted".

99 Justice Strathy (as he then was) also considered the propriety of "one-third" contingency fees in **Abdulrahim v. Air France**, *2011 ONSC 512* and determined at paragraph 13 that:

> A contingency fee of one-third is standard in class action litigation and has been common place in personal injury litigation in this province for many years. It has come to be regarded by lawyers, clients and the courts as a fair arrangement between lawyers and their clients, taking into account the risks and rewards of such litigation. Fees have been awarded based on such a percentage in a number of class action cases.

100 Notwithstanding the foregoing, I may still examine the reasonableness of the resulting percentage based fee against the actual time incurred and using prevailing multipliers as a crosscheck (**Rideout v. Health Labrador Corp.**, *2007 NLTD 150*, at paragraphs 167 and 168). That is, percentage-based fees and multiplier-based fees may be assessed as against one another, depending on which approach is being used in any particular case (**Gagne v. Silcorp Ltd.**, *(1998), 167 D.L.R. (4th) 325*, *27 C.P.C. (4th) 114* (Ont. C.A.), at paragraph 14).

101 In this case, Plaintiffs' counsel advises that they devoted 19,930 hours to this litigation. A fee of $16,665,000 represents a multiplier of 1.81 based upon the hourly rates cited by them. A multiplier of 1.81 is at the low end of class action jurisprudence given the risks, substantive legal hurdles and stage of proceeding at the time of settlement. Plaintiffs' counsel provided a chart that demonstrated court approved multipliers from 1.3 to more than 5, with the majority at greater than 2. Notwithstanding the inherent weaknesses of using lawyers' docket time and assigned rates as a basis for awarding a fee, the exercise in this case does assist me in determining that the fees sought here are reasonable in all the circumstances.

102 I am satisfied that there is no reason justifying disregard of the terms of the Retainer Agreements in these actions because Plaintiffs' counsel doggedly prosecuted these risky and challenging actions over many years and ultimately achieved substantial success. Let us look more closely at the circumstances of the litigation.

Specific Legal Risks Assumed by Class Counsel in Prosecuting the Action

103 This proceeding starkly reveals both the risk in, and the need for, class actions. It proved to be the first common issues trial of its kind in Canada. These class actions represent the quintessential access to justice case, where the consideration of risk to class counsel has been a guiding consideration in my assessment of the fairness and reasonableness of the fees sought:

> Another fundamental objective [of class proceedings] is to provide enhanced access to justice to those with claims that would not otherwise be brought because to do so as individual proceedings would be prohibitively uneconomic or inefficient. The provision of contingency fees ... is an important means to achieve this objective. [Payment of a contingency] fee if the class action succeeds gives the lawyer the necessary economic incentive to take the case in the first places and to do it well. However, if the Act is to fulfill its promise, that opportunity must not be a false hope.
>
> [**Gagne** at paragraph 14]

104 The quantum of a class counsel fee is "not only to reward counsel for meritorious efforts, but it should also encourage counsel to take on difficult and risky class action litigation" (**Abdulrahim**, at paragraph 9). These actions were on the far end of the continuum of difficult and risky litigation; Plaintiffs' counsel assumed substantial risk in putting an extraordinary amount of time into these matters over nine years, on a contingent basis, with highly uncertain results throughout.

105 I accept the facts as sworn to by Mr. Cooper in his affidavit in support of approval of the fees and disbursements of Plaintiffs' counsel. He identifies the unique factor present in this case which is lacking in almost all other class proceedings: for decades, the claims of these class members languished with no counsel wanting to take up their cause. This was despite the fact that nationally, hundreds of lawyers on the plaintiffs' side were

involved for decades in residential school litigation, national negotiations and, ultimately, a pan-Canadian settlement (the "IRSSA") in 2005. But, as stated by Mr. Cooper, for these individuals in Newfoundland and Labrador:

1) There was no clamour by litigation counsel to take on the case. The technical evidentiary issues, the uncertainty of liability, the defences available, the time required to advance the case, the prospect that the claims might ultimately have to be assessed on an individual basis, and the financial exposure of class counsel would have made this proceeding less than attractive to counsel.
2) The prevailing legal advice in 2006 was to seek to have these claims appended to IRSSA failing which they were unlikely to be resolved in favour of the survivors. Once Plaintiffs' counsel commenced these actions, inclusion into IRSSA had already been denied because Canada had refused to add the Facilities as "Eligible Indian Residential Schools" to IRSSA.
3) Nevertheless, "it was in the face of this advice that I [Mr. Cooper] and ultimately my co-counsel decided to advance the Claim. In essence, the Claim had been considered by competent senior counsel under the aegis of the Nunatsiavut Government and was rejected. This gives some insight into the risk that was associated with the advancement of the class action as known by Class Counsel in 2007."

106 This is a compelling starting point for an assessment of the degree of risk, skill, competence and dedication assumed by Plaintiffs' counsel in the advancement of this proceeding.

107 I discussed in detail above the legal risks involved in these claims in the context of why it was appropriate to approve the Settlement. Those same risks -- the difficulties of proving historic claims, the challenges of establishing a fiduciary duty and its breach, the risk of not obtaining an award of aggregate damages, and others -- also apply to my consideration of the reasonableness of the fees and disbursements sought by counsel. These were neglected cases that were difficult to carry over uncharted legal terrain. Plaintiffs' counsel struggled for nine long years, expended more than a million of their own dollars in disbursements, suffered innumerable set-backs and delays, but persevered to achieve a laudable resolution for the class members. Failing was a real possibility. Had they failed, Plaintiffs' counsel would not only have been paid nothing for their nine years of work but would have been left holding the disbursement bag as well.

Expectations of the Class, Ability to Pay and the Importance of the Issues

108 The representative Plaintiffs in each of the five actions executed the Retainer Agreements. They have identical provisions with respect to the fees of Plaintiffs' counsel, as reproduced above. Each of the representative Plaintiffs has also sworn in an affidavit that they:

1) were aware of the percentage of compensation Plaintiffs' counsel would seek if successful;
2) knew that Plaintiffs' counsel had spent hundreds of thousands of dollars in fees and disbursements prosecuting the case without promise of payment unless successful;
3) believe the fees sought are fair in all the circumstances, especially given the risks in the proceeding and the length of time the actions took to conclude; and
4) believe that had Plaintiffs' counsel not started these actions, these class members would have never received the recognition, compensation, commemoration and healing that the Settlement provides.

109 As described above, pursuant to my order of May 10, 2016, fourteen community meetings were held in June 2016 to communicate the terms of the proposed settlement and the dates of the approval hearing to all interested persons. In each location Plaintiffs' counsel also advised all in attendance that they would be seeking one-third of

the Compensation Fund for legal fees. As sworn to by Mr. Cooper in his affidavit:

> Despite noting this request [for fees] at every community meeting and in every notice published or sent, no Class Members has [*sic*] indicated to me [Mr. Cooper] any concern about such proposed fees, disbursements or taxes. In fact, some in attendance have openly stated their view of the fairness of the fees sought.

110 The class members are some of the most disadvantaged and vulnerable people in society, most of whom attended the Facilities at very young ages. These class members have lived for decades with their experiences without compensation or acknowledgement of the wrongs done to them while at the Facilities, many of which involve serious allegations of harm.

111 Historical cases involving vulnerable persons who have experienced serious and lasting harms are important to society. For the class members the issues are profound and immensely personal. These class actions provided a means for them to bring their claims before the Court and to create public awareness of the history of, and their experiences at, the Facilities (see **McIntyre (Litigation guardian of)** at paragraph 4).

112 These class members could not have financially supported this proceeding. Many live in poverty or close to it, many in remote communities, and many are unemployed or out of the labour force. Without a class proceeding, these individuals would have had no prospect of accessing the justice system for redress. This is self-evident from the fact that not one individual proceeding exists in the court system in Newfoundland and Labrador on behalf of a former resident of any of these Facilities.

Time and Legal Fees Incurred by Class Counsel

113 These actions were large, complex and vigorously defended. As we saw above, Plaintiffs' counsel devoted a significant amount of lawyer, student and clerk time to prosecuting these actions efficiently and effectively. To this point of the proceeding Plaintiffs' counsel report that they have devoted approximately 20,000 hours of lawyer, student and clerk time.

114 Although docketed time has been described as irrelevant by one judge (see the comments by Belobaba, J. in **Cannon** at paragraphs 4 and 5) it can, like the multiplier, provide a check against which to assess the reasonableness of the contingency fee charged. This is true even if one accepts, as I do, the presumptive validity of a properly understood retainer agreement that leads to a percentage based contingency fee that is not excessive in the circumstances. For example, a substantial fee would be reasonable had Plaintiffs' counsel achieved a settlement of $50 million by expending just "one imaginative, brilliant hour". But I would be unlikely to approve more than $16 million in compensation in those circumstances. Similarly, had the Plaintiffs' been awarded the $90 million sought by way of disgorgement, would fees of almost $30 million be fair and reasonable? These considerations are particularly apt where the fees are being paid out of a comprehensive settlement fund with no reversion to the defendant such that the more that is paid to the lawyers the less that will be paid to the class members.

115 I note that one way to mitigate against a contingency fee becoming excessive is to have it graduated based upon the point in the litigation process that settlement is achieved and the amount of the settlement. The factor for calculating fees could be stratified upwards based upon progressive litigation milestones (certification, discovery, trial, etc.) ***and*** also downwards based upon the settlement amount (for example, W% on the first $X of settlement amount, Y% (where Y is less than W) on the next $Z, and so on). That the Retainer Agreements here provide for the former but not the latter does not change my determination that they are fair and reasonable in the circumstances of the settlement, however. The foregoing comment is provided for general guidance as to one factor that the Court may consider when assessing reasonableness.

116 Perhaps in cases where settlement is achieved prior to or just following certification, the hours expended by counsel are less helpful in assessing the reasonableness of the fees charged. In this case, however, where the matter has been vigorously prosecuted and defended for nine years, the hours confirm the efforts of Plaintiffs'

counsel and assist me in concluding that the Retainer Agreements are reasonable.

Estimate of Settlement Implementation Time

117 This proceeding is not over. It simply moves to a new, and final, phase. Implementation will require additional time and effort by Plaintiffs' counsel. They will have to devote significant hours to the implementation of the Settlement to:

1) review, revise and approve notice materials;
2) monitor notice to ensure it has been disseminated in accordance with the approved notice plan;
3) communicate with class members who contact Plaintiffs' counsel with questions;
4) assist class members with claim forms and commissioning affidavits, if necessary;
5) communicate with third parties such as caregivers, family members, community organizations, and others who contact Plaintiffs' counsel about the claims process;
6) communicate with the representative Plaintiffs;
7) monitor settlement implementation to ensure the processes are being followed;
8) address any questions or issues raised by the claims administrator in the administration of claims;
9) review updates from the claims administrator;
10) prepare and file semi-annual reports to the Court;
11) review final distribution of compensation; and
12) attend to any other matters that may be raised during settlement implementation that require Plaintiffs' counsel's attention.

118 I am advised by Plaintiffs' counsel that in **Slark (Litigation guardian of) v. Ontario**, *2013 ONSC 6686* and **McKillop**, which involved claims processes similar to that proposed in the Settlement, class counsel devoted over 2,500 hours of lawyer, student and clerk time towards the administration and implementation of the settlements agreements, with a value of over $820,000 (not including taxes), after the hearing of the settlement approval motions. One would expect, however, there to be efficiencies in implementation of the Settlement based on Plaintiffs' counsel's work and experience in those cases. In addition, the class size in this proceeding is approximately one quarter of that in those classes. As a result, Plaintiffs' counsel estimates that they will devote additional time with a value of approximately $300,000 to $400,000 during the implementation phase of the Settlement.

119 In a case of this magnitude, therefore, with a settlement of $50 million that must be administered for some time following approval, I would normally be inclined to have a portion of the fees held back until the Distribution Plan has been completed. In this case, however, given the many years that have already passed, the significant contribution of professional time and disbursements by Plaintiffs' counsel, and most importantly, their demonstrated commitment to the interests of the class members, I am satisfied that no hold back of the legal fees is required.

Conclusion on Retainer Agreements Approval

120 Based upon the foregoing I am satisfied that the Retainer Agreements are fair and reasonable and so they are approved. I also approve payment out of the Compensation Fund to Plaintiffs' counsel fees in the amount of $16,665,000 (together with HST of $2,176,259.92), and reimbursement of disbursements of $1,397,828.10 (including applicable taxes).

DISPOSITION

121 The Settlement brings to an end this lengthy, novel and historic legal battle between members of this Province's indigenous communities and Canada. The compensation being made available to the class members is fair, certain and immediate. The healing process is furthered by commemoration and healing initiatives that will be paid for outside of the monies paid to class members. Although there may be other elements required to effect reconciliation, these are important steps. From the perspective of the Court, access to justice has been achieved, despite the challenges faced by the Plaintiffs and the passage of so many years.

122 Through the courage and strength of the indigenous persons who carried the case and the purposeful and tenacious efforts of Plaintiffs' counsel, the $50 million sought on behalf of the class members on the first day of trial became a reality exactly one year later. The settlement is approved, as are the Retainer Agreements and the fees and disbursements sought by Plaintiffs' counsel. The Plaintiffs are given leave to discontinue the actions.

R.P. STACK J.

---

1 The Nunatsiavut Government is an Inuit regional government. Although Nunatsiavut remains part of Newfoundland and Labrador, the NG has authority over many matters of central governance, including health, education, culture, language, justice, and community matters. NG has a membership of approximately 9000, most of whom are located in Labrador. The NG is one of the constituent organizations of the Inuit Tapiriit Kanatami ("ITK"), the national organization representing all Inuit rights-holding land claims organizations, which represents Canada's 60,000 Inuit, and acts to protect and advance the rights and interests of Inuit in Canada. The Innu Nation is the organization that formally represents the Innu of Labrador, approximately 2200 persons in total, most of whom live in the two Innu communities of Sheshatshiu and Natuashish. The NunatuKavut Community Council is the representative governing body for approximately 6,000 Inuit of south and central Labrador, collectively known as the Southern Inuit of NunatuKavut.

End of Document

CITATION: *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105
COURT FILE NO.: CV-080036065100 CP
DATE: 20111130

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: **The Estate of Chesney Henry "Chet" Baker et al.**, Plaintiffs/Moving Parties

AND:

Sony BMG Music (Canada) Inc. et al., Defendants/Respondents

BEFORE: G.R. Strathy J.

COUNSEL: *Paul Bates and Jonathan Foreman*, for the Plaintiffs/Moving Parties

Danielle Royal for the Defendant/Respondent Universal Music Canada Inc.

Timothy Pinos and Casey M. Chisick, for the Defendants/Respondents CMRRA and SODRAC

HEARD: November 22, 2011

2011 ONSC 7105 (CanLII)

ENDORSEMENT (CLASS COUNSEL FEE APPROVAL)

I get along without you very well,
of course I do.
Except when soft rains fall
and drip from leaves, that I recall
the thrill of being sheltered in your arms.
Of course I do,
but I get along without you very well.

Chet Baker, *I Get Along Without You Very Well (Except Sometimes)*

[1] Chet Baker was an American trumpeter and jazz singer. He was born in 1929 and died in Amsterdam in 1988 in tragic circumstances, after a troubled and turbulent life. He left behind an impressive, if occasionally melancholic, legacy of music.

[2] Unfortunately, Mr. Baker and his heirs, like many musicians and their families, did not receive full compensation for the use of his works by others. This was the result of a royalty and licensing system in Canada that permitted third parties, such as the defendants, Sony BMG Music (Canada) Inc. ("Sony"), EMI Music Canada Inc. ("EMI"), Universal Music Canada Inc. ("Universal") and Warner Music Canada Co. ("Warner") (collectively, the "Record Labels"), to reproduce and distribute copyrighted musical works owned or controlled by musicians or their rights holders, without having a licence to do so or without paying the royalties due to the rights holders.

[3] The issue was well known by the defendants Canadian Musical Reproduction Rights Agency Ltd. ("CMRRA") and Society for Reproduction Rights of Authors, Composers and Publisher (SODRAC) Inc. ("SODRAC"), (referred to as the "Collectives"). They had been aware of the problem for years and had apparently been unwilling or unable to resolve it. CMRRA represents the reproduction rights of the vast majority of music publishers whose repertoires are in use in Canada. SODRAC is a copyright collective that administers the reproduction rights in musical works and collects royalties on behalf of its clients. Due to a combination of factors, including the Collectives' lack of resources and the absence of motivation on the part of the Record Labels, nothing significant was done. The problem simply festered and grew worse – until this proceeding was commenced.

[4] This class action was brought in 2008 on behalf of artists and rights holders who had not received full compensation for the use of their works. It was initially commenced by Mr. Baker's widow, Carol Baker. Mrs. Baker saw it through almost to completion before she was required to withdraw as a result of a dispute concerning the administration of her husband's estate. Craig Northey, a Canadian singer/songwriter, agreed to step into the role of representative plaintiff to complete the work commenced by Mrs. Baker, ultimately finalizing a settlement with the defendants and establishing a structure not only to resolve past injustices, but to establish a mechanism to ensure that they did not recur.

[5] On May 30, 2011, I approved the settlement of this class proceeding. It will result in the payment of $46,688,805.91 into a settlement trust for the benefit of the class. In addition, the Record Labels will pay $600,000.00 as a contribution to the costs incurred by the Class.

[6] Class Counsel subsequently moved for approval of a request for payment of fees, taxes and disbursements in the amount of $7,647,583.85. The fee portion is $6,950,000.00, taxes are $610,805.19 and disbursements are $86,778.66. After the deduction of the $600,000.00 paid by the Record Labels, the sum of $7,047,583.85 would be paid out of the settlement fund. The fee portion of the account of Class Counsel represents a payment of approximately 15% of the settlement fund.

[7] On October 27, 2011, when this motion came on for hearing, some of the objecting parties requested an adjournment to consider the filing of additional material. As a condition of the adjournment, I approved an interim payment of $2,200,000.00 plus taxes and disbursements. All objectors acknowledged that Class Counsel was entitled to a fee of at least that amount.

[8] Class Counsel also ask for permission to pay an honorarium of $3,000, to each of Mr. Northey and Mrs. Baker.

Background

[9] This action was brought under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*C.P.A.*") on behalf of owners of copyright in certain musical works in relation to a systemic practice by the Record Labels whereby musical works were exploited without securing the necessary licences and/or without payment of the applicable mechanical royalties. The representative plaintiffs alleged that these parties were liable for infringing copyright in musical works, by reproducing those works in sound recordings released or distributed in physical

2011 ONSC 7105 (CanLII)

formats in Canada without securing licences from the owners of the copyright to reproduce those works and/or by failing to pay the required royalties. The claim made further allegations against the Collectives in their capacity as intermediaries between copyright owners and the Record Labels.

[10] A brief description of the problem will be sufficient for the purposes of this motion.

[11] Prior to 1988, the *Copyright Act,* R.S.C. 1985, c. C-42 contained a compulsory statutory licence for mechanical reproduction of musical works, which set royalties at two cents per playing surface. Because the licence was mandatory, and the royalty was fixed, the practice developed that record companies would release new records without applying for a licence in advance. This was an efficient method of operation, but it meant that the owner of the copyright in the work had to be located and paid. That was often a problem. The Record Labels began to develop what was referred to as the "Pending Lists", to record their use of musical works for which the owners of the copyright had not been paid.

[12] The statutory licence was repealed in 1988. This meant that it was now necessary to negotiate a licence in the case of each musical work. It fell to CMRRA to negotiate the terms of the licences. Unfortunately, in practice, there were serious problems, largely administrative.

[13] The practice of the record companies of "breach copyright now, pay later" continued under the new copyright regime, except that in some cases the "pay later" was not happening. Due to ongoing difficulties in identifying owners of copyright, and other administrative problems, the size and value of the items on the Pending Lists continued to grow. By the time this action was commenced, the list contained more than 250,000 items, with an estimated value in excess of $50,000,000.

[14] CMRRA had attempted, over the years, to address the issue of the Pending Lists. Although some progress was made from time to time, it is my impression that both CMRRA and the Record Labels had more pressing current issues to deal with and there were neither the resources, nor the will, to treat the Pending Lists as a priority.

This Action

[15] This action was commenced on the instructions of Carol Baker in the name of the Estate of Chesney Henry "Chet" Baker Junior and Chet Baker Enterprises LLC, by Statement of Claim issued on August 14, 2008. It was brought against the Record Labels and the Collectives.

[16] On September 3, 2008, a Fresh as Amended Statement of Claim was issued and on October 6, 2008, an Amended Fresh as Amended Statement of Claim was filed. Class Counsel filed a Certification Motion Record on January 26, 2009.

[17] The action was, in a sense, welcomed by the Collectives because it got the urgent attention of the Record Labels and it provided a potential framework for the resolution of the Pending Lists problem. On October 2, 2008, Class Counsel concluded a cooperation and settlement agreement with the Collectives. On March 31, 2009, Class Counsel moved for approval of the settlement agreement with the Collectives.

2011 ONSC 7105 (CanLII)

[18] The decision by Class Counsel to sue the Collectives and to negotiate a settlement agreement with them provided to be a shrewd tactical move. It isolated the Record Labels and it took advantage of the expertise and resources of the Collectives in prosecuting the action against the Record Labels. There is no question that the assistance of the Collectives, and their Lawyers, has contributed to the successful resolution of this matter and the establishment of a workable system going forward.

[19] The plaintiffs served a motion record for certification in January, 2009.

[20] I was appointed to case manage this proceeding in the fall of 2009. I have presided over about ten in-person case conferences and an equal number of teleconferences with counsel. There have also been several court appearances. I will describe my observations concerning these attendances, and of the dynamics of the litigation, in due course.

[21] Settlement discussions between the parties began in earnest in March of 2010. The parties attended before Justice Colin L. Campbell, acting as a mediator, over several dates. These discussions continued on a vigorous and adversarial basis until settlement agreements were reached with each of the Record Labels.

[22] Settlement terms were reached first with Sony, followed by Warner and then EMI in close succession in June 2010. Settlement documentation was executed with those labels throughout July and August of 2010. Minor amendments were made to the Sony settlement agreement and a final version was signed in December of 2010.

[23] Negotiations with Universal did not initially bear fruit. A revised schedule for the certification motion against Universal was established through a series of case management conferences. Class Counsel, the Collectives, and Universal conducted cross-examinations of all witnesses who had sworn affidavits in connection with the certification motion, including Mrs. Baker, who was examined in the U.K. This examination involved no small expense and confirms my impression that Universal was prepared to take a serious run at contesting certification.

[24] Settlement discussions continued with Universal concurrently with the certification schedule. Further mediation sessions were held with Justice Campbell. In or about December, 2010, settlement terms were finally reached with Universal and settlement documentation was executed shortly thereafter.

[25] In January of 2011, the Collectives advised that they had identified certain "held royalties" which had been paid to the Collectives by the Record Labels but could not be distributed. They stated that they wished to contribute these to the settlement fund. A second amended settlement agreement was therefore executed with the Collectives on January 31, 2011.

[26] On or about February 9, 2011, EMI advised that it would be submitting video royalty amounts into the settlement fund as contemplated by its settlement agreement. As a result, the parties agreed to a revised class definition reflecting EMI's participation in the video aspect of the settlement.

2011 ONSC 7105 (CanLII)

[27] In February of 2011, the Record Labels advised Class Counsel and the Collectives of their position that a portion of the "held royalties" which had been paid to the Collectives by the Record Labels, and were proposed to be paid into the settlement trust, should be credited to the payments to be made by the Record Labels into the settlement trust. This reflects the ongoing adversarial nature of the proceedings.

[28] All parties engaged in negotiations aimed at ascertaining the nature and veracity of the Record Labels' claims to a credit in respect of those held royalties. Those negotiations culminated in an agreement whereby the Record Labels have been provided with a credit of $1.25 million against payments to be made by them into the settlement trust.

[29] Prior to the execution of the agreement to provide a credit to the Record Labels in respect of "held royalties", correspondence was sent to the Court from Paul Baker, Chet Baker's son, challenging the authority of Carol Baker to act on behalf of the estate of Chet Baker in commencing this action and in pursuing the settlement.

[30] Carol Baker and Class Counsel disagreed with the objections made by Paul Baker. Notwithstanding that view, the Record Labels continued to have concerns about the ability of Carol Baker and Chet Baker Enterprises LLC to act as Representative Plaintiffs. It was ultimately agreed by all parties, and approved by me, that it would be most expeditious, efficient and desirable for Mrs. Baker and Chet Baker Enterprises LLC to withdraw as the proposed representative plaintiffs in favour of an appropriate substitute.

[31] Class Counsel were then retained by Craig Northey, an accomplished Canadian songwriter and musician, who has a claim for unpaid mechanical royalties on one of Record Label's pending lists. Mr. Northey was prepared to step into the role of representative plaintiff and to prosecute the action to a conclusion.

[32] The settlement agreements reached between Carol Baker and the defendants were terminated and Mr. Northey executed new settlement agreements with each of the defendants on substantially the same terms as the agreements signed by Mrs. Baker. In addition, Mr. Northey executed a copy of the agreement providing the Record Labels with a credit with respect to the "held royalties".

[33] As a result of the time and effort required to address the issue of the substitution of a new class representative, the Record Labels demanded a reduction to the costs payments provided for in each Label's settlement agreement in the aggregate amount of $150,000, to be divided as agreed amongst the Record Labels as a condition of entering into the new agreements with Mr. Northey. Once again, the Record Labels pressed for every concession they could get. The plaintiff agreed to this demand, recognizing, among other things, the desirability of concluding the settlement in a timely way.

[34] It is likely that additional work will be required of Class Counsel in the administration of the settlement. Class Counsel request compensation for such work on an hourly rate basis out of the settlement fund.

2011 ONSC 7105 (CanLII)

The Settlement

[35] Under the terms of the settlement, as ultimately implemented, a total of $46,688,805.91 is to be paid into a settlement trust for the benefit of Class members. After payment of Class Counsel's fees and other expenses, these funds will be administered and distributed by an entity ("CSI") jointly created by the Collectives. The Record Labels will contribute a total of $42,761,023.94 of this amount and CMRRA and SODRAC will pay $3,927,781.97 in "held royalties". The objective of the settlement administration will be to identify, and pay, the accrued royalties to as many rights holders as possible. It will be necessary to prioritize the efforts of the administration in both temporal and financial terms. Priority will be given to high value amounts (items on the Pending Lists with a value of $2,500 or more) and medium value amounts ($1,000-$2,500) which will be identified on a claims website which can be accessed by potential class members. Efforts will be made to locate rights holders in respect of low value items (less than $1,000).

[36] As well, as part of the settlement, a system of licensing and royalty administration has been established, on a going-forward basis, to ensure that the problem does not recur. This is a very important feature of the settlement and a significant accomplishment.

[37] After the administration period has been completed with respect to high value and medium value amounts, any residue will be distributed *cy-pres* to the universe of rights holders with market share in Canada, according to analysis that will be carried out by CSI. A similar distribution will be made with respect to the low value items.

[38] It is the stated goal of Class Counsel, and CSI to compensate rights holders to the greatest extent possible. As noted, Class counsel propose to remain involved, on a fee-for-service basis, in the administration of the settlement, as required.

Settlement Approval

[39] On May 30, 2011, I approved the settlement, finding that it was fair, reasonable and in the best interests of the class. My reasons indicated that I was satisfied that this action meets the requirements of section 5 of the *C.P.A.*: there is an identifiable class, represented by a suitable and qualified plaintiff, with tenable causes of action under the *Copyright Act* and for unjust enrichment, which give rise to issues that can be resolved on a common basis. I found that certification, and the settlement it implements, would achieve the goals of the *C.P.A.* by giving access to justice to many individuals with relatively modest claims that could not, as a practical matter, have been economically pursued on an individual basis. I found that the action and the settlement achieved judicial economy by consolidating the claims of several thousand class members into one proceeding and achieved behaviour modification by resolving a long-standing problem in the music industry and by putting a process in place to address the problem going forward.

The Position of Class Counsel

[40] As stated above, Class Counsel seeks approval of a fee of $6,950,000 plus taxes and disbursements.

2011 ONSC 7105 (CanLII)

[41] Both representative plaintiffs executed contingent fee agreements that stipulated a maximum counsel fee of 30% of the amount recovered. The fee request made by Class Counsel is approximately 15% of the gross settlement value and therefore represents a significant discount of the fee to which Class Counsel is contractually entitled. The fee request is supported by both Mrs. Baker and Mr. Northey.

[42] In summary, the submissions of Class Counsel are as follows:

(a) this was complex intellectual property litigation, involving multiple defendants and a seemingly intractable problem that has finally been resolved in a way that not only provides direct benefits to the Class, but also addresses the issue on an ongoing basis;

(b) the settlement was an extremely good one, resulting in a high rate of recovery of the unpaid amounts;

(c) Class Counsel carried all the disbursements in the litigation and agreed to indemnify the representative plaintiff against an adverse costs award – this avoided the need to seek assistance from the Class Proceedings Fund, which would have charged a 10% levy on any settlement or recovery;

(d) it has taken over four years to bring this matter to completion, during which time Class Counsel received no fees; and

(e) Class Counsel were at risk for a variety of reasons, including the risk that the action would not be certified or, if certified, would not ultimately be successful.

[43] I will address other points made by Class Counsel in the course of my reasons.

Objections

[44] There were no substantive objections to the settlement itself and there have been only two opt-outs. The fee request is opposed by the Collectives, by Universal and by Warner/Chappell Music Canada Ltd. ("WCMC"). I will review their objections.

The Objection of WCMC

[45] WCMC takes the position that the fee is excessive in light of the services rendered by Class Counsel, when balanced against the complexity of the matter, the importance of the matter to the Class, the expectations of the Class and the effect that the fee will have on the recovery achieved by the Class. That being said, WCMC acknowledges the contribution made by Class Counsel to the successful resolution of this matter and asks that a fair fee be awarded, having regard to the time and expenses invested by Class Counsel. It submits that the fee should be based on the time actually spent and the hourly rates of Class Counsel.

[46] WCMC submits that the litigation was not complex, liability was not seriously disputed and the action was settled at a relatively early stage. It says that Class members should be entitled to receive the royalties that are due to them, and should not be required to accept a

2011 ONSC 7105 (CanLII)

discount in order to allow Class Counsel to benefit from a fee that far exceeds the time spent on the matter.

[47] WCMC makes the point that songwriters rely on royalties to earn their livelihood and that without songwriters and their songs, the world would be decidedly bleak. Its letter of objection points out:

> Songwriters rely on royalties as their means of making a living. Take away a songwriter's income and a songwriter will be forced to pursue a different livelihood. The result will be detrimental to us all. Songs are used in television, movies, commercials and for personal enjoyment. Songs are used to tell stories, to create moods, to quiet the mind, generate enthusiasm, to energize the body, to uplift spirits. Music is used to celebrate and to mourn. Music can be educational and can be therapeutic. The world benefits from the fruits of the songwriter's labor.

[48] This is a fair point, elegantly made. No sensible person would suggest, however, that a songwriter should be compensated based on the time spent writing the song, which is the way in which WCMC submits Class Counsel should be compensated, in spite of the terms on which they took on the brief.

[49] WCMC's letter continues:

> The songwriters and publishers were punished by the failure of the record Companies to pay royalties in the first instance. They are being punished a second time by being made to accept less than the full royalties they are entitled; and, will be punished a third time if Class Counsel is awarded the contingent fee requested, which will further reduce the royalties payable to the Class Members.

[50] WCMC concludes by asking that the Court fix Class Counsel's fee in an amount that corresponds with the time actually spent, so that the royalties payable to class members will more closely correspond to the amounts actually owing to them.

The Objection of Universal

[51] Universal is both a defendant and, through its publishing arm, is a member of the Class. It acknowledges that Class Counsel are entitled to fair compensation, but it says that the fee requested is excessive having regard to the nature of the dispute, the settlement and the expectations of the class. It also says that there was unnecessary duplication of work and over-lawyering by Class Counsel.

[52] Universal's position is similar to the position of WCMC. It says that the issues in the action were straightforward, the problem was notorious and long-standing and the matter settled prior to certification and before significant time was expended in preparation for discovery and trial.

2011 ONSC 7105 (CanLII)

[53] Universal also notes that the net amount that class members will receive will already be diluted by the 10% commission that will be paid to CSI for the administration of the settlement.

[54] Finally, Universal says that a review of Class Counsel's docket summary suggests that the involvement of three counsel firms in the action resulted in duplication of effort and "over-lawyering." It refers to *Andersen v. St Jude Medical Inc.*, [2004] O.J. No. 3102 (S.C.J.) at para. 11, in which Cullity J. expressed concern about the risk of duplication of work and overhead when there are multiple counsel involved in the brief. As has been noted by Universal, that was a contested costs award and not a fee request. That distinction reflects the philosophy of costs awards that what may be reasonable billing as between a lawyer and his or her own client may not be within the reasonable expectations of the opposing party when it comes to a costs award. Universal submits, however, that the same principles should apply to shield class members from being required to pay excessive fee requests by Class Counsel.

2011 ONSC 7105 (CanLII)

The Objection of the Collectives

[55] The Collectives say that the fees claimed are not fair and reasonable. They say that a "multiplier" approach should be used, using a multiplier of 1.3, resulting in a Class Counsel fee of around $2,725,000.

[56] The objections of the Collectives are, essentially, that this was relatively risk-free litigation that was handed to Class Counsel on a platter, that liability was not seriously in issue, that most of the heavy lifting was done by the Collectives and that the resulting settlement, while decent, was not exceptional. They make the following submissions, in summary:

(a) after being named as defendants in this action, the Collectives and their lawyers made significant efforts to resolve the issues, thereby taking a considerable burden off the shoulders of Class Counsel – their lawyers spent a total of 2,200 billable hours on the matter, reflecting the time and effort involved;

(b) the Collectives, and their lawyers, have been significantly involved in moving the action forward, in fact, at times they were pressing Class Counsel to move the matter forward;

(c) the future licensing proposal was developed by the Collectives, which have also helped to develop the proposal and documentation for the resolution of the litigation;

(d) the Collectives were actively involved in pushing for settlement, participating in the mediation, negotiating with the Record Labels and developing the settlement documentation and protocols;

(e) the Collectives identified the existence of the held royalties, which were added to the settlement trust and this recovery was not the result of the efforts of Class Counsel;

(f) there was time and money wasted due to the issues surrounding the authority of Carol Baker to represent the Baker estate, ultimately resulting in a reduction of $150,000 of the amount paid by the Record Labels by way of costs – this issue could have been foreseen and avoided;

(g) the net benefit of the settlement is approximately $38.5 million, after deduction of the 10% commission that will be payable to the Collectives for the administration of the settlement and

(h) the held royalties were not contributed to the settlement by the Collectives as a result of any efforts made by Class Counsel and they should be excluded from the settlement fund for the purposes of calculating the fee.

2011 ONSC 7105 (CanLII)

Discussion

Approval of Class Counsel's Retainer

[57] The first issue is the consideration of the agreement made between Class Counsel and the representative plaintiffs with respect to fees and disbursements.

[58] Section 33 of the *C.P.A.* recognizes that Class Counsel may enter into a contingent fee arrangement with the representative plaintiff. Section 32(2) provides that an agreement respecting fees and disbursements between Counsel and the Class representative is not enforceable unless approved by the Court. The agreement must be in writing, must state the terms under which the fees and disbursements are to be paid and must give an estimated fee. It must also state the method by which payment is to be made, whether by lump sum, salary or otherwise. Where the Court does not approve the agreement, it may nevertheless determine the amount of fees and disbursements owing to counsel.

[59] As I have noted, the fee agreement between Class Counsel and the representative plaintiffs called for a contingent fee of 30%. Class Counsel voluntarily agreed to reduce their fee to approximately 15%.

[60] I find that the fee agreements meet the requirements of the *C.P.A.* I turn now to the question of whether Class Counsel's fee request should be approved.

Fee Approval

[61] My responsibility in this motion is to determine a fee that is "fair and reasonable" in all of the circumstances: *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.) at paras. 13 and 56.

[62] The factors to be considered in the application of this test are well-known and I will turn to them in a moment. I will begin with a few preliminary textual comments.

[63] First, a contingent fee retainer in the range of 20% to 30% is very common in class proceedings, as it has been in other kinds of litigation in this province for some years. As Class

Counsel has pointed out, there have been a number of instances in recent years in which this Court has approved fees that fall within that range. These include:

- *Abdulrahim v. Air France*, [2011] O.J. No. 326: 30%
- *Ainslie v. Afexa Life Sciences Inc.*, [2010] O.J. No. 3302: 19.4%
- *Robertson v. ProQuest LLC*, [2011] O.J. No. 2013 24%
- *Osmun v. Cadbury Adams Canada Inc.*, [2010] O.J. No. 2093: 25%
- *Pichette v. Toronto Hydro*, [2010] O.J. No. 3185: 28.5%
- *Robertson v. Thompson Canada Ltd.*, [2009] O.J. No. 2650: 36%
- *Cassano v. Toronto- Dominion Bank* (2009), 98 O.R. (3d) 542: 20%
- *Martin v. Barrett*, [2009] O.J. No. 2015: 29%

[64] There should be nothing shocking about a fee in this range. Personal injury litigation has been conducted in this province for years based on counsel receiving a contingent fee as high as 33%. In such litigation, it is generally considered to reflect a fair allocation of risk and reward as between lawyer and client. It serves as an inducement to the lawyer to maximize the recovery for the client and it is regarded as fair to the client because it is based upon the "no cure, no pay" principle. The profession and the public have for years recognized that the system works and that it is fair. It allows people with injury claims of all kinds to obtain access to justice without risking their life's savings. The contingent fee is recognized as fair because the client is usually concerned only with the result and the lawyer gets well paid for a good result.

[65] My second observation reflects the reality of class action litigation. Defendants tend to be well-resourced and represented by larger law firms. This is a case in point. There were four defendants. EMI and Universal were represented by national and international law firms, each with over 500 lawyers. Sony and Warner were represented by a smaller litigation firm (about 50 lawyers) which focuses exclusively on complex litigation. The Collectives were represented by a 200 lawyer firm. These were some of the best law firms in the country, charging substantial hourly rates, with virtually unlimited resources and no incentive to roll over and play dead.

[66] Due to the nature of the work, Class Counsel are frequently associated with smaller firms and are invariably engaged on a contingent basis. Without wanting to paint all with the same brush, defendants frequently employ a strategy of wearing down the opposition by motioning everything, appealing everything and settling nothing. If class proceedings are to realize the goal of access to justice, Class Counsel must be liberally compensated to ensure that they take on challenging but difficult briefs such as this one.

[67] There must be an economic incentive to encourage lawyers to take on litigation of this kind and this is a factor to be considered in assessing the reasonableness of a fee: *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (C.A.); *Parsons v. Canadian Red Cross Society* (2000), 49

2011 ONSC 7105 (CanLII)

O.R. (3d) 281 (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.) at paras. 59-61. If first-class lawyers cannot be assured that the Courts will support their reasonable fee requests, how can the Courts and the public expect them to take on risky and expensive litigation that can go for years before there is a resolution?

[68] My third comment, which is not original, is that this is one area where the Court should free itself from the chains of the hourly rate. The result achieved for the class should generally be the most important test of the value of counsel's services.

[69] Finally, flowing from this, it seems to me that one should consider the proposed fee from the perspective of the class member, both prospectively and retrospectively. Had it been possible for Class Counsel and the class members to discuss the issue from the outset, would the class have considered the fee arrangement reasonable? If so, in light of the ultimate resolution, does the fee remain reasonable? In the context of this case, if Class Counsel had proposed a fee of 15 cents per dollar of gross recovery, would that have appeared fair and reasonable at the outset? With the benefit of hindsight, does it appear fair and reasonable?

[70] I now turn to the factors that have traditionally been considered in determining the fees of Class Counsel. In *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (Sup. Ct.) at para. 67, Cumming J. summarized those factors:

> (a) the factual and legal complexities of the matters dealt with;
>
> (b) the risk undertaken, including the risk that the matter might not be certified;
>
> (c) the degree of responsibility assumed by Class Counsel;
>
> (d) the monetary value of the matters in issue;
>
> (e) the importance of the matter to the class;
>
> (f) the degree of skill and competence demonstrated by Class Counsel;
>
> (g) the results achieved;
>
> (h) the ability of the class to pay;
>
> (i) the expectations of the class as to the amount of fees; and
>
> (j) the opportunity cost to Class Counsel in the expenditure of time in pursuit of the litigation and settlement.

See also: *Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254 (S.C.); *Wamboldt v. Northstar Aerospace (Canada)* [2009] O.J. No. 2583 (S.C.J.) at para. 33; *Smith Estate v. National Money Mart Co.*, [2011] O.J. No. 1321, 2011 ONCA 233 (C.A.).

2011 ONSC 7105 (CanLII)

[71] The weight to be given to a particular factor will vary from case to case. In *Ainslie v. Afexa Life Sciences Inc.*, [2010] O.J. No. 3302, 2010 ONSC 4294, I observed that one of the most important factors on a fee approval motion must be the result achieved in relation to the amount at issue and the complexity of the case. Some assessment must be made of what the plaintiff was able to obtain, in relation to what the case was really "worth". Other important facts are the time spent and the risks incurred by the lawyers, the agreement between Class Counsel and the representative plaintiff and the level of fees awarded in other proceedings of a similar nature. I stated, at para. 44:

> After examining all these factors, it is important to ask whether the work of Class Counsel has fulfilled the goals of the *C.P.A.* by giving access to justice to claimants who might not otherwise obtain it and by promoting behaviour modification of wrongdoers. It is also important to recognize that the achievement of these goals demands that there is an available pool of experienced and skilled lawyers of high repute, who are prepared to take on the onerous and risky responsibility of Class Counsel. Where counsel achieve successful results, they render a service not just to the class but to the legal system itself, by providing access to justice and by achieving judicial economy. Their fees should not be assessed simply on the basis of *quantum meruit* - they should be enhanced in appropriate cases to recognize and reward successful performance and to serve as an incentive to counsel to take on class action litigation

[72] The *results achieved* in this case were, in my view, excellent. The Collectives and Universal agree that the result was a good one, although they point out that there has been no recovery of interest or statutory damages.

[73] The gross recovery under the settlement is almost the full amount owing to class members. The net recovery, after the deduction of fees, will be in the range of 80% to 85% of the amount owing. It is true that substantial statutory damages were potentially recoverable under the *Copyright Act*, but the availability of such damages is not absolute and the entitlement to such damages was speculative in the circumstances. It is also true that the settlement does not include recovery of interest over the long period that payment was withheld, but a party will frequently agree to forebear a claim for interest in return for a settlement. The results achieved must also be considered in the context that there were serious defences available to the defendants, including, in particular, limitations defences.

[74] While the defendants say that the percentage fee should not be applied to the commission of some $4 million payable to CSI for the administration of the settlement, that money is necessarily spent in order to put the settlement into the hands of the class in an equitable and expedited manner. It was obtained through the efforts of counsel. While the "held royalties" are somewhat in the nature of a windfall, we should not lose track of the fact that Class Counsel have actually agreed to reduce their fee to a percentage that is half as much as the amount to which they were entitled under their retainer agreements.

2011 ONSC 7105 (CanLII)

[75] The matter was *important to the class.* As the submission of WCMC points out, intellectual property rights and the entitlement to royalties for their use are vitally important to songwriters and musicians. The breach of those rights was real and long-standing. The recovery of wrongfully withheld past royalties, and the creation of a structure to ensure that the problem will not recur, must be regarded as an extremely important achievement for the benefit of the Class.

[76] The *monetary value of the matter* was significant, some $50 million. This will be real cash in the hands of the Class – not coupons, discounts or forgiveness of debt having only notional value.

[77] The *degree of responsibility assumed by counsel* was also significant, in light of the size of the Class and the amount at issue. It is fair to note that Class Counsel was assisted by the Collectives, but Class Counsel was ultimately responsible for, and accountable for, the prosecution of the litigation.

[78] The *factual and legal complexities* of the matter were not at the highest end of the scale, but they were significant. The issues in the action were essentially unique and unprecedented and required thorough investigation. There were multiple parties. The settlement itself was extremely complicated, involved multiple parties and multiple documents and a complex structure for resolution.

[79] In my view, the *skill and competence demonstrated by Class Counsel* was exceptional. They developed and executed an aggressive strategy designed to bring this action forward for certification and their determination to do so, and their credibility as counsel, brought the defendants, one by one, to the bargaining table and ultimately to settlement. The objectors do not take issue with the skill and competence of Counsel, other than to point out that the difficulties that arose with respect to Mrs. Baker resulted in increased costs and delayed the resolution. In my view, the unfortunate and possibly unmeritorious concerns raised by Paul Baker, at the eleventh hour, cannot be laid at the doorstep of Class Counsel. It was one of those things that can go wrong in litigation. Class Counsel responded to the challenge in a timely and practical manner.

[80] The *risk undertaken by Class Counsel*, and the *opportunity cost* was sizeable. The action took four years to bring to conclusion. In comparison to some substantial class actions, this is commendable expedition. At the same time, during those years Class Counsel received not a penny for their efforts. They incurred and paid disbursements on behalf of the class. They spent some 6,000 hours on the file without compensation. Their docketed time has a face value of about $2.2 million. They bore the risk of an adverse costs award if the action was not successful. They, not the Class, were at risk.

[81] The *expectation of the class as to the amount of the fee* and *the ability of the class to pay* would not detract from the fee proposed by Class Counsel. There has been minimal opposition to the fee request in spite of quite extensive notice of this hearing. The class members are clearly able to pay the fee and it will not significantly dilute their recovery.

2011 ONSC 7105 (CanLII)

[82] Turning to the dynamics of the litigation, having case managed this action for over two years, and having conducted a number of case conferences as this proceeding worked its way to resolution, it is my view that this was a difficult, hard-fought piece of litigation in which the outcome was by no means assured. While the plaintiffs were successful in securing the early cooperation of the Collectives, this itself was no small accomplishment. Nor were the initial settlements with Sony, Warner and EMI. Universal remained a tenacious hold-out and there were very serious questions as to whether a resolution would be achieved.

[83] From my observations, the positions taken by Universal from time to time were highly adversarial and its position was aggressively and effectively advanced. I reject any suggestion that the settlement was a cake walk for Class Counsel. It was hard work and the risk of failure of the resolution strategy was always present. So was the risk that the action would not be certified for any one of the reasons advanced by Universal.

[84] Class Counsel were insistent that if the matter was not resolved, they would proceed to a certification hearing and counsel for Universal was equally insistent that certification would be vigorously opposed and that there were flaws in the plaintiff's case that made it unsuitable for certification. This was not posturing. The very satisfactory result in the proceeding was due to the preparedness of Class Counsel to go to the wall if a satisfactory settlement could not be achieved. I am convinced that this resolve was demonstrated to the defendants throughout and it resulted in a better and more effective settlement for the class.

[85] Having supervised the proceeding and having reviewed counsel's time records, it is my view that the assertion that this case was over-lawyered is unfair and erroneous. Class Counsel were a consortium consisting of Bates Barristers, Harrison Pensa and the Canadian Internet Policy and Public Interest Clinic, a legal clinic representing consumers and public interests in intellectual property and other matters. Most of the work was done by Mr. Bates, the more senior of the lawyers (1983 call), and by Mr. Foreman (2002 call). Mr. Foreman spent at least 1,670 hours on the file. Mr. Bates spent about 800 hours. The total time spent on the matter, by all personnel in the Class Counsel consortium, was around 6,000 hours, having a face value of $2.2 million. Although there were various juniors, paralegals and others involved in the file, I have no sense at all that this is a case in which everyone from the most senior partner to the most junior clerk was thrown at the file in order to pump up the fee. Nor do I have the sense, at all, that any of the lawyers involved was engaging in unnecessary or redundant work. On the contrary, my observation is that Class Counsel conducted themselves efficiently throughout.

[86] I think one should resist the temptation to engage in armchair quarterbacking when assessing the value of Class Counsel's time. The objecting defendants and WCMC make the argument that this was an easy piece of litigation. I disagree. The problem festered for many years before Class Counsel got involved. None of the defendants was able to resolve it. It took over four years to resolve once this action was commenced. Even after it had been resolved with some of the defendants, there were constant frictions and new problems cropped up, such as the "held royalties" and the substitution of a new class representative.

[87] WCMC suggests that Class members are being "punished" by having to pay over a percentage of the royalties to which they are entitled in order to pay the lawyers. This submission overlooks the fact that Class members would likely still be waiting for their royalties had Class

2011 ONSC 7105 (CanLII)

Counsel not agreed to invest their own blood, sweat and tears in the issue and to take on the Record Labels in what has proven to be an arduous battle.

[88] In this case, the proposed fee is about 15% of the net settlement. Had Class Counsel proposed a fee of this size to the Class, as a condition of taking on a battle that had sat unresolved for years, there is no question in my mind that the vote would have been overwhelmingly positive. Looking back on the time and effort displayed by Class Counsel and considering the result and the other factors I have referred to, it seems to me that it was a fair bargain and the result is, in general, fair.

[89] I would say that the "held royalties" do not stand on quite the same footing and there should be a modest reflection of the fee to reflect this. In all the circumstances, a fee of $6,250,000 would be fair and reasonable, plus taxes. In addition, Class Counsel shall be entitled to render invoices to CSI on an hourly rate basis, for any services rendered in the implementation of the settlement. All such invoices shall be approved by me or by the judge case-managing this proceeding in the future.

Compensation for Representative Plaintiffs

[90] Class Counsel have requested payment of an "honorarium" of $3,000 to each of Mrs. Baker and Mr. Northey, out of the fees received by Class Counsel.

[91] The retainer agreements signed by Mrs. Baker and Mr. Northey allowed for the possibility of a *quantum meruit* compensation of the class representative, if approved by the Court:

> If the action is successful, the consortium shall make a request to the Court for an award of compensation for the plaintiff on a *quantum meruit* basis for the time spent acting as a representative for the class. It is acknowledged that such compensation is entirely within the discretion of the court.

[92] Mrs. Baker and Mr. Northey have sworn affidavits stating that, while they have no expectation of receiving such compensation or honorarium, they would be grateful for any payment the Court may see fit to make. Their affidavits indicate that they were extensively involved in settlement discussions, correspondence, telephone conversations and meetings, and review of settlement documentation. Mrs. Baker, who lives in England, was required to travel from her home in Cornwall to London for cross-examination on her affidavits.

[93] The payment of compensation to a representative plaintiff is exceptional and rarely done: *McCarthy v. Canadian Red Cross Society* [2007] O.J. No. 2314 (S.C.J.) at para. 20; *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.); *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.); *Bellaire v. Daya* [2007] O.J. No. 4819 (S.C.J.) at para. 71. It should not be done as a matter of course. Any proposed payment should be closely examined because it will result in the representative plaintiff receiving an amount that is in excess of what will be received by any other member of the class he or she has been appointed to represent: *McCutcheon v. Cash Store Inc.*[2008] O.J. No. 5241 (S.C.J.) at para. 12. That said,

2011 ONSC 7105 (CanLII)

where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, it may be appropriate to award some compensation: *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.) at para. 28.

[94] The Court of Appeal has recently indicated in *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, 106 O.R. (3d) 37 at paras. 134-135 that any compensation paid to the representative plaintiff should normally be paid out of the settlement fund and not out of Class Counsel's fee, to avoid concerns with respect to fee-splitting.

[95] It is interesting to note that on certification motions, the Court is often concerned to ensure that the representative plaintiff is truly engaged in the litigation and is not a mere "bench-warmer" or a "straw man" recruited by Class Counsel. Courts have frequently commented on the need to have an active and involved plaintiff who will be familiar with the proceedings, instruct counsel, monitor settlement discussions and generally act as any private client would in supervising his or her own litigation. A private client will normally receive indirect compensation for such efforts out of the proceeds of settlement or judgment. A representative plaintiff normally will not. That being said, these are contributions the Court expects a representative plaintiff to make and I respectfully agree with the observation of Hoy J. in *Bellaire v. Daya,* above, at para. 71 that compensation should not be awarded simply because the representative plaintiff has done what is expected of him or her. It should be reserved for cases, like *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (S.C.J.) where the contribution of the representative plaintiff has gone well above and beyond the call of duty.

[96] I have decided that this is not one of those rare and exceptional cases that calls for payment of compensation to the class representative. I do not wish to minimize, in any way, the efforts of Mrs. Baker and Mr. Northey. They have acted as exemplary representatives. They can be proud of their contributions to the prosecution and resolution of this matter and they have earned the gratitude of the Class. The Court could ask no more of them. I hope they will appreciate that my decision not to award compensation is no reflection on their most commendable efforts on behalf of the Class.

Summary and Order

[97] An order will therefore issue:

(a) approving the retainer agreements entered into between the representative plaintiffs and Class Counsel;

(b) approving the fees of Class Counsel in the amount of $6,250,000 plus taxes and directing that such amount be paid out of the Settlement Trust; and

2011 ONSC 7105 (CanLII)

(c) providing that future services rendered by Class Counsel shall be invoiced on a time and hourly rate basis, subject to Court approval.

G.R. Strathy J.

Date: November 30, 2011

2011 ONSC 7105 (CanLII)

Baxter et al. v. The Attorney General of Canada

[Indexed as: Baxter v. Canada (Attorney General)]

83 O.R. (3d) 481

2006 CanLII 41673 (ON SC)

Ontario Superior Court of Justice,
Winkler R.S.J.
December 15, 2006

Civil procedure -- Class proceedings -- Settlement -- Plaintiffs bring motion on consent for certification of action asserting claim in respect of Indian Residential School as class proceeding and for approval of settlement -- Settlement to be Canada-wide and intended to resolve some 15,000 ongoing claims in respect of residential schools -- Settlement approved subject to certain changes made -- Court requires that supervisor of proposed claims procedure be independent of government and report to courts -- Court requires that financial information regarding administration of settlement and in particular of claims procedure be provided for approval -- Court also set out process for review of contingent fees charged by counsel representing claimants under claims procedure.

The plaintiffs brought a motion, on consent, for certification of an action as a class proceeding and approval of a proposed settlement. The action related to claims arising as a result of the existence and operation of Indian Residential Schools ("IRS"). IRS were the subject of approximately 15,000 ongoing claims. The proposed settlement was Canada-wide and was meant to encompass all outstanding litigation. There were five elements to the compensation it provided. Two elements provided individual compensation for the Survivor class members (i.e., former residents, estimated at almost 79,000 persons): the Common Experience Payment ("CEP"),

based on verified attendance at one of the residential schools, and consisting of a base payment of $10,000 for attendance plus $3,000 for each additional year or part year of attendance; and the Independent Assessment Process ("IAP"), which was available to class members who were advancing personal claims based on serious physical abuse, sexual abuse or other abuse leading to serious psychological harm suffered while resident at a school. The remaining three elements were an Aboriginal Healing Foundation, to be given an initial endowment of $125 million, a Truth and Reconciliation Commission with funding of $60 million, and commemorative projects, for which $20 million had been earmarked. Canada had agreed to bear all internal administrative costs associated with delivery of the CEP and the IAP. The proposed settlement also contained terms relating to the payment of legal fees.

Held, the settlement should be approved, subject to certain changes being made.

It was clear that the criteria for certification were met with respect to the existence of a cause of action, identifiable classes, common issues and representative plaintiffs without conflicts on the common issues who could adequately represent the class members. However, the preferable procedure criterion still had to be satisfied. The court should not adopt a less rigorous standard with respect to consent certifications for settlement than with respect to opposed certification motions. Where certification is sought on consent for the purpose of approving a settlement, the court must be vigilant in scrutinizing the settlement, and in particular, its claims resolution and distribution mechanism, to ensure that the interests of the absent class members who are being bound by the settlement will be adequately protected. Thus the need for a "workable litigation plan" remains in full force. In this case, both the CEP and the IAP components would require claims procedures. The record was not sufficient to allow a determination that the proposed processes could be conducted in a fair, efficient and manageable manner. [page482] No administration plan was filed. The administration proposal in the settlement only required Canada to "commit sufficient resources" to ensure that a targeted number of claims could be

2006 CanLII 41673 (ON SC)

processed on an annual basis. The absence of detailed information about the plan of administration did not meet the standard of disclosure required on a motion for approval of settlements.

One deficiency in the proposed administrative scheme that had to be addressed was the potential for conflict between Canada's proposed role as administrator and its role as continuing litigant. The administration of the plan had to be neutral and independent of any concerns that Canada, as a party to the settlement, might otherwise have. In order to satisfactorily achieve this requisite separation, the administrative function had to be completely isolated from the litigation function, with an autonomous supervisor or supervisory board reporting ultimately to the courts. Such person or persons, once appointed by the government and approved by the courts, should not be subject to removal by the government without further approval from the courts.

Another deficiency was the lack of specific cost analysis relating to the administration of the settlement. The parties proposed only a "commitment to fund" approach to the administration, with no budget, no information relating to cost and no commitment to provide any greater level of information to the court in the future. Moreover, the non-disclosure was compounded by the fact that Canada intended, by the express terms of the settlement, to maintain a veto over additional administrative expenditures. This combination of inadequate information and absolute veto power over expenditures was unacceptable. Financial information sufficient to make an informed decision regarding the administration of the settlement, and in particular the CEP and the IAP programs, had to be provided for the purposes of approval and thereafter on a periodic basis. Moreover, the provisions of the settlement relating to the ability of the court to exercise its ongoing jurisdiction over the administration had to be consistent with the obligations of the court to the class members under the Class Proceedings Act, 1992, S.O. 1992, c. 6. This would require, as stated above, the appointment of an autonomous supervisor or supervisory board reporting ultimately to the court.

2006 CanLII 41673 (ON SC)

The provisions of the settlement with respect to legal fees were generally reasonable. However, there was a problem with respect to future legal fees for IAP claimants. The IAP was meant to address the more serious personal injury claims. Under the terms of the settlement, Canada had agreed to pay an additional 15 per cent on top of any compensation awarded under the IAP to help defray the claimants' legal costs. However, notwithstanding this, lawyers representing individual IAP claimants would be charging contingent fees in excess of the 15 per cent payable by Canada. The settlement did not prevent his practice nor did it restrict the amount of such contingent fees payable by the claimant. There was no mechanism for dealing with future issues that might arise between IAP claimants and their respective counsel relating to fees. It was difficult to imagine that the claimants would be in a position to successfully navigate the legal system to ensure that their rights were protected in regard to the legal fees they might have to pay. There had to be a process to regulate fees charged by counsel under the IAP. All individual retainer agreements relating to the IAP should be provided to the adjudicator hearing the case after an award is rendered but before compensation is paid. All fees charged or to be charged to the individual claimant should be clearly set out. The adjudicator should assess the reasonableness of the fee having regard to the complexity of the case, the result achieved, the intent of the settlement to provide successful claimants with reasonable compensation and the fact that an additional 15 per cent of the compensation awarded would be paid by Canada. The adjudicator's decision as to fees [page483] was subject to appeal to the Chief Adjudicator or his designate in respect of errors in principle.

The parties were given 60 days to complete the required changes.

Cases referred to

Amchem Prods. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231 (1997);

2006 CanLII 41673 (ON SC)

Cloud v. Canada (Attorney General) (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924, 192 O.A.C. 239, 247 D.L.R. (4th) 667, [2005] 1 C.N.L.R. 8, 27 C.C.L.T. (3d) 50, 2 C.P.C. (6th) 199 (C.A.), supp. reasons [2005] O.J. No. 733 (C.A.); Gariepy v. Shell Oil Co., [2002] O.J. No. 4022, [2002] O.T.C. 776, 21 C.L.R. (3d) 98, 26 C.P.C. (5th) 358, 117 A.C.W.S. (3d) 690 (S.C.J.); McCarthy v. Canadian Red Cross Society, [2001] O.J. No. 2474, [2001] O.T.C. 470, 8 C.P.C. (5th) 349, 106 A.C.W.S. (3d) 193 (S.C.J.); McCarthy v. Canadian Red Cross Society, [2001] O.J. No. 567, [2001] O.T.C. 111, 8 C.P.C. (5th) 340, 103 A.C.W.S. (3d) 260 (S.C.J.); Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572, 103 O.T.C. 161, 40 C.P.C. (4th) 151, 91 A.C.W.S. (3d) 351 (S.C.J.)

2006 CanLII 41673 (ON SC)

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5

MOTION for the certification of an action as a class proceeding and for the approval of a settlement.

Kirk M. Baert and Celeste Poltak, for National Certification Committee.

L. Craig Brown, for Baxter plaintiffs.

Russell Raikes and Mohamed Moussa, for Cloud plaintiffs.

Jon Faulds, for Alberta plaintiffs.

Paul Vickery and Catherine Coughlan, for defendant.

John McKiggan and Arnold Pizzo McKiggan, for National Consortium.

S. John Page, for Anglican Church entities.

Rod Donlevy and Pierre Baribeau, for Catholic entities.

John Phillips, for Assembly of First Nations.

Janice Payne, for Inuit organizations.

Peter Grant, for unaffiliated counsel.

Anthony F. Merchant, Evatt Merchant and Jane Ann Summers, for Merchant Law Group.

Susan M. Vella and Nathaniel Carnegie, for certain objectors.

Paulette Pummells, for The New England Company.

Randy Bennett and Jordan Nichols, court-appointed monitor.

WINKLER R.S.J.: --

Overview

[1] The plaintiffs bring this motion, on consent, for a certification of the action as a class proceeding and approval of a proposed settlement including payment of class counsel fees. The [page484] action relates to claims arising throughout Canada as a result of the existence and operation of institutions known collectively as "Indian Residential Schools" ("IRS"). As is often the case on this type of motion, it is the position of the parties that in the event that the proposed settlement is not approved by the court, the consent to certification is a nullity and the parties will continue with litigation in the normal course. The proposed settlement before the court also includes terms relating to the payment of fees for lawyers other than class counsel. These lawyers have been advancing claims in individual litigation. It is proposed that this individual litigation will be terminated and the claims encompassed by the settlement. These payments are a departure from the norm and arise mainly as a result of the extensive litigation that has already been commenced in relation to the underlying class claims. In that respect, counsel for both plaintiffs and defendants anticipate that the settlement, if

2006 CanLII 41673 (ON SC)

approved, will largely end all existing litigation relating to IRS. This is explained in more detail below.

[2] For over 100 years, Canada pursued a policy of requiring the attendance of Aboriginal children at residential schools, which were largely operated by religious organizations under the supervision of the federal government. The children were required to reside at these institutions, in isolation from their families and communities, for varying periods of time. This policy was finally terminated in 1996 with the closing of the last of the residential schools and has now been widely acknowledged as a seriously flawed failure. In its attempts to address the damage inflicted by, or as a result of, this long-standing policy, the settlement is intended to offer a measure of closure for the former residents of the schools and their families.

[3] The flaws and failures of the policy and its implementation are at the root of the allegations of harm suffered by the class members. Upon review by the Royal Commission on Aboriginal Peoples, it was found that the children were removed from their families and communities to serve the purpose of carrying out a "concerted campaign to obliterate" the "habits and associations" of "Aboriginal languages, traditions and beliefs", in order to accomplish "a radical re-socialization" aimed at instilling the children instead with the values of Euro-centric civilization. The proposed settlement represents an effort to provide a measure of closure and, accordingly, has incorporated elements which provide both compensation to individuals and broader relief intended to address the harm suffered by the Aboriginal community at large.

[4] The parties are proposing a Canada-wide settlement, with approval orders being sought in this court and the superior [page485] courts of eight other provinces and territories. They have asked the courts to depart from the normal practice and approve, as a term of the settlement, the combining of all outstanding litigation relating to the residential schools, into a single class action which will effectively be filed in each jurisdiction in Canada if approval of the settlement is

2006 CanLII 41673 (ON SC)

granted. As a result of this approach, the class of former residents, identified as the "Survivor" class in the record, is estimated to number almost 79,000 persons. This national class is generally described as "All persons who resided at an IRS in Canada between January 1, 1920, and December 31, 1997, who were living as of May 30, 2005 . . . ."

[5] The national "Survivor" class will effectively be sub-classed for the purpose of determining which of the nine approving courts has jurisdiction over the claim of a specific class member. This will be accomplished by modifying the general class description with an additional province of residence requirement. The Ontario court, in addition to the jurisdiction over the residents of Ontario, will also have jurisdiction over the claims of the current residents of those provinces where approval has not been formally sought, specifically, New Brunswick, Newfoundland and Labrador, Nova Scotia and Prince Edward Island, as well as over the claims of those persons no longer resident in Canada. In addition, the class in Cloud v. Canada (Attorney General) (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924 (C.A.), which is currently the only certified action in respect of the residential schools litigation, will be included in the proposed settlement.

[6] In addition, under its terms, the settlement will only be effective if there is unanimous approval by the courts on "substantially the same terms and conditions".

[7] Under the proposed settlement, all members of the Survivor class will receive a cash payment, with the amount varying according to the length of time each individual spent as a student in the residential schools system. This class-wide compensatory payment, which is referred to as the Common Experience Payment ("CEP"), is one of five key elements of the settlement before the court. In addition, there is an Independent Assessment Process ("IAP"), which will facilitate the expedited resolution of claims for serious physical abuse, sexual assaults and other abuse resulting in serious psychological injury. The foregoing elements are aimed at personal compensation for the students who attended the schools. The other three elements of the settlement are

2006 CanLII 41673 (ON SC)

designed to provide more general, indirect benefits to the former students and their families. These elements are the establishment of a Truth and Reconciliation Commission, with a mandate to make a public and permanent record of [page486] the legacy of the schools, in conjunction with the earmarking of a significant portion of the settlement fund for healing and commemoration programs.

[8] In my view, the proposed compensation components of the settlement are fair and reasonable, if they are delivered in an expeditious manner consistent with the intention expressed in the settlement. However, I have concerns that there are aspects of the planned administration and implementation of the settlement that may have a deleterious impact on the benefit of the settlement to the class members. I am approving the settlement, subject to those concerns being satisfactorily addressed. My reasons follow.

The Role of the Court

[9] Whenever a proposed settlement comes before the court for approval in circumstances where the subject matter clearly has broader social and political implications, it is useful to review the court's role and, by extension, the proper limits of its jurisdiction. The court must review the settlement on established legal principles, to determine whether it is fair, reasonable and in the best interests of the class as a whole. As stated in Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572, 103 O.T.C. 161 (S.C.J.), at para. 77:

> . . . it must be remembered that these matters have come before the court framed as class action lawsuits. The parties have chosen to settle the issues on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the classes as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review of the settlement.

2006 CanLII 41673 (ON SC)

[10] On a settlement approval motion, the court's review is not directed toward the merits of the action but rather is concerned with whether the settlement meets the criteria for court approval. Thus, in accordance with this approach, the record must explain in general terms the alleged wrongs and the factual background supporting the claims. This is consistent with the position that the settlement represents a compromise in which the defendants are not admitting liability but rather are joining with the plaintiffs in presenting the compromise to the court as a fair resolution of the outstanding issues. Consequently, on a motion of this nature supported by a record of this type, it is not appropriate for the court to make findings of fact on the merits of the litigation from which the settlement emanates. Instead, the [page487] court must examine the settlement in the context of the record before it. That examination includes a review of the allegations underlying the claims, the defences advanced in response and any objections to the settlement, to determine whether the settlement is "fair, reasonable and in the best interests of the class as a whole".

[11] From the evidence of the objectors who spoke at the hearing, based both on personal experience and in relation to the experiences of family members, it was clear that the effects of the residential school legacy were lasting and profound. Unfortunately, a motion for certification and approval of a compromise settlement is an inadequate forum for dealing with the underlying issues. Indeed, the very essence of the proposed settlement is to provide proceedings designed specifically for that purpose. The fact that the court is not reviewing in detail the history of residential schools in Canada or the individual histories of former residents is not to in any way diminish the significance of either the history or the impact on the individuals.

[12] In like fashion, the fact that the court is not making findings on the merits of the litigation on this motion ought not to be taken to mean that the approval process is a mere formality, or in the vernacular, a "rubber stamping" by the court. The court has an obligation under the Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA") to protect the interests of

2006 CanLII 41673 (ON SC)

the absent class members, both in determining whether the settlement meets the test for approval and in ensuring that the administration and implementation of the settlement are done in a manner that delivers the promised benefits to the class members. In seeking the approval of the court, the plaintiffs and defendants essentially seek the benefits of having the court sanction the settlement. Such approval cannot be divorced from the obligation it entails. Once the court is engaged, it cannot abdicate its responsibilities under the CPA.

2006 CanLII 41673 (ON SC)

The Settlement

[13] The residential schools are the subject of approximately 15,000 ongoing claims at present. Some of these claims are being advanced in traditional court litigation and some through the government's existing alternative dispute resolution process. The litigation stream includes a number of class actions, including the present proceeding and the Cloud v. Canada (Attorney General) action that was certified previously. In a bid to negotiate a global resolution to this litigation, Canada appointed the Honourable Frank Iacobucci as its chief negotiator on May 30, 2005. Multi-party negotiations ensued from June 2005 through [page488] to November 2005, when an Agreement in Principle was reached. The details of the settlement were finalized and approved by the federal cabinet on May 10, 2006. The negotiations involved representatives from native communities, church groups, the federal government and various legal counsel.

[14] In keeping with the objective of a global resolution, the settlement is pan-Canadian and meant to encompass all outstanding litigation. There are five elements to the compensation it provides. Two elements provide individual compensation for the Survivor class members, while the remaining three are initiatives designed to address broader historical and future concerns of the Survivor class members, their families and their communities at large.

[15] Individual compensation for the Survivor class members will be provided through the CEP and through access to an expedited IAP for certain serious claims.

[16] The CEP is based on verified attendance at one of the residential schools. Claimants will receive a base payment of $10,000 for attendance plus $3,000 for each additional year or part year of attendance. $1.9 billion will be allocated to a trust fund under the settlement for the purpose of making these payments. In the event that such amount is insufficient to pay all of the verified claims of the Survivor class members, Canada has agreed to supplement with the additional funding necessary to ensure full payment for all such claims. Another provision of the settlement deals with the prospect of a surplus in the original fund for the CEP. In the event that the verified claims do not exhaust the original $1.9 billion, additional compensation, up to $3,000 per person, will be paid to the claimants if the surplus exceeds $40 million. Any additional surplus amount after those supplementary payments have been made will be transferred to Aboriginal organizations for healing and education programs. Similarly, if the surplus at first instance is less than $40 million, there will be no additional individual compensation but rather, the entire amount will be transferred to Aboriginal organizations.

[17] The CEP is intended to provide class-wide relief based on attendance alone at a residential school. The IAP, on the other hand, will be available to a more limited number of class members who are also advancing personal claims based on abuse suffered while resident at a school. In respect of those claims, additional compensation will be available where the class member establishes that he or she suffered serious physical abuse, sexual abuse or other abuse leading to serious psychological harm. Remedies available under this process include compensation for non-economic loss, i.e., pain and suffering, along with compensation for "loss of opportunity", future care and other consequential [page489] harm. Compensation for these claims will be capped at $275,000 plus a modest additional amount for future care. There is an additional provision for payments for actual income losses, where they are proven in accordance with the standards applicable to the process, up to a maximum of $250,000. The latter amount will be determined based on the same legal and factual analysis for such loss of income that is utilized in

2006 CanLII 41673 (ON SC)

regular court proceedings. Canada will fund this program without any cumulative cap on the total amount of compensation to be paid.

[18] The individual compensation aspects of the settlement are complemented by the provision of funding for three initiatives that will provide broader community-based benefits. The Aboriginal Healing Foundation will be given an initial endowment of $125 million "to support the objective of addressing the healing needs of Aboriginal People affected by the Legacy of Indian Residential Schools, including the intergenerational impacts, by supporting holistic and community-based healing to address needs of individuals, families and communities . . .". There will be a Truth and Reconciliation Commission established, with funding of $60 million "to contribute to truth, healing and reconciliation", through hearings and reports as necessary, with an objective of creating a permanent and public record of the "legacy of the residential schools". Finally, an additional $20 million has been earmarked for commemorative projects.

[19] The individual compensation will not be diminished by the costs of administration of the programs. Canada has agreed to bear all internal administrative costs associated with the delivery of the CEP and IAP.

[20] The legal fees of class counsel are being paid directly by Canada, subject to approval by the courts. Such payments are over and above the amount of money available to be paid as compensation to the class members. In view of the extensive litigation already under way, there were also negotiations with individual claimant counsel which resulted in an agreement that such counsel would be paid directly by Canada, subject to a limit per case, on the understanding that claimants need make no further payment to those counsel with respect to the claim for, or receipt of, a CEP. However, claims made under the IAP will be subject to additional legal fees to be paid by the claimant. Canada has also agreed to pay successful claimants an amount equal to 15 per cent of any award to partially defray those fees.

2006 CanLII 41673 (ON SC)

Law and Analysis

[21] As stated above, my concerns do not go to the compensation elements of the settlement. Although not perfect in every [page490] respect, or perhaps in any respect, perfection is not the standard by which the settlement must be measured. Settlements represent a compromise between the parties and it is to be expected that the result will not be entirely satisfactory to any party or class member. My concerns with respect to this settlement go to its administration, the actual legal fees that may be charged to the class members, the potential fettering of the jurisdiction of this court as a result of some of the terms and the scope of the class to be bound by the settlement.

The CPA Requirements

[22] The administrative concerns may be best explained in the context of a certification analysis. Whether a motion for certification is being conducted on a contested basis or on consent for the purposes of settlement, the criteria set out in s. 5(1) of the CPA must be met. Briefly put, those requirements are (a) the existence of a cause of action, (b) shared by an identifiable class, (c) from which common issues of fact or law arise, (d) for which a class proceeding would be the preferable procedure for resolution, and (e) for which there is a representative plaintiff who has produced a workable litigation plan and who can fairly and adequately represent the interests of the class members without conflict on the common issues.

[23] On this motion, it is clear that the criteria are met with respect to the existence of a cause of action, identifiable classes, common issues and representative plaintiffs without conflicts on the common issues who can adequately represent the class members. However, the preferable procedure criterion must also be satisfied. It is now trite law that for a class proceeding to be the "preferable procedure" for the resolution of the claims of a given class, it must represent a "fair, efficient and manageable" procedure that is "preferable" to any alternative method of resolving the claims.

2006 CanLII 41673 (ON SC)

[24] The manageability aspect of the preferable procedure criterion is often the point of contention on opposed certification motions. The plaintiffs assert that courts adopt a less rigorous standard with respect to consent certifications for settlement. I do not share this view. Settlements may mandate a different approach, but this is because the process of arriving at a settlement often leads to the parties adopting a claims procedure that alleviates some or all of the manageability concerns that arise in class actions with respect to the determination of individual claims. As stated by Nordheimer J. in Gariepy v. Shell Oil Co., [2002] O.J. No. 4022, [2002] O.T.C. 776 (S.C.J.), at para. 27: [page491]

> . . . The requirements for certification in a settlement context are the same as they are in a litigation context and are set out in section 5 of the Class Proceedings Act, 1992. However, their application need not, in my view, be as rigorously applied in the settlement context as they should be in the litigation context, principally because the underlying concerns over the manageability of the ongoing proceeding are removed.

(Emphasis added)

[25] A similar view was expressed by the United States Supreme Court in Amchem Prods. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231 (1997). The majority held, at p. 620, that "[c] onfronted with a request for settlement-only class certification, a . . . court need not inquire whether the case, if tried, would present intractable management problems, . . . for the proposal is that there be no trial". In short, this means that while the certification test is not "relaxed" in the literal sense in the context of settlement, the test may be more easily satisfied in certain circumstances. However, the underlying assumption in both Gariepy and Amchem is that the administrative claims procedure will satisfy any manageability concerns, thereby leaving the case amenable to certification. However, the court must still examine the proposed claims procedure to ensure that it will indeed be a "manageable" process.

2006 CanLII 41673 (ON SC)

[26] In a contested certification motion, the court expects that the plaintiff moving for certification will be able to demonstrate that the action is manageable as a class proceeding, in part, through the provision of a workable litigation plan. It may be safely assumed that the defendant, in the traditions of the adversarial system, will bring any deficiencies in the plan to the attention of the court. This safeguard is not present where certification is sought on consent for the purpose of approving a settlement because the plaintiff and the defendant have a joint interest in seeing the settlement approved. Accordingly, the court must be vigilant in scrutinizing the settlement, and in particular, its claims resolution and distribution mechanism, to ensure that the interests of the absent class members who are being bound by the settlement will be adequately protected.

[27] In any event, the representative plaintiff and the defendant focus on the certification issues but this often provides a distorted perspective with respect to the individual claims. The representative plaintiff and the defendant may resolve the macro issues through a settlement, but this most often represents the real start, rather than the end, of the litigation for the individual class member, especially in those cases, as here, where a key term of the settlement is merely access to a modified claims resolution procedure. [page492]

[28] The fact that a settlement may provide only a modified claims resolution procedure for the class members is not objectionable in and of itself. However, the court must be especially cautious to ensure that the whole of the process does in fact confer an actual benefit to the class members individually. Thus, the need for a "workable litigation plan", although it may be framed as a plan of administration, remains in full force.

[29] This is particularly so where the claims resolution procedure represents a primary benefit under the settlement, and leaves the individual entitlement to a deferred resolution, with its attendant costs, burdens and risks. In other words, it cannot be the case that the class members receive nothing more

2006 CanLII 41673 (ON SC)

than the opportunity to litigate their claims in an extra-judicial process that offers no material advantages over normal course litigation. Otherwise, the class members are compromising their rights, and possibly the entirety of their claims, without receiving a corresponding benefit for having done so.

The Manageability of the Claims Procedures

[30] The court cannot make the determination as to whether a claims resolution procedure confers a benefit on class members in a vacuum. Typically, evidence is proffered regarding the claims procedure that must be followed in order for class members to obtain benefits under the settlement, along with an administration plan demonstrating that the resources are in place or will be in place to ensure that the benefits are delivered on a timely basis. This information is, in all material respects, the "litigation plan" which addresses the manageability concerns for the purposes of certification.

[31] In the present case, both the CEP and IAP components will require claims procedures. While the CEP may be relatively straightforward, the sheer volume of anticipated claims, at approximately 79,000, requires a careful consideration of the administrative plan and the resources available to carry out that plan. The court must be assured that the class members will receive the promised benefits in a timely manner. Similar, if not stricter, scrutiny must be applied to the proposed IAP, in view of counsel's concessions that it will indeed be more complicated and more time-consuming than the CEP process and in consideration of the very serious issues it is meant to address for certain class members.

[32] As a starting point, it should be noted that the record before the court is not sufficient to make a determination that the proposed processes can be conducted in a "fair, efficient and manageable" manner. There was no administration plan filed. An [page493] affidavit sworn by Luc Dumont, the current Director General of Operations at the Office of Indian Residential Schools Resolution Canada, was proffered setting out some details of the number of personnel that would be

2006 CanLII 41673 (ON SC)

assigned to administering the settlement. However, it did not contain sufficient detail to satisfy the court that the administration of the settlement will be efficiently and effectively carried out.

[33] This lack of information may have to do with the framing of the administration proposal in the settlement which only requires Canada to "commit sufficient resources" to ensure that a targeted number of claims can be processed on an annual basis. Some counsel conceded that this amounts to asking the court to "take it on faith" that the settlement can be properly administered. With the CPA now in its second decade, this court has sufficient experience with the administration of settlements in large and complex class actions to recognize the dangers in this approach. Further, the absence of detailed information about the plan of administration does not meet the standard of disclosure required on a motion for approval of settlements. As stated in McCarthy v. Canadian Red Cross Society, [2001] O.J. No. 2474, [2001] O.T.C. 470 (S.C.J.), at para. 19:

> The Court is obligated to carefully scrutinize proposed settlements in a class proceeding. Nonetheless, where settlement proposals are advanced on uncontested motions, in my view, there is a positive obligation on all parties and their counsel to provide full and frank disclosure of all material information to the Court.

The requirement for "full and frank disclosure" is manifest when the court is called upon to evaluate a settlement of this scope and magnitude and clearly extends to pertinent information about the proposed administration of the settlement.

[34] Moreover, I cannot accede to the submission of counsel for the Assembly of First Nations ("AFN") that, notwithstanding the currently unsatisfactory administration plan, the court should simply take a "wait and see" approach to the settlement administration because of the flexibility under the CPA to address deficiencies at a later point. The flexibility of the CPA may be properly utilized to address the inevitable but

2006 CanLII 41673 (ON SC)

unforeseeable issues that may arise in the course of complex litigation or the administration of a settlement. On the other hand, it would be an abdication of the court's role under the CPA to fail to address foreseeable deficiencies at this stage. As this court noted in McCarthy v. Canadian Red Cross Society, [2001] O.J. No. 567, [2001] O.T.C. 111 (S.C.J.), at para. 19: [page494]

> Settlement approval in class proceedings cannot be granted on a speculative basis. As stated above, the court has a duty to safeguard the interests of absent class members, especially where those class members are being asked to surrender rights in return for a settlement which is not reflective of the damages suffered on a case by case basis. The court cannot perform its duty in the absence of evidence. As stated by Sharpe J. in Dabbs at paragraph 15:
>
> > . . . the court cannot exercise its function without evidence. The court is entitled to insist on sufficient evidence to permit the judge to exercise an objective impartial and independent assessment of the fairness of the settlement in all the circumstances.

[35] The court must protect the interests of the absent class members. Taking a "fix it later" approach in respect of concerns that are both readily apparent and capable of being addressed now does not meet that obligation. The AFN submission harkens back to the mistaken assumption that there is a relaxed standard to be employed under the CPA in respect of certification where settlement approval is sought. The parties moving for approval of a settlement that entails the possibility that class members will have to engage in a further dispute resolution process must satisfy the court that the process, and indeed the settlement administration in its totality, will be "fair, efficient and manageable". Where concerns are raised as to the structure and resources in place, or contemplated, to administer the settlement, the court cannot adopt a relaxed standard to the detriment of the proposed class members.

The Administrative Deficiencies

2006 CanLII 41673 (ON SC)

[36] I turn now to the specific deficiencies that must be addressed in the proposed administrative scheme. In my view, they are neither insurmountable nor do they require any material change to the settlement agreement itself.

[37] I preface my comments with a caution that the court has a general concern whenever a defendant proposes to change roles and become the administrator of a settlement. There must be a clear line of demarcation between the defendant as litigant and the defendant as neutral administrator. Further, there must be an express recognition by the defendant proposed as administrator that the settlement is being implemented and administered in a court supervised process and not subject to the direction of the defendant either directly or indirectly. The difficulty in drawing the distinction, and adhering to the underlying concept, is the reason why the court must be especially circumspect when considering the approval of a defendant as administrator. The line is even more blurred in this case where Canada, as defendant, will still be an instructing respondent in respect of individual claims made under the IAP. [page495]

[38] The potential for conflict for Canada between its proposed role as administrator and its role as continuing litigant is the first issue that must be addressed. One of the goals of this settlement is to resolve all ongoing litigation related to the residential schools. The structure of the administration must be consistent with this aim and not such as to render itself subject to claims of bias and partiality based on apparent conflicts of interest. If such perception exists, it has the potential to taint even those areas where the neutrality is more enshrined such as the adjudication process. Accordingly, the administration of the plan must be neutral and independent of any concerns that Canada, as a party to the settlement, may otherwise have. In order to satisfactorily achieve this requisite separation, the administrative function must be completely isolated from the litigation function with an autonomous supervisor or supervisory board reporting ultimately to the courts. This separation will serve to protect the interests of the class members and insulate the government

2006 CanLII 41673 (ON SC)

from unfounded conflict of interest claims. To effectively accomplish this separation and autonomy it is not necessary to alter the administrative scheme by replacing the proposed administration or by imposing a third party administrator on the settlement. Rather, the requisite independence and neutrality can be achieved by ensuring that the person, or persons, appointed by Canada with authority over the administration of the settlement shall ultimately report to and take direction, where necessary, from the courts and not from the government. By extension, such person, or persons, once appointed by the government and approved by the courts, is not subject to removal by the government without further approval from the courts. This is consistent with the approach taken in all class action administrations and there is no reason to depart from that approach in this instance.

[39] The autonomous supervisor or supervisory board envisioned by the court will have the authority necessary to direct the administration of the plan in accordance with its terms, to communicate with the supervisory courts and to be responsible to those courts. Simply put, it cannot be the case that the "administrator", once directed by the courts to undertake a certain task, must seek the ultimate approval from Canada. The administration of the settlement will be under the direction of the courts and they will be the final authority. Otherwise, the neutrality and independence of the administrator will be suspect and the supervisory authority of the courts compromised.

[40] The foregoing are organizational issues that relate to what may be called the "executive oversight" role in the administration. There are other issues in relation to the operational framework [page496] for delivery of the benefits under the settlement, particularly with respect to the costs of administration.

[41] It is beyond dispute that the administration of this settlement will be expensive in absolute terms. In fact, there is evidence before the court that the current ADR process, upon which the IAP is based, was costing three times as much to administer as it was delivering in compensation in the early

2006 CanLII 41673 (ON SC)

stages of operation. Since the IAP appears to be essentially the same plan as the ADR with minor modifications there are obvious concerns. The material before the court relating to the proposed settlement is devoid of specific cost analysis relating to its administration. Moreover, there were no submissions made by any party regarding contemplated changes in the administration that would serve to reduce costs.

[42] Absent any explanation, the current costs of the ADR program appear to be excessively disproportionate when considered against the typical costs of administering a class action settlement. This court has never approved a settlement where the costs of administration exceed the compensation available let alone where the cost excess is a factor of three. It is no answer, as was suggested in argument, that since Canada, as defendant, has committed to funding the administrative cost separately from the settlement funding, the court need not be concerned with the quantum of that cost. This proposition must be rejected for a number of reasons. First, it ignores the court's supervisory role in class actions. Secondly, it fails to recognize how the peculiar aspects of certain terms of this settlement relating to funding can impact unfairly on the class members, while at the same time leaving the courts powerless to provide a remedy. This is addressed in more detail below. Thirdly, it fails to recognize that this is not a settlement where the administration is being paid out of a fixed settlement fund. The administrative costs will be paid from the general revenues of the government. This leads to a certain precariousness in respect of the administration and leads to the prospect of the ongoing administration of the settlement becoming a political issue to the potential detriment of the class members.

[43] The settlement administration cost is typically estimated by the parties when they seek court approval for a settlement. This enables the court to evaluate whether the claims under the settlement will be processed and compensation delivered to the class members in a satisfactory manner. Here, the parties have departed from the normal course and propose only a "commitment to fund" approach to the administration, with no budget, no information relating to cost and no

2006 CanLII 41673 (ON SC)

commitment to provide any greater level of information to the court in the future. Moreover, [page497] the non-disclosure is compounded by the fact that Canada intends, by the express terms of the settlement, to maintain a veto over additional administrative expenditures.

[44] This combination of inadequate information and absolute veto power over expenditures is unacceptable. The court cannot approve a settlement without adequate information to ensure that the class members' interests are being protected and that it will be able to maintain an effective ongoing supervisory role. As stated in McCarthy ([2001] O.J. No. 2474 (S.C.J.)) at para. 21:

> . . . a class proceeding by its very nature involves the issuance of orders or judgments that affect persons who are not before the Court. These absent class members are dependent on the Court to protect their interests. In order to do so, the Court must have all of the available information that has some bearing on the issues, whether favourable or unfavourable to the moving party.

[45] The scope of the problem with the combination of undisclosed costs and overriding government veto is revealed by simple extrapolation from the evidence that was provided. The IAP program is estimated to provide potential total compensation in the amount of $2 to $3 billion. If the current ADR process cost to compensation ratio of 3:1 is maintained, this means that administration costs of this program alone will be in the range of $6 to $9 billion, effectively dwarfing the benefits provided to the class. Should this scenario come to pass, the remedy may not be the expenditure of more dollars, but rather the reallocation of funds to generate greater efficiencies or a more effective and expeditious administration. I caution that these numbers are based on limited data and conjecture by counsel. They do indicate, however, the possible magnitude of the problem and reveal the need for more precise information.

[46] I have not ignored the provision in the settlement providing an exception to the government veto in respect of its

2006 CanLII 41673 (ON SC)

commitment to fund the IAP program to ensure that a minimum of 2,500 claims are processed per year. While presented as a benchmark of performance, it is in fact an effective veto over any attempt to increase the number of claims processed over and above the 2,500 per year target. The evidence is that the class members are elderly and dying at a rate of approximately 1,000 per year. It is possible that efficiencies may be gleaned from the reallocation of funds without increasing expenditures. The structure of the settlement cannot be such as to preclude the administrator or the court in its supervisory role from considering options to improve the delivery of benefits.

[47] The principles engaged on this motion for settlement approval are twofold. First, the settlement must be fair, reasonable [page498] and in the best interests of the class as a whole. Secondly, the court must make its decision on a fully informed basis, bearing in mind that the court has an obligation to oversee the settlement until all of the benefits have been distributed to the class members.

[48] The IAP portion of the settlement is the area where the greatest administrative cost expenditure will occur. It is clear from Mr. Dumont's affidavit and the evidentiary record on the motion that the IAP is to be a continuation of the existing unilateral ADR program under a new name. As he states at para. 4:

> Based on experience with the current ADR process, the additional resources required in order to meet the continuing obligations related to the current ADR process and to meet new obligations related to the implementation of the IAP will number approximately 445 persons.

(Emphasis added)

He further deposes that "the current ADR process will have 48 adjudicators as of October 31, 2006" and although he states that "adjudicators employed in the ADR process will not be automatically transferred to the IAP" he also notes that "the Criteria for the Selection of Adjudicators in the IAP is the same criteria used for selecting model A adjudicators in the

2006 CanLII 41673 (ON SC)

ADR" and that therefore "planning has proceeded on the expectation that many ADR adjudicators will apply to be IAP adjudicators and will be successful in the procurement process".

[49] Mr. Dumont's evidence was offered based on his current experience with the ADR process. That may be the best guide available at the moment as to the requirements of the administration of the settlement. However, his evidence lacks any financial details as to the current or estimated costs of the administration. Further, as he states in para. 2, "the information provided in the affidavit is based on Canada's current planning assumptions, some of which will require further development, in co-operation with the other parties to the [settlement]". This pinpoints precisely the area of concern for the court. Mr. Dumont acknowledges that the administration plan is in a developmental stage. Nonetheless, under the terms of the proposed settlement, once approval is granted, the court is to have no role in approving any further developments in the implementation of the settlement without the acquiescence of Canada.

[50] The parties have put before the court an admittedly incomplete administration plan while at the same time attempting to foreclose the court's oversight role. This is unacceptable. As stated above, the role of the court in a class proceeding does not terminate at the point of settlement approval. It has an ongoing [page499] obligation to oversee the implementation of the settlement and to ensure that the interests of the class members are protected.

[51] I do not want the foregoing to be misunderstood as imparting a requirement that the court be the de facto administrator of the settlement. Rather, the court must be in a position to effectively evaluate the administration and the performance of the administrator and, further, be empowered to effect any changes that it finds necessary to ensure that the benefits promised under the settlement are being delivered. Any terms of the settlement that attempt to curtail this jurisdiction cannot be sanctioned by the court.

2006 CanLII 41673 (ON SC)

[52] In conclusion, this element of the settlement is problematic on two fronts. First, financial information sufficient to make an informed decision regarding the administration of the settlement, in particular the CEP program and the IAP, must be provided for the purposes of approval and thereafter on a periodic basis. Secondly, the provisions of the settlement relating to the ability of the court to exercise its ongoing jurisdiction over its administration must be consistent with the obligations of the court to the class members under the CPA. This will also require, as stated above, the appointment of an autonomous supervisor or supervisory board reporting ultimately to the court. In respect of this latter point, although I would not make it a condition of approval, I would strongly encourage that the administrator engage the assistance of a consultant experienced in the administration of complex class action settlements.

2006 CanLII 41673 (ON SC)

The Legal Fees

[53] The next issue to be addressed relates to the legal fees component of the settlement. The settlement agreement contemplates the payment of legal fees on two fronts. First, there will be payment for class counsel and certain unaligned "independent counsel" who have been representing claimants in individual actions. Secondly, the agreement has a provision regarding fees under the IAP in which Canada has undertaken to pay, in respect of any compensation awarded under the process, an additional 15 per cent to assist the claimant with his or her legal fees in advancing the claim.

[54] The payment to class counsel and independent counsel is anticipated to be in the range of $85-$100 million, divided as follows: $40 million to the National Consortium, $25-$40 million to the Merchant Law Group and approximately $20 million to the independent or unaffiliated counsel. I will address the basis for the range, as opposed to a fixed amount, for the fees of the Merchant Law Group later in these reasons. [page500]

[55] The basis for the fees being paid under the settlement differs amongst each of the groups. The counsel group identified as the National Consortium is comprised of 19 member

law firms, practising collectively in eight provinces and two territories. Within the National Consortium some firms were advancing primarily class actions, some primarily individual actions and some were advancing both. As of May 30, 2005, the National Consortium represented, on a collective basis, 4,826 named individual residential school survivors across the country. As part of the settlement, the National Consortium members agreed to waive any contingent fees on the CEP already incurred and to not charge fees to any future or prospective clients in respect of the CEP.

[56] Darcy Merkur, a partner with Thomson, Rogers, one of the member firms of the National Consortium, filed an affidavit in support of the legal fees. He states at para. 17:

> The $40 million, plus applicable taxes, payable by Canada to the National Consortium is intended to compensate Consortium members for the work they have done to November 20, 2005 and their agreement to waive their individual contingency retainer agreements by not charging fees to their clients on the CEP. It also compensates for their agreement not to charge fees on the CEP to any future or prospective clients, a substantial consideration given that there are an estimated 60,000 potential CEP clients who are not presently represented.

[57] Mr. Merkur deposes that he personally reviewed the dockets of the member firms of the National Consortium for the purpose of providing the federal representative with a summary during the negotiations. Based on his analysis of the information, as of October 15, 2005, the class action portion of the docketed time was categorized as follows in para. 132 of his affidavit:

> Value of Lead Counsel's time in active class actions: $3,952,533.75
>
> Value of Consortium time in support of the Baxter Action: $3,009,495.19
>
> Value of Consortium time in support of the Alberta test

2006 CanLII 41673 (ON SC)

cases: $5,461,896.85

Value of Consortium time in other class actions: $ 42,239.75

Value of Consortium time in other representative actions: $1,101,147.48.

In addition, Mr. Merkur states that between October 15 and November 20, 2005, the class members docketed additional time valued at $708,660. The total amount of class counsel time for the National Consortium is approximately $14.6 million based on these figures. When compared against the $40 million dollars being sought, it represents a request for a multiplier of approximately 2.73. [page501]

[58] Mr. Iacobucci has also filed an affidavit in support of the settlement. In the section dealing with fees for the National Consortium, he deposes at para. 32:

> The National Consortium has prepared an affidavit describing the work done collectively by the National Consortium and each of its members, the proposed distributions of the $40 million payment to each of its members, and the rationales for the amounts of these payments. In accordance with the fees verification agreement between Canada and the National Consortium, I have reviewed the affidavit and agree that the payment of $40 million in legal fees, plus GST and PST of $3,213,048.99 and disbursements of $2,402,173.56 is fair and reasonable having regard to the substantial legal work, including significant class action work, undertaken by the National Consortium and its members over many years and the fact that National Consortium members, like others signing the agreement, have undertaken not to seek payment of any legal fees in respect of the Common Experience Payment.

[59] In his submissions on the fee issue, Mr. Baert, on behalf of the National Consortium, stated that the $40 million fee being sought by the consortium, and indeed the entire $100 million that might be paid to all of the "class" counsel groups, was justified on the basis of the CEP component alone notwithstanding any other benefits that were achieved for the

2006 CanLII 41673 (ON SC)

class through the settlement.

[60] The settlement provides that the "class" fee will be paid in a lump sum within 60 days of the implementation date. It is not conditional on the take-up rate for the CEP nor is it tied to specific percentages of the CEP fund being utilized. Accordingly, while the total potential fee of $100 million represents less than 5 per cent of the CEP fund, on the current estimates of 79,000 claimants, the percentage, as it relates to direct payments to the class members, could rise substantially depending on the number of claimants that come forward. Although any remainder in the CEP fund will not be returned to Canada in the event that there are less claimants than anticipated, the maximum increase to any claimant in the event of a surplus in the CEP fund is $3,000. The balance of the moneys would be utilized for purposes of general benefit to the class.

[61] Premium fees are awarded in respect of class actions in recognition of the risk undertaken and result obtained for the class. The risk in this case was self-evident given the complexity of the action, the uncertainty of success because of the novel causes of action asserted, the difficulties relating to damages assessments and the protracted litigation. Further, as this court recognized in Parsons, the fact that the parties engage in negotiations does not necessarily diminish the risk faced by class counsel. The elimination of the risk is only achieved once the court has approved the settlement. [page502]

[62] Looking only at the CEP component, there has been considerable success achieved for the class members. The evidence filed on the settlement indicates that this particular element was a serious bone of contention between the parties, and the plaintiffs' insistence on compensation for the class members on this front coupled with the defendant's intransigent refusal to give ground was an effective barrier to engaging in meaningful negotiations for a significant period of time. Having held fast to the point, the plaintiffs and their counsel reaped a significant benefit for the class members.

[63] Those counsel who are regarded as "independent" in that

2006 CanLII 41673 (ON SC)

they are neither members of the National Consortium or the Merchant Law Group but who are instead representing individual claimants will receive payments of fees under the settlement. These lawyers will receive payments of up to $4,000 for each retainer agreement or substantial solicitor-client relationship as of May 30, 2005. The rationale for this is set out in Mr. Iacobucci's affidavit at para. 26:

> Sections 13.05 and 13.06 of the Settlement Agreement establish the fundamental principle for the payment of legal fees under the Settlement Agreement, namely, each lawyer who had a retainer agreement or a substantial solicitor-client relationship (a "Retainer Agreement") with a former student as of May 30, 2005 will be paid for outstanding Work-in-Progress up to a cap of $4,000, so long as he or she does not charge any fees in respect of the Common Experience Payment. The requirement that a Retainer Agreement exist as of May 30, 2005 is intended to avoid providing a windfall to lawyers who "signed up" clients once my appointment and the existence of the settlement discussions was known.

[64] The fees to be paid to the "independent counsel" relate to individual retainers and the process contemplated will ensure their verification. There was an objection raised in respect of the $4,000 cap per retainer for the independent counsel fees in respect of Work-in-Progress. It was argued that this provision serves to disadvantage those individual claimants whose counsel have already expended more than the cap amount in pursuit of their individual claims. The underlying assumption is that there will be counsel who will not agree to accept the $4,000 in full settlement of their outstanding accounts and instead bring a claim for fees against any of their clients who file a claim for the CEP instead of opting out of the settlement.

[65] The "cap" objection was not addressed by any counsel moving, or supporting the motion, for settlement approval at the hearing. However, as a group, "independent counsel" were represented at the bargaining table and the proposal set out in the settlement was arrived at through negotiation. Given the number of independent counsel who appear to have accepted this

2006 CanLII 41673 (ON SC)

proposal, the lack [page503] of information before the court as to the scope of any potential problem in this regard and the reality that no viable alternative was proposed, I cannot accede to this objection as a basis for rejecting either the settlement as a whole or this term in particular. I have no concerns with either the proposed process for verification of the fees of the "independent counsel" or the amounts.

[66] As stated above, there was a range set out for the fees of the Merchant Law Group as opposed to a fixed number. In addition, a different verification process was followed. This too was addressed by Mr. Iacobucci in his affidavit. At para. 34 he states:

> The verification process agreed to with the Merchant Law Group is different from the verification process for the National Consortium because of the very serious concerns that I had and continue to have with respect to the Merchant Law Group fees. These concerns include:
>
> (a) uncertainty about the number of former residential school students that Merchant Law Group purports to represent;
>
> (b) lack of evidence or rationale to support the Merchant Law Group's claim that it had Work-in-Progress of approximately $80 million on its residential school files; and
>
> (c) an apparent discrepancy between the amount of class action work Merchant Law Group represented it had carried out and the amount of class action work it had actually done.

Mr. Iacobucci goes on to set out the proposed verification process in para. 35 of his affidavit. He states:

> The Merchant Law Group agreed to the following four-part verification process set out in the Merchant Fees Verification Agreement.

2006 CanLII 41673 (ON SC)

(a) First, the Merchant Law Group's dockets, computer records of Work in Progress and any other evidence relevant to the Merchant Law Group's claim for legal fees will be made available for review and verification by a firm to be chosen by me.

(b) Second, I will review the material from the verification process and consult with the Merchant Law Group to satisfy myself that the amount of legal fees to be paid to the Merchant Law Group is reasonable and equitable "taking into consideration the amounts and basis on which fees are being paid to other lawyers in respect of this settlement, including the payment of a 3 to 3.5 multiplier in respect of the time on class action files and the fact that the Merchant Law Group has incurred time on a combination of class action files and individual files.

(c) Third, if I am not satisfied that the $40 million is a fair and reasonable amount in light of this test, the Merchant Law Group and I will make reasonable efforts to agree on another amount.

(d) Fourth, if we cannot reach agreement, the amount of the fees shall be determined by Mr. Justice Ball or, if he is not available, another Justice of the Court of Queen's Bench in Saskatchewan. [page504]

[67] The fee verification process for the Merchant Law Group has been a source of contention and has generated a motion before Justice Ball in Saskatchewan. On that motion, Canada was seeking to enforce the terms of the agreement with the Merchant Law Group pursuant to the settlement. At the time, the parties had not moved before any court for approval of the settlement and Justice Ball dismissed the motion as premature. Now that the parties have moved for settlement approval, a motion in which the Merchant Law Group has participated, the issue is joined and no longer premature. Indeed, the verification process is a term of the settlement agreement.

2006 CanLII 41673 (ON SC)

[68] No argument of any force has been advanced as to why the contemplated fee verification process is not binding upon the Merchant Law Group. I am not persuaded by the argument that there are solicitor-client confidentiality considerations that prevail over the agreed process, especially in the context of a class action settlement where the benefit of engaging in the process will enure to the clients in that their legal fees, as verified, will be paid by the defendant. Further, I do not accept Mr. Merchant's argument that the current dispute between Canada and the Merchant Law Group relating to the fee verification process can hold up the entire settlement approval. In my view, the fee component of the settlement as it relates to the Merchant Law Group is the process agreed upon for arriving at the actual fee request. That process is clear from the agreement. Once an amount has been determined through this process, it will be assessed by the courts as to reasonableness on the same basis as are the fees of other "class" counsel. I see no reason to depart from the agreed process or to delay approval of the settlement on this basis.

[69] In my view, the "class" portion of the legal fees are reasonable. That does not conclude the fee analysis, however.

[70] It is apparent from the record that the class counsel fees might only represent a portion of the total fees that will be payable on behalf of those class members who make claims under the IAP. The IAP is meant to address the more serious personal injury claims. It is almost certain that most claimants will require the assistance of counsel to advance their claims in this process. Under the terms of the settlement, Canada has agreed to pay an additional 15 per cent on top of any compensation awarded under the IAP to help defray the legal costs of claimants. However, notwithstanding this, lawyers representing individual IAP claimants will be charging contingent fees in excess of 15 per cent payable by Canada. The settlement does not prevent this practice nor does it restrict the amount of such contingent fees payable by the claimant. Indeed, the absence of any control [page505] mechanism on individual fee arrangements appears to have been a conscious choice in the drafting of the settlement. This is evident from Mr. Merkur's affidavit. He deposes, at para. 18:

2006 CanLII 41673 (ON SC)

> The Settlement Agreement also recognizes that some counsel will be performing future work on behalf of individual clients who pursue further compensation through the [IAP] established by the Settlement Agreement. With respect to such future work, the Settlement Agreement takes a hand's off approach to whatever retainer agreements might exist between counsel and client. However, it does provide that Canada shall pay a further 15% of any IAP award to help defray lawyer's fees. This is a continuation of the approach taken by Canada under the IAP's predecessor, the Dispute Resolution process established in November, 2003.
>
> (Emphasis added)

[71] During argument, Mr. Merchant advised the court that the Merchant Law Group would limit its contingent fees to an additional 15 per cent of any IAP compensation award, for a total of 30 per cent when added to the amount to be paid by Canada. Although this position regarding fees was eventually adopted by all counsel appearing at the hearing, this voluntary concession does not limit the fees that may be charged by other lawyers who may act for claimants under the IAP.

[72] It is estimated that the number of claimants under the IAP may reach 15,000. Mr. Merchant suggested that the total value of the settlement could be as much as $5 billion when all of the claims made under the IAP have been adjudicated. No other counsel challenged this number. Accordingly, when the value of the other benefits under the settlement are subtracted from this total, the IAP could generate over $2.5 billion in compensation. If this number is correct, it means that additional legal fees payable by Canada will total $375 million. Further, if the additional amount of fees charged by lawyers to individuals is held to another 15 per cent, the total fees to counsel under the IAP alone would total $750 million. This is in addition to the "class" fee of $100 million for total legal fees of $875 million, if all contingent fee agreements are limited to 30 per cent, which is not the case. Again, these numbers are based on limited data and conjecture by counsel.

2006 CanLII 41673 (ON SC)

[73] As stated above, the parties decided to take a "hand's off" approach with respect to the IAP contingent counsel fees. This position was urged upon the court as the proper approach. I cannot accede to this submission. During argument, I expressed a concern that in the event of issues arising between the IAP claimants and their respective counsel relating to fees, the claimant would have no effective recourse to challenge the reasonableness of any additional fees charged. Counsel responded that such claimants could follow the general procedures available in their [page506] province or territory of residence with respect to assessments of legal fees. In consideration of the evidence adduced in support of the counsel fee proposals, this appears to be an illusory remedy at best. As Mr. Merkur, addressing the difficulties counsel have in representing claimants in this case, deposes at para. 25 of his affidavit:

> Both Thomson, Rogers and Richard Courtis, our co-counsel, have toll free numbers that our client can call. In a typical week we will field some 50 calls from residential school survivors. We have found that many of our clients have literacy problems that make it extreme difficulty [sic] for them to fully understand our regular update correspondence, even when written with such limitations in mind. Our clients often call us for clarification of certain points set out in our letters and we spend much time doing this. Because of the geographic dispersion of our clients it is often difficult if not impossible to visit regularly with them in person. A further problem is miscommunication spread within the Aboriginal communities caused by false rumours about settlements and funds received.

Further, at para. 26 he deposes:

> Because of these challenges the process of making legal representations available to residential school claimants is more time consuming and difficult than with most other types of clients. Gathering information from clients in order to prepare pleadings and respond to motions, and meetings with clients in order to get ready for examinations for discovery

2006 CanLII 41673 (ON SC)

and other litigation steps are more difficult than in conventional litigation.

[74] In the face of this evidence, it is difficult to accept that the claimants will be in a position to successfully navigate the legal system to ensure that their rights are protected in regard to the legal fees they might have to pay. Accordingly, the suggestion that such disputes or concerns should be left to ordinary course litigation to be resolved must be rejected.

[75] As a general principle, wherever a settlement incorporates a claims resolution procedure, the entirety of that procedure is to be conducted under the supervision of the court. This must of necessity include the relationship between counsel and clients engaged in the process, especially where the legal fees or part thereof are paid pursuant to the settlement. As stated above, the court must ensure that claimants obtain the expected benefits of the settlement.

[76] One of the purported benefits of the settlement is the fact that it presents a comprehensive scheme for dealing with all issues arising from the residential school program. In keeping with the general principle, claimants must have recourse within the administration of this settlement to challenge the reasonableness of the fees they are charged by counsel.

[77] In my view, the submissions of Mr. Merchant on the contingent fee issue may serve as a guide. Mr. Merchant made representations [page507] to the court that he spoke from personal experience in that he has been involved in a number of contested trials relating to the residential schools. Accordingly, it appears that his suggestion that an additional 15 per cent was appropriate was based on that experience. Further, a fee of 30 per cent on a contingent basis is a substantial retainer in any event.

[78] There must be a process to regulate fees charged by counsel under the IAP. All individual retainer agreements relating to the IAP must be provided to the adjudicator hearing

2006 CanLII 41673 (ON SC)

the case after an award is rendered but before compensation is paid. All fees charged or to be charged to the individual claimant must be clearly set out. This means that any counsel participating in the process will be under an obligation to make full disclosure in respect of the fees charged, directly or indirectly to the claimant, including disbursements and taxes. The adjudicator will assess the reasonableness of the fee having regard to the complexity of the case, the result achieved, the intent of the settlement to provide successful claimants with reasonable compensation and the fact that an additional 15 per cent of the compensation awarded will be paid by Canada. The adjudicator's decision as to fees may be subject to appeal to the Chief Adjudicator or his designate in respect of errors in principle. Directions to pay to any person other than the claimant an amount in excess of the fees, including disbursements and any applicable taxes, determined to be reasonable by the adjudicator will be considered void.

2006 CanLII 41673 (ON SC)

The Jurisdiction of the Courts

[79] I turn now to the jurisdiction of the supervisory courts. At the outset, it must be recognized that once the parties have sought the approval of the courts for the settlement, they have attorned to the jurisdiction of each of those courts. To the extent that the terms of the settlement attempt to restrict the ability of any of the approving courts' jurisdiction to deal with matters pertaining to the settlement, including its ongoing administration, such provisions are unacceptable. By the same token, I accept that in a multi-jurisdictional settlement such as this, a provision requiring unanimous approval by all of the supervising courts prior to a "material" amendment being made to the agreement is not an unreasonable provision. Such a requirement does not infringe on the jurisdiction of this or any other court in the context of this settlement. Joint approval of the settlement has been sought from all of the supervisory courts, on the understanding that the settlement will fail unless it is approved by all of the courts. Accordingly, it follows [page508] that if a material amendment were to be sought by the parties, such an amendment would also require unanimous approval by the courts.

[80] My concern goes to the provisions of the settlement that may impact on the ability of this and every other approving court to exercise its respective power over the implementation and administration of the settlement, as it affects the class members under its specific jurisdiction. This concern was raised with the parties and it was not alleviated by the submissions made in response. This court has had considerable experience with the administration of complex class proceeding settlements. The problems with logistical co-ordination on a timely basis alone, notwithstanding any other difficulties that may arise, renders any approach that requires unanimous approval of nine courts unworkable in dealing with issues related to specific classes and class members. It is especially troubling where there is a class that has a large number of elderly members and time is of the essence in dealing with issues.

[81] I do not suggest that the parties need rewrite the agreement to deal with this issue. It is common in complex class actions that problems of this nature are dealt with by way of protocols prepared by the parties, in consultation with the courts, to ensure that the administration functions as intended. In my view, the jurisdictional concerns may be addressed by way of such a protocol, to be approved by all of the courts.

The Class Definitions

[82] Finally, I will deal with the issue arising from the proposed class definition as it relates to those who attended a residential school but died prior to May 30, 2005. The proposed settlement would exclude the estates of such persons from making claims under the CEP program or the IAP. It was argued that this provision was negotiated to ensure that the surviving members of the class benefited as much as possible from the direct compensation available. The incongruity of this argument is apparent in the submission that an estimated 1,000 class members have died since May 30, 2005 and, given the large number of elderly people in the class, this number is increasing. There was open disagreement between class counsel

2006 CanLII 41673 (ON SC)

as to whether the estates of those persons deceased prior to May 30, 2005 had a sustainable claim in any event. What is clear is that an arbitrary line has been drawn between class members in similar circumstances. Here, the estate of a person who died on May 29, 2005 is not entitled to make a claim whereas the estate of a person dying on [page509] May 30, 2005 is so entitled. Certain of the objectors characterized this arbitrary approach as being unfair.

[83] A key point about this arbitrary distinction is that the estates of those persons who died prior to the May 30, 2005 deadline will not receive CEP or IAP compensation. Nonetheless, it is still the intention to have those estates bound by the settlement terms in that their claims will be extinguished by the general releases to be granted if the settlement is approved. While it is not uncommon, or necessarily objectionable, to draw distinctions between class members for the purposes of distributing compensation from a global fund, in those cases where a distinction is drawn, compensation is usually paid to claimants on both sides of the divide albeit in reduced amounts on one side.

[84] Where the intention is to bind potential class members without direct compensatory payment, the court must apply careful scrutiny to the provisions of the settlement seeking to effect that result. This analysis must be conducted on a case by case basis. Here, it was contended that the indirect benefits to the family members of the deceased class members, through the healing and commemoration initiatives, was a countervailing benefit given in exchange for the right being extinguished by the settlement. In addition, the estates of those class members whose direct claims are being extinguished may exercise their opt out rights in order to pursue their individual litigation. I agree with these submissions, but would add that the opt out notices must be drafted in a manner to make it clear that these rights are being extinguished under this settlement.

Conclusion

[85] In conclusion, subject to the correction of the

2006 CanLII 41673 (ON SC)

deficiencies noted above, I would certify the action as a class proceeding as proposed and approve the settlement as being "fair, reasonable and in the best interests of the class as a whole". The changes that the court requires to the settlement are neither material nor substantial in the context of its scope and complexity. It would serve the interests of the proposed class to have these issues dealt with in an expeditious manner and to that end, I am prepared to grant the parties a reasonable period, not to exceed 60 days from the date of these reasons, to complete the required changes. I will make myself available on short notice to deal with any issues that may arise.

Order accordingly. [page510]

APPENDIX A

THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE DIOCESE OF ATHABASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF CARIBOO, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE DIOCESE OF MOOSONEE, THE SYNOD OF THE DIOCESE OF WESTMINISTER, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE DIOCESE OF SASKATCHEWAN, THE SYNOD OF THE DIOCESE OF YUKON, THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE PRESBYTERIAN CHURCH IN CANADA, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH IN CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (also known as THE METHODIST MISSIONARY SOCIETY OF CANADA), THE CANADIAN CONFERENCE OF CATHOLIC BISHOPS, THE ROMAN CATHOLIC BISHOP OF THE DIOCESE OF CALGARY, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS, THE ROMAN

2006 CanLII 41673 (ON SC)

CATHOLIC BISHOP OF THUNDER BAY, THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, THE ROMAN CATHOLIC BISHOP OF VICTORIA, THE ROMAN CATHOLIC BISHOP OF NELSON, THE CATHOLIC EPISCOPAL CORPORATION OF WHITEHORSE, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD -- McLENNAN, THE CATHOLIC ARCHDIOCESE OF EDMONTON, LA DIOCESE DE SAINT-PAUL, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF MACKENZIE, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, THE ROMAN [page511] CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION ARCHIEPISCOPALE CATHOLIQUE ROMAINE DE SAINT-BONIFACE, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF THE DIOCESE OF SAULT STE. MARIE, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, THE ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE MISSIONARY OBLATES OF MARY IMMACULATE -- GRANDIN PROVINCELES PERES MONTFORTAINS (also known as THE COMPANY OF MARY), JESUIT FATHERS OF UPPER CANADA, THE MISSIONARY OBLATES OF MARY IMMACULATE -- PROVINCE OF ST. JOSEPH, LES MISSIONAIRES OBLATS DE MARIE IMMACULEE (also known as LES REVERENDS PERES OBLATS DE L'IMMACULEE CONCEPTION DE MARIE), THE OBLATES OF MARY IMMACULATE, ST. PETER'S PROVINCE, LES REVERENDS PERES OBLATS DE MARIE IMMACULEE DES TERRITOIRES DU NORD OUEST, LES MISSIONAIRES OBLATS DE MARIE IMMACULEE (PROVINCE U CANADA -- EST), THE SISTERS OF SAINT ANNE, THE SISTERS OF INSTRUCTION OF THE CHILD JESUS (also known as THE SISTERS OF THE CHILD JESUS), THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, THE SISTERS OF CHARITY (GREY NUNS) OF ST. ALBERT (also known as THE SISTERS OF CHARITY (GREY NUNS) OF ST. ALBERTA), THE SISTERS OF CHARITY (GREY NUNS) OF THE NORTHWEST TERRITORIES, THE SISTERS OF CHARITY (GREY NUNS) OF MONTREAL (also known as LES SOEURS DE LA CHARIT (SOEURS GRISES) DE I'HPITAL GNRAL DE MONTREAL), THE GREY SISTERS NICOLET, THE GREY NUNS OF MANITOBA INC. (also known as LES SOEURS GRISES DU MANITOBA INC.), THE SISTERS OF ST. JOSEPH OF SAULT STE. MARIE, LES SOEURS DE SAINT-JOSEPH DE ST-HYACINTHE and INSTITUT DES SOEURS DE SAINT-JOSEPH DE SAINT-HYACINTHE LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE (also known as LES SOEURS DE L'ASSOMPTION DE LA SAINTE

2006 CanLII 41673 (ON SC)

VIERGE) DE NICOLET AND THE SISTERS OF ASSUMPTION, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE DE L'ALBERTA, THE DAUGHTERS OF THE [page512] HEART OF MARY (also known as LA SOCIETE DES FILLES DU COEUR DE MARIE and THE DAUGHTERS OF THE IMMACULATE HEART OF MARY), MISSIONARY OBLATE SISTERS OF SAINT-BONIFACE (also known as MISSIONARY OBLATES OF THE SACRED HEART AND MARY IMMACULATE, or LES MISSIONAIRES OBLATS DE SAINT-BONIFACE), LES SOEURS DE LA CHARITE D'OTTAWA (SOEURS GRISES DE LA CROIX) (also known as SISTERS OF CHARITY OF OTTAWA -- GREY NUNS OF THE CROSS), SISTERS OF THE HOLY NAMES OF JESUS AND MARY (also known as THE RELIGIOUS ORDER OF JESUS AND MARY and LES SOEURS DE JESUS-MARIE), THE SISTERS OF CHARITY OF ST. VINCENT DE PAUL OF HALIFAX (also known as THE SISTERS OF CHARITY OF HALIFAX), LES SOEURS DE NOTRE DAME AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, SISTERS OF THE PRESENTATION OF MARY (SOEURS DE LA PRESENTATION DE MARIE), THE BENEDICTINE SISTERS, INSTITUT DES SOEURS DU BON CONSEIL, IMPACT NORTH MINISTRIES, THE BAPTIST CHURCH IN CANADA

Third Parties

2006 CanLII 41673 (ON SC)

2013 ONSC 5637 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Marcia Brown and Robert Commanda / Plaintiffs

AND:

The Attorney General of Canada / Defendant

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: Justice Edward Belobaba

COUNSEL: *Jeffery Wilson* and *Morris Cooper* for the Plaintiffs

Owen Young, *Paul Evraire* and *Michael Bader* for the Defendant

HEARD: July 15 and 16, 2013

Re-Hearing of the 'Sixties' Scoop' Certification Motion

DECISION ON CERTIFICATION

Introduction

[1] The aboriginal communities in Ontario refer to it as the "Sixties' Scoop." For a time, and particularly for a nineteen-year period between 1965 and 1984, welfare authorities in Ontario removed many Indian and aboriginal children from their families and communities and placed them with foster or adoptive parents that were non-aboriginals. It is alleged that many of the "scooped" children lost their identity as aboriginal persons and suffered mentally and physically. The aboriginal communities describe the effects of the Sixties Scoop as horrendous, destructive, devastating, and tragic.

[2] Marcia Brown and Roberta Commanda are aboriginals of Ojibway ancestry, and they were scooped children. In this proposed class action, which was commenced on February 9, 2009, notably they do not sue the Ontario welfare authorities. They sue only the Federal Crown. They accuse the Federal Crown of a systemic assimilation policy purposely designed to destroy First Nations families and communities. They bring their action on behalf of approximately 16,000 aboriginals who, they allege, were the victims of a deliberate program of "identity genocide of children" that occurred in Ontario between December 1, 1965 and December 31, 1984 ...

[3] This is how Justice Perell began his 2010 decision certifying the "Sixties' Scoop" lawsuit as a class action.[1] The time-period in question covers almost twenty years. It begins on December 1, 1965 when the Federal Crown signed an agreement with the province of Ontario known as the *Canada-Ontario Welfare Services Agreement* ("the 1965 Agreement") and ends on December 31, 1984, the day before the *Child and Family Services Act*[2] ("CFSA") was proclaimed in force, making aboriginality an important factor in child protection and placement practices.

[4] Under the 1965 Agreement, the Federal Crown entered into a funding agreement that allowed Ontario to extend the delivery of its existing child welfare (as well as other welfare services) to Indians living on reserves. The 1965 Agreement was limited in its scope to "Indians with reserve status". It did not apply to the Inuit or Metis peoples and some exceptions aside, it did not provide for the funding of welfare services to Indians or other aboriginal persons living in urban centres or in other places off-reserve.

[5] The welfare services were listed in a schedule and included "services to children, including the protection and care of neglected children, the protection of children born out of wedlock and adoption services provided under the [provincial child welfare law.] One section of the 1965 Agreement provided that "no provincial welfare program shall be extended to any Indian Band in the Province unless that Band has been consulted by Canada or jointly by Canada and by Ontario and has signified its concurrence." As it turned out, no Indian Bands were consulted.

[6] At the hearing before Justice Perell, the plaintiffs made clear that it was the 1965 Agreement "that gave rise to these claims."[3] That is, it was the 1965 Agreement that allowed (or "unleashed", depending on one's perspective) a well-intentioned but

---

[1] *Brown v. Canada (Attorney General)*, 2010 ONSC 3095, 102 O.R. (3d) 493.

[2] S.O. 1984, c. 55. The CFSA took effect on January 1, 1985.

[3] *Brown v. Canada (Attorney General)*, *supra* note 1, at para. 41.

2013 ONSC 5637 (CanLII)

profoundly uninformed child protection bureaucracy to "scoop" thousands of Indian children that were found to be in need of protection off Indian reserves and place them in non-aboriginal homes. (I will return to the significance of the 1965 Agreement when I consider the class definition).

[7] The proposed class period ends at the end of 1984 when the CFSA was proclaimed in force. The CFSA did more that provide a legislative direction that aboriginality should be a factor to be considered in child protection and placement matters. The new law recognized that:

> Indian and native people should be entitled to provide, whenever possible, their own child and family services, and that all services to Indian and native children and families should be provided in a manner that recognizes their culture, heritage and traditions and the concept of the extended family[4]

and, in essence, mandated that, whenever possible, Indian or native children needing protection should be placed in an Indian or native setting – ideally, with a member of the extended family, or with the child's Band or native community[5], and when the child was being placed for adoption, the child's Band or native community had to be given thirty days written notice.[6]

[8] The CFSA provisions did not just list "aboriginality" as another factor for judicial consideration. They inscribed in law for the first time a legislative recognition that the aboriginal culture had a very different understanding of community, family and children in need of protection and that these differences had to be respected. With the enactment of the CFSA provisions, the chances of the Indian or native children being adopted-out to a non-aboriginal family and losing their culture and identity were reduced dramatically.

[9] Over the 19 years in question, however, before the CFSA took effect, on-reserve children deemed in need of protection were routinely placed in non-aboriginal homes and always with court approval. The judges that reviewed the crown ward-ship or adoption applications were undoubtedly acting in good faith and making decisions that they thought were in the best interests of the child. Some of the judges, on their own initiative,

---

[4] CFSA, s. 1(f).

[5] CFSA, s. 57(2)(d).

[6] CFSA, s. 134(3).

2013 ONSC 5637 (CanLII)

may even have weighed and considered the child's aboriginal culture in coming to their decisions. But none of them were statutorily required to preserve this culture and identity by placing the child *whenever possible* with an aboriginal family or Band. That was the unequivocal message of the CFSA enacted in 1984.

[10] And that is why the Federal Crown is wrong to argue that because all of the placements were pursuant to court orders and the courts acted in the best interests of the children, that the so-called Sixties Scoop cannot now be questioned or challenged. Remember, the plaintiffs are not challenging the actual court decisions that allowed the aboriginal children to be placed in non-aboriginal homes. There is no collateral attack in this proposed class action on the judicial decisions. The plaintiffs are alleging that the Federal Crown had a duty or responsibility to protect and preserve the Indian children's culture and identity both when entering into the 1965 Agreement,[7] and after the children were placed in the non-aboriginal homes, and failed to do so. They seek damages for the harm that was caused not by the court orders but by the alleged breaches of fiduciary and common law duty on the part of the Federal Crown.

2013 ONSC 5637 (CanLII)

The harm that was done

[11] On the evidence before me, the harm done was profound and included lasting psychological and emotional damage. According to Dr. Harvey Armstrong, who was the chairperson of the Canadian Psychiatric Association Section on Native Mental Health for many years and directed a University of Toronto program that provided mental health services to about 15,000 Cree and Ojibway people, the First Nations people of Ontario "experienced intentional and inadvertent culture/identity genocide."

[12] Dr. Armstrong's expert evidence was summarized by Justice Perell:

> - In the early part of the 20th century, Canada applied a policy of cultural extermination when officials seized thousands of native children from their homes on the reserve and committed them to residential schools that not only deprived them of the experience of living in an aboriginal family, but punished them for expressing their Indian customs, traditions and languages.

---

[7] The plaintiffs allege in para. 28 of the Statement of Claim: "When the Agreement was made, it was not sufficient for Canada to provide funding only. Canada's duty of care to the Class required more than the application of funding." The particulars of this pleading, as they came out during the course of the hearing, included the suggestion that the Federal Crown should have insisted as a term or condition of the funding arrangement that the provincial child protection system continue to protect and preserve the apprehended child's Indian and native culture and identity by ensuring whenever possible that Indian and native children in need of protection were placed in aboriginal homes.

- In the 1960s, 70s and 80s, ill-informed child welfare workers in Ontario, who did not know enough about native communities and their resources to parent and protect the community's children, removed children and placed them with non-Indian caregivers with the same intention as of the residential school experience, albeit in the context of a replacement family rather than a residential school setting.

- This was a misguided policy based on the belief that the answer to the Indian problem was to assimilate the Indian children into mainstream culture.

- The effect of this policy was loss of culture, loss of language, loss of ability to parent as an aboriginal person, loss of identity, increased rate of psychopathology, confused identity formulation, psychiatric disorders, substance abuse, emotional isolation, violence, unemployment, feelings of betrayal, and extreme lack of emotional attachment. [8]

[13] Dr. Armstrong concluded his opinion with this comment:

> It is true that adolescence is a period of identity growth and confusion and thus arguably common to all persons. But nothing in my work with all persons compares with the experience of the Indian child who confronts the period identity with the discovery of a breach of trust and betrayal for himself and his people, as he experiences it.

[14] Mr. Kenn Richard, a director of Native Child and Family Services of Toronto added the following:

> In our work at Native Child and Family Service of Toronto, I know first-hand the experiences of the surviving children of the "Sixties Scoop". Typically, we met them (and we are still meeting them) anywhere from their adolescent years to adulthood and we work with them in counselling or therapy. We are providing necessary counselling or therapy because, when they found themselves confronting the fact of their Indian or native culture, they then experienced quite an alarming degree of frustration and anger with feelings of distance or non-belonging from both their indigenous family and their adoptive or permanent placement non-Indian or non-native family, and entered into a crisis over their identity.
>
> The re-claiming of their identity as an Indian or native person becomes

---

[8] *Brown v. Canada (Attorney General)*, *supra* note 1, at para. 59.

2013 ONSC 5637 (CanLII)

> fundamental to our therapeutic work with these survivors and their capacity to achieve a sufficient sense of self-esteem in order to cope within society and make a constructive contribution to the community and live a good and non-combative life, in the sense of coming to terms with themselves and others whom they trusted ...
>
> [A] dysfunction emerged when their indigenous identity became clear to them, as it must, and they were wholly ill-equipped to understand, appreciate, connect, or identify with their Indian or native selves, and thus the identity crisis.

[15] The evidence tendered by the plaintiffs' other two experts was similar.

Justice Perell's decision

[16] Perell J. carefully reviewed all of the claims and issues in a detailed 39-page decision and concluded that the class action could be certified if the statement of claim was amended and the class definition and proposed common issues were revised. He said this:

> ... it is my conclusion that: (a) with amendments to their statement of claim; (b) with revisions to the proposed class definition and proposed common issues, and (c) subject to the preparation of an adequate litigation plan, Ms. Brown and Mr. Commanda will be able to satisfy all five criteria of the test for certification. Therefore, conditional upon Ms. Brown and Mr. Commanda revising their proposed class action in the manner described below and conditional upon the court approving the litigation plan for the revised class action, I grant their motion to certify the action as a class proceeding.[9]

[17] It was obvious from Justice Perell's reasons what he was deciding and what specific changes had to be made and, not surprisingly, the plaintiffs immediately filed a Fresh as Amended Statement of Claim following Perell J.'s directions to the letter. The Federal Crown, however, instead of appealing the certification decision on the merits, chose to focus on the conditionality of the certification order and took the position that Perell J.'s suggested changes were not obvious from his reasons, that the defendants could not know what the amended claim would look like and (despite three days of hearing where all of the issues were fully argued) that they were denied the right to respond to the amended claims of fiduciary duty and negligence.

---

[9] *Brown v. Canada (Attorney General)*, *supra* note 1, at para. 9.

2013 ONSC 5637 (CanLII)

[18] These submissions were accepted by the Divisional Court[10] who set aside the conditional certification order and directed that the matter be re-heard by another class actions judge. The Court of Appeal affirmed.[11]

2013 ONSC 5637 (CanLII)

The re-hearing before me

[19] I heard the plaintiff's motion for certification under the *Class Proceedings Act, 1992* ("CPA")[12] and the Federal Crown's motion under Rule 21 of the *Rules of Civil Procedure* to strike the pleadings on July 15 and 16, 2013. At the conclusion of the hearing I advised counsel that the plaintiffs' motion for certification would be granted (unconditionally) and the Federal Crown's motion to strike would be dismissed. Written reasons would follow in September.

[20] These are my reasons.[13]

[21] I will not repeat the factual background. It was set out in detail in Justice Perell's decision and was also summarized by the Court of Appeal. I will proceed directly with the legal analysis under the CPA.

[22] Generally speaking, I agree with the analysis of Justice Perell. I particularly agree that there are two possible causes of action, breach of fiduciary duty and negligence; that that the core common issue, as reworded by me below, will significantly advance the litigation; that a class action is by far the preferable procedure; and that Ms. Brown is a suitable representative plaintiff. I differ with Justice Perell in two respects, both of which stem from the fact that it was the 1965 Agreement, as the plaintiffs explained, that "gave rise to these claims." I have narrowed the class definition and re-worded the common issue to reflect this fact.

Analysis

---

[10] 2011 ONSC 7712, 114 O.R. (3d) 352 (Div. Ct.).

[11] 2013 ONCA 18, (2013) 114 O.R. (3d) 355 (C.A.).

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

[13] For the purpose of any appeals, I assured counsel at the conclusion of the hearing that the formal date of this decision would be the day these reasons were released (September 30, 2013) and not July 16, 2013 when the decision was announced.

[23] Under s. 5(1) of the CPA, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[24] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim. The question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be pursued as a class proceeding. Although s. 5(1) of the CPA, as just noted, requires the plaintiff to satisfy five prerequisites, the bar for certification is actually quite low. The plaintiff only has to establish a plausible cause of action under the first prerequisite and "some basis in fact" for each of the remaining four prerequisites.[14]

[25] Indeed, the Supreme Court has made it clear that the CPA should be construed generously. An overly restrictive approach must be avoided in order to realize the benefits of the legislation as foreseen by its drafters, namely serving judicial economy, enhancing access to justice and encouraging behaviour modification by those who cause harm. The Court underlined the particular importance of keeping this principle of interpretation in mind at the certification stage.[15]

(1) Cause of action

[26] The first question is whether the plaintiffs have a cause of action. The test under s. 5(1)(a) of the CPA is the same as that under Rule 21, i.e. that the claim should be permitted to proceed unless it is "plain and obvious" that it cannot succeed.[16] That is, that the claim has no chance of success.[17] This is obviously a very low hurdle.

[27] The allegations of fact as pleaded in the statement of claim, which must be taken as true, can be summarized (in one very long sentence) as follows: The Federal Crown, having responsibility for the protection of Indian culture and identity, and knowing about

---

[14] For a summary of the oft-repeated principles and citations, see *Arora v. Whirlpool Canada*, 2012 ONSC 4642, 24 C.P.C. (7th) 68, at paras. 120 to 124.

[15] *Hollick v. City of Toronto*, 2001 SCC 68, [2001] 3 S.C.R. 158, at paras. 14-16 [*Hollick*].

[16] *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 [*Hunt v. Carey*].

[17] If there is a chance that the plaintiff might succeed, then the plaintiff should not be driven from the judgment seat: *Hunt v. Carey*, *ibid.*, at para. 36.

2013 ONSC 5637 (CanLII)

the importance of this culture and identity to the Indian people, funded the expansion of Ontario child welfare services to on-reserve Indian children without consulting Indian Bands, and without taking any steps to ensure that the provincial child welfare authorities would preserve and protect, whenever possible, an apprehended child's aboriginal culture and identity; and then, after the child was placed in a non-aboriginal home, the Federal Crown failed to take reasonable steps to protect this culture, advise the child of his or her Indian status, and upon reaching the age of majority, the steps he or she could take to regain this status, or the federal benefits that he or she may be entitled to. These acts or omissions, say the plaintiffs, were acts of "fundamental disloyalty, betrayal and dishonesty to the plaintiffs and the class members."

2013 ONSC 5637 (CanLII)

[28] The plaintiffs allege that the Federal Crown knew or should have known that the 1965 Agreement provided no protection for the cultural identity of vulnerable aboriginal children within Ontario's child welfare system. And yet it did nothing. Specifically, the plaintiffs allege that the Federal Crown:

- failed to consult with the Ontario Indian Bands in respect of the provision of funding for child welfare practices and policies to on-reserve Indian children that it knew were clearly in conflict with its duty to protect the cultural identity of on-reserve Indian children;

- did nothing to stop Ontario from providing child welfare services in consequence of which the class members lost their cultural identity;

- did nothing to ameliorate the harmful effects of Ontario's child welfare services;

- did nothing to assure that aboriginal children were made aware of their status as aboriginal children when they were placed in non-aboriginal homes;

- did nothing to assure that the aboriginal children would be provided with services that could enable them to be aware of and exercise their culture, traditions, customs and identity during the period of their placement in non-aboriginal homes;

- did nothing to assure that aboriginal children were made aware of their status as aboriginal persons or the benefits available to them when they left their non-aboriginal homes or entered their age of majority;

- did nothing to assure that aboriginal children, when approaching their age of majority, or leaving their non-aboriginal homes, would be provided with services that could enable them to reclaim their cultural identity; and

- failed to ensure that aboriginal children had, at least, the protections in respect of their cultural identity as those which were subsequently implemented by Ontario in the 1984 CFSA.

[29] By failing to take any of these steps to protect the aboriginal cultural identity of the plaintiffs and the putative class members, the plaintiffs say that the Federal Crown was careless, reckless, willfully blind, or was deliberately accepting or promoting a policy of cultural assimilation. These omissions were acts of fundamental disloyalty, betrayal and dishonesty to the plaintiffs and the putative class members. In failing to act when it should have done so, say the plaintiffs, the Federal Crown breached its fiduciary and common law duties of care.

[30] I will now turn to these alleged duties of care. I will first discuss the fiduciary duty claim and then the negligence claim.

2013 ONSC 5637 (CanLII)

(i) Fiduciary duty

[31] Justice Perell concluded the breach of fiduciary duty claim cleared the s. 5(1)(a) hurdle. In his view, it was not plain and obvious that there was no viable cause of action for breach of fiduciary duty against the Federal Crown based on what it did or did not do as aboriginal children were being placed in non-aboriginal homes. He put it this way:

> [A]ssuming that the Federal Crown did have a fiduciary relationship with the aboriginal children and assuming that the child welfare system in Ontario robbed these children of their communities, culture, support, and identity, in my opinion, it is not plain and obvious that there was no breach of fiduciary duty by the Federal Government when it allegedly did nothing to stop the Ontario system from operating in this way or when it allegedly did nothing to ameliorate any harmful effects of the child welfare scheme or when it did nothing to assure that Indian children were made aware of their status as Indians when they were placed in non-aboriginal homes.[18]

[32] I agree with Justice Perell for the following reasons. I begin with the reminder that the "cause of action" hurdle under s. 5(1)(a) of the CPA is a low hurdle: the defendant must show that the impugned cause of action plainly and obviously has no chance of success and is doomed to fail. When one is dealing with the law of fiduciary duty or aboriginal claims, two "very dynamic"[19] areas of law that are rapidly "evolving,"[20] the

---

[18] *Brown v. Canada (Attorney General)*, *supra* note 1, at para. 134.

[19] *Bonaparte v. Canada (Attorney General)* (2003), 64 O.R. (3d) 1 (C.A.), at para. 32 [*Bonaparte*].

hurdle becomes even lower and the defendant has "a particularly heavy burden in seeking to strike a pleading."[21]

[33] As Justice Hugessen noted in the *Shubenacadia Indian Band* decision:[22]

> The Statement of Claim is to be read generously and with an open mind and it is only in the very clearest of cases that the Court should strike out the Statement of Claim. This, in my view, is especially the case in this field, that is the field of aboriginal law, which in recent years in Canada has been in a state of rapid evolution and change. Claims which might have been considered outlandish or outrageous only a few years ago are now being accepted.
>
> If there is in a pleading a glimmer of a cause of action, even though vaguely or imperfectly stated, it should, in my view, be allowed to go forward.[23]

2013 ONSC 5637 (CanLII)

[34] This does not mean, of course, that any claim for breach of fiduciary duty arising out of the relationship between the Federal Crown and the aboriginal peoples must necessarily survive the pleading stage. What it does mean, according to the Court of Appeal is that "more claims of this nature may be, as of yet, unprecedented but nonetheless tenable at law within the meaning of Rule 21."[24]

[35] Turning then to the viability of a breach of fiduciary duty claim against the Federal Crown on the facts as pleaded herein, I agree with the Federal Crown that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties do not typically give rise to a fiduciary relationship.[25] However, it is important to note that the existence of a public law duty does not exclude the possibility that the

---

[20] *Davis v. Canada (Attorney General)*, 2004 NLSCTD 153, 240 Nfld. & P.E.I.R. 21, at para. 11.

[21] *Ibid.*

[22] *Shubenacadia Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2001 FCT 181, 104 A.C.W.S. (3d) 62 (F.C.T.D.), at para. 5.

[23] *Ibid.*, at para. 6.

[24] *Bonaparte*, *supra* note 19, at para. 33.

[25] *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 96 [*Wewaykum*]; *Gladstone v. Canada (Attorney General)*, 2005 SCC 21, [2005] 1 S.C.R. 325 at para. 27.

Crown undertook, in the discharge of that public law duty, obligations "in the nature of a private law duty" towards aboriginal peoples.[26] I will return to this point shortly.

[36] I also agree with the Federal Crown that even though it stands in a fiduciary relationship with Canada's aboriginal peoples,[27] a fiduciary relationship alone does not impose a generalized fiduciary duty. Not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation.[28]

[37] I accept the Federal Crown's submission that fiduciary duty may arise in one of two ways:

> (i) First, and unique to the aboriginal context, a duty may arise as a result of the Crown's assumption of discretionary control over specific aboriginal interests. Typically, this first category has been limited to interests in land, specifically a communal aboriginal interest in land that is integral to the nature of the aboriginal community and their relationship to the land; and
>
> (ii) Second, a fiduciary duty may arise if three elements are present: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary; (2) a defined person or class of persons vulnerable to a fiduciary's control; and (3) a legal or substantial practical interest of the beneficiary that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[38] In my view it is at least arguable, given the evolving state of the law, that both of these categories apply on the facts as pleaded herein. I will deal first with the "assumption of discretionary control over specific aboriginal interests" category.

The first category

[39] I begin with the pronouncement of the Supreme Court that over the decades, the Federal Crown has assumed a "high degree of discretionary control [...] over the lives of

---

[26] *Wewaykum, ibid.*, at para. 74.

[27] It is now well settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin v. The Queen*, [1984] 2 S.C.R. 335 [*Guerin*]; *Bonaparte*, *supra* note 19, at para. 26, citing *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 at p. 183.

[28] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574.

2013 ONSC 5637 (CanLII)

aboriginal peoples"[29] and that the fiduciary duty, where it exists, is called into existence "to facilitate supervision of the high degree of discretionary control."[30]

[40] The Supreme Court has also made clear that in the area of aboriginal law, the fiduciary duty imposed on the Federal Crown does not exist at large but in relation to specific Indian interests.[31] It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.[32]

[41] The only interest that has been recognized "to date" as imposing a private law fiduciary duty or "in the nature of" a private law fiduciary duty is Indian lands:

> Fiduciary protection accorded to Crown dealings with aboriginal interests in land (including reserve creation) has not *to date* been recognized by this Court in relation to Indian interests other than land outside the framework of s. 35(1) of the *Constitution Act, 1982*.[33] (Emphasis added.)
>
> The Indians' interest in land is an independent legal interest. *It is not a creation of either the legislative or executive branches of government.* The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty.[34] (Emphasis added.)

[42] But Indian and native, indeed aboriginal, culture and identity is also "not a creation of either the legislative or executive branches of government." As noted by the Supreme Court in *Alberta v. Elder Advocates*,[35] the interest affected must be a specific

---

[29] *Wewaykum*, *supra* note 25, at para. 79.

[30] *Ibid.*

[31] *Wewaykum*, *supra* note 25, at para. 81.

[32] *Ibid.*, at para. 83.

[33] *Ibid.*, at para. 81.

[34] *Guerin*, *supra* note 27, at p. 385, cited in *Wewaykum*, supra note 25, at para. 76.

[35] *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 [*Elder*].

2013 ONSC 5637 (CanLII)

private law interest to which the person has a pre-existing distinct and complete legal entitlement:

> Examples of sufficient interests include property rights, interests akin to property rights, and *the type of fundamental human or personal interest that is implicated when the state assumes guardianship of a child* or incompetent person.[36] (Emphasis added.)

[43] In *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, the Supreme Court adopted "the accepted view" that the aboriginal peoples (and one must assume that this includes their children) "are, in effect, *wards of the state*, whose care and welfare are a political trust of the highest obligation."[37]

[44] Given these dicta and noting again that the law in this area is "rapidly evolving," it is at least arguable that a fiduciary duty arose on the facts herein for these reasons: (i) the Federal Crown exercised or assumed discretionary control over a specific aboriginal interest (i.e. culture and identity) by entering into the 1965 Agreement; (ii) without taking any steps to protect the culture and identity of the on-reserve children; (iii) who under federal common law were "wards of the state whose care and welfare are a political trust of the highest obligation"; and (iv) who were potentially being exposed to a provincial child welfare regime that could place them in non-aboriginal homes. Remember, as Justice Hugessen noted, all the plaintiffs have to show on the facts herein is "a glimmer of a cause of action, even though vaguely or imperfectly stated."[38]

[45] Also, if the Federal Crown's duty toward aboriginal peoples in respect of lands held in trust for them has been recognized "on a collective basis,"[39] is it not at least arguable that the same can be said about the Crown's duty toward aboriginal people with respect to their culture and identity?

[46] In my view, given the judicial admonition about new causes of action in the rapidly evolving area of aboriginal law, and given the case law just cited, it is not plain and obvious and beyond any doubt that the fiduciary duty alleged herein does not fall

---

[36] *Ibid.*, at para. 51.

[37] *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211, at 219 [*St. Ann's Island*], cited in *Wewaykum*, *supra* note 25, at para. 73. Emphasis added.

[38] *Supra*, note 22, at para. 6.

[39] *Elder*, supra note 35, at para. 50.

2013 ONSC 5637 (CanLII)

within the first category, namely the Crown's assumption of discretionary control over specific aboriginal interests. There is more than the glimmer of a cause of action.

The second category

[47] I would say the same thing about the second category. Recall the three elements in the second category:

> Second, in cases other than ones involving lands of historic use or occupation, a fiduciary duty may arise if three elements are present: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary; (2) a defined person or class of persons vulnerable to a fiduciary's control; and (3) a legal or substantial practical interest of the beneficiary that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[48] In my view, each of the three elements are, at least arguably, present herein. First, the execution of the 1965 Agreement was (arguably) an undertaking by the Federal Crown, pursuant to the federal government's spending power, to fund the expansion of the provincial welfare system, including its child protection component, to on-reserve families. This was being done, one must assume, with the latter's best interests in mind. Second, there was (arguably) a defined person or class of persons (on-reserve Indian children) that were thus made vulnerable to the provincial child welfare system. This development depended on federal funding and thus (arguably) stemmed from the fiduciary's initial exercise of discretion or control. Third, there was (arguably) a legal or substantial practical interest of the beneficiary (i.e. the Indian child's aboriginal culture and identity) that stood to be adversely affected by the alleged fiduciary's exercise of discretion or control. As it turned out, the interests of the beneficiary were profoundly affected by the alleged failure on the part of the Federal Crown to consult with the Indian Bands and, at least, to try to negotiate a cultural protection clause as a term or condition of the federal funding.

[49] What about evidence of disloyalty? The case law is clear that misconduct alone by a fiduciary does not necessarily constitute a breach of a fiduciary duty. There must be some disloyalty or a wrong "that is a betrayal of the trust component of the relationship."[40]

---

[40] *Varcoe v. Sterling* (1992), 7 O.R. (3d) 204, at para. 72 (Gen. Div.).

2013 ONSC 5637 (CanLII)

[50] The aboriginal peoples have been described by the Supreme Court as a "specific class of persons to whom the government owes an exclusive duty of loyalty."[41] The Supreme Court has also noted that the relationship between the federal government and aboriginals is "trust-like, rather than adversarial" and that "contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."[42] And, recall again what was said in the *St. Ann's Island* case: that the aboriginal people are "wards of the state whose care and welfare are a political trust of the highest obligation."[43]

[51] Can it not therefore be said that there is at least a glimmer of actionability in the allegation that the Federal Crown should have done more when it entered into the 1965 Agreement and in failing to do so, breached its trust with the on-reserve Indian families and thus acted disloyally? I therefore cannot agree with the Federal Crown that it is plain and obvious that no fiduciary duty arose under the second category discussed above.

[52] In sum, given the judicial admonition that the field of aboriginal law is rapidly evolving and the case law discussed above, I cannot in good conscience conclude that it is plain and obvious that the breach of fiduciary duty allegation under either the first or second categories has no chance of success. In my view, as I have already noted, there is more than a glimmer of a cause of action based on fiduciary duty under both categories as set out above.

(ii) Negligence

[53] Justice Perell found that the claim in negligence also cleared the s. 5(1)(a) / Rule 21 hurdle. Referring back to his breach of fiduciary duty analysis, he said this:

> More or less for the reasons already expressed above, it is not plain and obvious that there is no cause of action in negligence. The negligence claim would be based on what Canada knew or ought to have known and

---

[41] *Elder*, *supra* note 35, at para. 49.

[42] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at para. 59.

[43] *Supra*, note 37.

2013 ONSC 5637 (CanLII)

> what it did or did not do after Ontario welfare authorities began placing aboriginal children in non-aboriginal homes.[44]

[54] I agree with Justice Perell for the following reasons. I begin by noting that because the alleged duty of care (to preserve and protect aboriginal culture and identity) does not fall within an established category of negligence, the two-stage *Anns-Cooper* analysis is required.[45] Stage One involves an examination of foreseeability and proximity, including policy considerations relevant to the relationship between the parties; and Stage Two requires a consideration of residual policy considerations of a broader nature to determine if they negative any *prima facie* imposition of a duty of care.[46]

2013 ONSC 5637 (CanLII)

Stage One

[55] First, foreseeability and proximity. As the Supreme Court explained in *Imperial Tobacco*:

> Proximity and foreseeability are two aspects of one inquiry - the inquiry into whether the facts disclose a relationship that gives rise to a *prima facie* duty of care at common law. Foreseeability is the touchstone of negligence law. However, not every foreseeable outcome will attract a commensurate duty of care. Foreseeability must be grounded in a relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other.[47]

[56] Stopping here, can it be seriously argued that the relationship between the Federal Crown and the aboriginal peoples of Canada is *not* grounded in sufficient closeness or proximity to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other? Having just completed the fiduciary relationship / fiduciary duty analysis, how could I or any judge conclude that any such proximity argument has no chance of success and plainly and obviously is doomed to fail? In my view, there is more than a glimmer of a cause of action in negligence. Let me explain.

---

[44] *Brown v. Canada (Attorney General)*, *supra* note 1, at para. 152.

[45] *Anns v. Merton London Borough Council*, [1978] A.C. 728; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R 537 [Cooper].

[46] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 39-66 [*Imperial Tobacco*]; *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, 111 O.R. (3d) 161 (C.A.), at paras. 70-74 [*Taylor*].

[47] *Imperial Tobacco*, *ibid.*, at para. 41.

[57] First, the foreseeability of the alleged psychological and emotional injuries is explicitly pleaded and supported with relevant and material evidence in the plaintiffs' narrative. The real question under the Stage One analysis is proximity.

[58] In determining proximity, one of the factors to consider is the nature of the overall relationship existing between the plaintiff and the defendant.[48] The concept of proximity describes a relationship between a plaintiff and a defendant that is sufficiently close and direct to render it fair and reasonable to require that the defendant, in the conduct of its affairs, be mindful of the plaintiff's legitimate interests.[49]

[59] This factor is not concerned with how intimate the plaintiff and defendant were, or with their physical proximity, so much as with whether the actions of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed.[50] The court must evaluate the closeness of the relationship between the plaintiff and the defendant and determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.[51]

[60] Here, as I have already noted, there is a fiduciary relationship between the Federal Crown and the aboriginal people "whose care and welfare are *a political trust* of the highest obligation."[52] The 1965 Agreement also (arguably) created proximity with the intended targets - the on-reserve children that were potentially in need of protection. Is it not at least arguable that it would be just and fair having regard to this unique and important historical relationship and the intended impact of the 1965 Agreement to impose a duty of care upon the Federal Crown?

[61] I therefore find, under Stage One of the analysis, that there is at least an arguable *prima facie* duty of care that cannot plainly and obviously be described as having no chance of success.

Stage Two

---

[48] *Cooper*, *supra* note 45, at paras. 34-35.

[49] *Taylor*, *supra* note 46, at para. 66 and *Cooper*, *supra* note 5, at paras. 32-36.

[50] *Taylor*, *supra* note 46 at para. 68.

[51] *Cooper*, *supra* note 45, at para. 34.

[52] *St. Ann's Island*, *supra* note 37. Emphasis added.

2013 ONSC 5637 (CanLII)

[62] I will now turn to the Stage Two analysis. Has the Federal Crown established a residual policy consideration of a broader nature that would negative the *prima facie* duty of care? Or, to put it more accurately, a residual policy consideration of a broader nature that would plainly and obviously negative the *prima facie* duty of care established under Stage One?

[63] The Federal Crown makes two "residual policy" arguments: one, that imposing on Canada a duty to the plaintiffs flowing from the 1965 Agreement would result in an unwarranted and constitutionally improper interference by Canada in provincial child welfare jurisdiction as well as an inappropriate interference with the judiciary's role in authorizing the Crown ward-ships or adoptions; and two, that Canada was required to abide by the terms of court orders that sanctioned the adoption or the placement of the plaintiffs.

[64] In my view, neither policy submission succeeds. The Federal Crown could have taken a number of steps which would not have amounted to constitutional interference or resulted in the violation of any court orders. For example, the Federal Crown could have (i) consulted with the Indian bands (as it was obliged to do under the terms of the 1965 Agreement); (ii) negotiated an aboriginal cultural protection provision; or (iii) followed up the child placements, whether Crown ward-ships or adoptions, by providing the displaced children and their new non-aboriginal families with information about the child's Indian status, his or her future options and the availability of federal benefits upon reaching the age of majority.

[65] In my view, there would have been nothing unconstitutional about the Federal Crown consulting with the Indian bands, or negotiating cultural protection as a condition precedent before the funding would flow, or taking the various steps suggested after the Indian child was placed in a non-aboriginal home.[53] Nor would any of these actions have been in violation of any court orders (indeed, no specific examples have been suggested). The plaintiffs prevail on the Stage Two analysis.

[66] In sum, it is not plain and obvious that the survivors of the Sixties' Scoop cannot establish a relationship of sufficient proximity that makes it fair and just to impose a private law duty of care on the Federal Crown on the facts of this case. The plaintiffs and

---

[53] It is not disputed that the provincial welfare system, as a law of general application, could constitutionally apply to families or children living on reserves. But the province was not extending its welfare services to the reserves, perhaps thinking that this was a federal responsibility. The 1965 Agreement as a funding agreement could easily have included a term or condition that would have obliged the provincial authorities to learn about the Indian and native culture and their unique understanding of families and parenting and to act accordingly. The addition of this obligation as a condition of federal funding, in my view, would not have raised any constitutional concerns.

2013 ONSC 5637 (CanLII)

class members may or may not prevail in the action overall. The defendant may show at trial, for example, that the applicable standard of care in the 1960's was not breached either in entering into the 1965 Agreement without "doing more" as pleaded by the plaintiffs, or in the acts or omissions impugned thereafter. But for now the breach of fiduciary duty and negligence actions must be allowed to proceed. The courtroom door should not be closed to Ms. Brown and the other members of the class at this stage of the proceedings.

2013 ONSC 5637 (CanLII)

[67] The plaintiffs have cleared the s. 5(1)(a) and Rule 21 hurdle.

(2) Identifiable class

[68] Section 5(1)(b) of the CPA requires that there be an identifiable class of two or more persons that would be represented by the representative plaintiff. Class definition is important because it describes the persons entitled to relief, those who will be bound by the decision and those who are entitled to notice of certification.[54] Class membership must be determinable by stated, objective criteria.[55] And, there must be a rational relationship between the class and the common issues.[56]

[69] Based on Justice Perell's analysis, the plaintiffs revised their class definition to read as follows:

> Aboriginal persons in Ontario between December 1, 1965 and December 31, 1984 who were placed in the care of non-aboriginal foster or adoptive parents who did not raise the children in accordance with the aboriginal person's customs, traditions, and practices.

[70] In my view, this class definition is too broad. According to the plaintiffs, it was the 1965 Agreement "that gave rise to these claims."[57] However, as already noted, the 1965 Agreement funded the expansion of the provincial welfare services to "Indians with reserve status." That is, with some minor exceptions, only to Indian families and children living on reserves. Also, recall that both causes of action, fiduciary duty and negligence,

---

[54] *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Gen. Div.), at para. 10.

[55] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534.

[56] *Pearson v. Inco Ltd.*, (2006), 78 O.R. (3d) 641 (C.A.), at para. 57 [*Pearson*], rev'g (2004), 44 C.P.C. (5th) 276 (Div. Ct.), which had aff'd (2002), 33 C.P.C. (5th) 264 (S.C.J.), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 1. at para. 57.

[57] *Brown v. Canada (Attorney General)*, *supra* note 1, at para. 41.

as discussed above, depend in part on the significance of and their connection to the 1965 Agreement.

[71] It therefore makes sense to revise the class definition so that it can more rationally accord with the causes of action and the common issues. The class definition should be revised to read as follows:

> Indian children who were taken from their homes on reserves in Ontario between December 1, 1965 and December 31, 1984 and were placed in the care of non-aboriginal foster or adoptive parents who did not raise the children in accordance with the aboriginal person's customs, traditions, and practices.[58]

[72] I am satisfied that this is the class definition that should be certified.

(3) Common issues

[73] Section 5(1)(c) of the CPA requires that the claims of class members raise common issues of fact or law that will move the litigation forward. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim.[59] The fundamental aspect of a common issue is that the resolution of the common issue will avoid duplication of fact-finding or legal analysis.[60]

[74] Justice Perell concluded that the core common issue should be this:

> In Ontario, between December 1, 1965 and December 31, 1984, when an aboriginal child was placed in the care of non-aboriginal foster or adoptive parents who did not raise the child in accordance with the child's aboriginal customs, traditions, and practices, did the federal Crown have and breach a fiduciary or common law duty of care to take

---

[58] In describing the human parameters of both the class definition and the common issue discussed below, it is my intention to mirror the parameters set out in the 1965 Agreement. I recognize that strictly speaking (given the minor exceptions noted in this Agreement) the reach of the Agreement may be slightly broader than Indian children actually living on the reserves. If these slightly broader nuances are important to class counsel and potential class members, please let me know and I will revise the class definition and the common issue accordingly.

[59] *Hollick*, *supra* note 15, at para. 18; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 55, 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.).

[60] *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 39.

2013 ONSC 5637 (CanLII)

> reasonable steps to prevent the aboriginal child from losing his or her aboriginal identity?[61]

[75] Here again, and for the reasons just stated, I believe that the common issue must be revised to reflect the significance of the 1965 Agreement. My revision reads as follows:

> When the Federal Crown entered into the Canada-Ontario Welfare Services Agreement in December 1, 1965 and at any time thereafter up to December 31, 1984:
>
> (1) Did the Federal Crown have a fiduciary or common law duty of care to take reasonable steps to prevent on-reserve Indian children in Ontario who were placed in the care of non-aboriginal foster or adoptive parents from losing their aboriginal identity?
>
> (2) If so, did the Federal Crown breach such fiduciary or common law duty of care?

[76] I am satisfied that this is the common issue that should be certified.

(4) Preferable procedure

[77] Section 5(1)(d) of the CPA requires that a class proceeding be the "preferable procedure for the resolution of the common issues." The analysis must consider whether a class proceeding is a "fair, efficient and manageable method of advancing the claim" as a whole.[62] Preferability is to be broadly construed and is meant to capture two ideas: (i) whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and (ii) whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation or any other means of resolving the dispute.

[78] The Federal Crown argues that a test case would be preferable to a class proceeding. I do not understand this submission. The same amount of time and effort would be required in litigating the common issue whether as a "test case" or a class proceeding. But the advantage to both sides of the latter is that the parties would come away with a judicial decision that is binding on the entire 16,000-person class, not just the test case litigant.

---

[61] *Brown v. Canada (Attorney General)*, *supra* note 1, at para. 12.

[62] *Pearson*, *supra* note 56, at para. 67.

2013 ONSC 5637 (CanLII)

[79] This is not a situation where there are many other actions waiting to proceed and where a test case would either open or close this potential pipeline of cases. Here, there are no other actions. There may even be a question as to how many of the class members would actually proceed to individual damage trials if the common issue is decided in their favour. But there is no question that a class action to determine the core common issue would significantly advance the litigation. At this point, only a class proceeding can sensibly "test" the viability of the fiduciary duty and negligence claims.

[80] I agree with Justice Perell's analysis:

> In a sense, the litigation of Ms. Brown's and Mr. Commanda's story will be the test case for determining whether the Federal Crown committed a civil harm. If Ms. Brown or Mr. Commanda successfully prove or fail to prove that the Federal Crown owed them respectively a fiduciary or common law duty, then a precedent will be established and other class members will be bound by that result. If Ms. Brown and Mr. Commanda are successful then other class members, if they are inclined to do so, can come forward in individual issues trials to prove class identification, causation, damages, and quantum of damages.
>
> It remains to be seen how many members of the class, said to be 16,000 persons, would proceed to individual issues trials because each class member will have an individual history and story to tell about the consequences of their placement in non-aboriginal homes. That said, in my opinion, the common issues trial and any individual issues trial will be manageable and provide access to justice, and they are the preferable and perhaps the *only* procedure for resolving the claims of those allegedly injured by the Sixties Scoop.[63]

[81] In short, there is at least some basis in fact for concluding that a class action is the "preferable procedure for the resolution of the common issues." The preferability criterion in s. 5(1)(d) has been satisfied.

(5) Representative plaintiff

[82] Finally, under s. 5(1)(e) of the CPA, the court must be satisfied that there is a representative plaintiff who (i) would fairly and adequately represent the interests of the class, (ii) has produced a workable litigation plan and (iii) does not have a conflict of interest with any of the other class members.

---

[63] *Brown v. Canada (Attorney General)*, *supra* note 1, at paras. 185-86.

2013 ONSC 5637 (CanLII)

[83] The proposed representative need not be 'typical' of the class, but must be 'adequate' in the sense that he or she will vigorously prosecute the claim.[64] 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.[65]

[84] The Federal Crown concedes that the plaintiff Marcia Brown was "probably" entitled to be a registered Indian at the time of her initial apprehension by child welfare authorities in 1967 or 1968. The difficulty, given the revised class definition, is with the co-plaintiff. Robert Commanda was neither a registered Indian nor entitled to be registered pursuant to the *Indian Act* at any time during the proposed class period. He did not have reserve status. Also, his interactions with the provincial child welfare system occurred before the 1965 Agreement was entered into. Therefore, he does not have a claim that is a genuine representation of the claims of the members of the class to be represented.[66]

[85] I am prepared to appoint Marcia Brown as the representative plaintiff. I am satisfied that she would fairly and adequately represent the class. Although this now leaves Ms. Brown as the sole representative plaintiff, I am satisfied on the evidence before me that there are more than two members in the revised class, indeed thousands more.

[86] As for the litigation plan, I am satisfied that the plaintiff has produced a revised 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 proceedings. And, I find that the representative plaintiff does not have an interest in conflict with the interests of the other class members.

[87] In short, the five required prerequisites set out in s. 5(1) of the CPA have been satisfied.

---

[64] *Campbell v. Flexwatt* (1997), 98 B.C.A.C. 22 (C.A.), at paras. 45, 75-76, leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 13.

[65] *Drady v. Canada (Minister of Health)*, 159 A.C.W.S. (3d) 177 (S.C.J.) at paras. 36-45; *Attis v. Canada (Minister of Health)*, 29 C.P.C. (5th) 242 (S.C.J.) at para. 40, aff'd (2003), 127 A.C.W.S. (3d) 450 (C.A.).

[66] *Ibid.* I note that Mr. Commanda later become entitled to Indian registration because of the amendments made to the *Indian Act* in 1985.

2013 ONSC 5637 (CanLII)

Conclusion

[88] The action is certified as a class proceeding. I agree in general with the reasons of my colleague, Justice Perell. I have, however, made two changes: the class definition has been narrowed and the common issue has been reworded to better reflect the significance of the 1965 Agreement and for improved readability.

Disposition

[89] The plaintiffs' motion for certification is granted. The class definition and proposed common issue are revised as set out above. Marcia Brown is appointed representative plaintiff.

[90] The Federal Crown's Rule 21 motion to strike is dismissed.

[91] The Federal Crown's motion, in the alternative, to strike certain paragraphs from the Fresh as Amended Statement of Claim on the basis that they are conclusions of law, constitute argument or lack material facts is also dismissed. In my view, some of the impugned paragraphs come close to the line and possibly could be struck on the grounds just stated, but on balance, I will let them stand because they add to the overall narrative and nothing of importance turns on their presence or absence.

[92] The Notice of Certification to the Class shall be given pursuant to the revised Litigation Plan of Proceeding attached to the Notice of Motion. Class members who elect to opt out of the class proceeding must do so within 60 days of the date of the Notice of Certification. The Federal Crown shall be responsible for all costs associated with giving Notice of this action to the class.

[93] Counsel are directed to prepare an order in the form contemplated by s. 8 of the CPA. If any questions arise in this regard, please let me know.

[94] The representative plaintiff is entitled to her costs. If costs cannot be resolved by the parties, I will be pleased to receive brief written submissions within 14 days from Ms. Brown and within 10 days thereafter from the Federal Crown.

[95] I am obliged to counsel for their assistance.

2013 ONSC 5637 (CanLII)

Belobaba J.

Date: September 27, 2013

2013 ONSC 5637 (CanLII)

CITATION: Cannon v. Funds for Canada Foundation, 2013 ONSC 7686
COURT FILE NO.: CV-08-362807-CP
DATE: 20131219

2013 ONSC 7686 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: MICHAEL CANNON / Plaintiff / Moving Party

AND

FUNDS FOR CANADA FOUNDATION, MATT GLEESON AND SARAH STANBRIDGE as trustees for the DONATIONS CANADA FINANCIAL TRUST, PARKLANE FINANCIAL GROUP LIMITED, TRAFALGAR ASSOCIATES LIMITED, TRAFALGAR TRADING LIMITED, APPLEBY SERVICES (BERMUDA) LTD. as trustee for the BERMUDA LONGTAIL TRUST, EDWIN C. HARRIS Q.C., PATTERSON PALMER also known as PATTERSON PALMER LAW, PATTERSON KITZ (Halifax), PATTERSON KITZ (Truro), MCINNES COOPER, SAM ALBANESE, KEN FORD, RIYAD MOHAMMED, DAVID RABY, GREG WADE, GLEESON MANAGEMENT ASSOCIATES INC., MARY-LOU GLEESON, MATT GLEESON and MARTIN P. GLEESON / Defendants / Responding Parties

Proceeding under the Class Proceedings Act, 1992

BEFORE: Justice Edward Belobaba

COUNSEL: *Margaret Waddell, Samuel Marr and Andrew Lewis* for the Plaintiff

HEARD: October 18, 2013

APPROVAL OF LEGAL FEES

[1] In a short endorsement dated October 18, 2013 I approved the class action settlements with the FFCF-Gleeson Defendants and the Lawyer Defendants. I was satisfied that these settlement agreements were in the best interests of the class members. The class members will receive about $28.2 million. The class action will continue against the non-settling defendants.

[2] I also considered class counsel's motion for the approval of their legal fees on the settlements achieved. Based on the contingency fee retainer agreement, class counsel was asking for one-third of the settlement amount – about $9.4 million. Contingency fee awards of 25 per cent (sometimes 30 per cent) have been approved by Ontario courts. But, I was not aware of any decision that had approved a full one-third. I therefore advised class counsel I was prepared to approve legal fees in the amount of 25 per cent (because my sense of the case law was that the accepted range was 20 to 25 per cent), but that I needed further written submissions to persuade me that the approval of the full one-third was indeed fair and reasonable.

[3] I have now been provided with these supplementary submissions and I am persuaded that my Order of October 18, 2013 approving the 25 per cent amount should be varied to allow the full one-third. I have also been persuaded that a one-third contingency fee agreement, if fully understood and accepted, should be accorded presumptive validity.

Analysis

[4] I initially approved class counsel's legal fees at the 25 per cent level (rather than the full one-third that had been agreed to in the retainer agreement) because, frankly, that's what other judges were doing. I reviewed several of the decisions, expecting to find persuasive reasons for capping the legal fees at say, 20 to 25 per cent and not allowing the 30 per cent or one-third that had been agreed to in the retainer agreement. What I found, instead, were well-intentioned judicial efforts to rationalize legal fee approvals by discussing arguably irrelevant or immeasurable metrics such as docketed time (irrelevant) or risks incurred (immeasurable.) By using these metrics, judges felt comfortable building up a reasonable legal fees award that was capped at the 20 to 25 per cent level, sometimes 30 per cent but rarely, if ever, approved at the one-third level.

[5] I couldn't understand this reasoning. Why should it matter how much actual time was spent by class counsel? What if the settlement was achieved as a result of "one imaginative, brilliant hour" rather than "one thousand plodding hours"?[1] If the settlement is in the best interests of the class and the retainer agreement provided for, say, a one-third contingency fee, and was fully understood and agreed to by the representative plaintiff, why should the court be concerned about the time that was actually docketed?

---

[1] To borrow the language of Cumming J. in *Vitapharm Canada Ltd. v. Hoffman LaRoche Ltd.*, 12 C.P.C. (6th) 226, [2005] O.J. No.1117 (S.C.J.) at para. 107 (QL).

2013 ONSC 7686 (CanLII)

This only encourages docket-padding and over-lawyering, both of which are already pervasive problems in class action litigation.

[6] If "risks incurred" was something judges could really measure on the material provided, then this metric might make sense. Everyone understands that class counsel accept and carry enormous risks when they undertake a class action. But I don't understand how a judge, post-hoc and in hindsight, confronted with untested, self-serving assertions about the many risks incurred, can measure or assess those risks in any meaningful fashion and then purport to use this assessment as a principled measure in approving class counsel's legal fees. And why are we approaching legal fees approval as a building blocks exercise to begin with, working from the bottom up rather than from the top down? Why not start at the top with the retainer agreement that was agreed to by the clients and their solicitor when the class action began?

[7] In my view, it would make more sense to identify a percentage-based legal fee that would be judicially accepted as presumptively valid. This would provide a much-needed measure of predictability in the approval of class counsel's legal fees and would avoid all of the mind-numbing bluster about the time-value of work done or the risks incurred.

[8] What I suggest is this: contingency fee arrangements that are fully understood and accepted by the representative plaintiffs should be presumptively valid and enforceable, whatever the amounts involved. Judicial approval will, of course, be required but the presumption of validity should only be rebutted in clear cases based on principled reasons.

[9] Examples of clear cases where the presumption of validity could be rebutted include the following:

(i) *Where there is a lack of full understanding or true acceptance on the part of the representative plaintiff.* Did the representative plaintiff truly understand that one-third of the recovery would be claimed by class counsel as legal fees? Class counsel would be wise to set out the consequences of their contingency fee arrangement in some detail in the retainer agreement: e.g. "if we recover $30 million for the class, we will be entitled to legal fees of $10 million." Settlement agreement notices should bold-face or highlight the legal fees portion in order to focus class members' attention on the amount being requested. Affidavits from the representative plaintiffs or class members supporting the legal fees request would certainly be relevant.

(ii) *Where the agreed-to contingency amount is excessive*. I, for one, am prepared to accept that a one-third contingency is presumptively reasonable and acceptable in the class actions area because that amount that has been

2013 ONSC 7686 (CanLII)

found to be reasonable and acceptable (and successful) in the personal injury area.[2] If class counsel seek higher amounts, say 40 or 50 per cent, they should be prepared to provide a detailed justification because these higher amounts fall outside the penumbra of what, in my view, is currently acceptable.

(iii) *Where the application of the presumptively valid one-third contingency fee results in a legal fees award that is so large as to be unseemly or otherwise unreasonable.* I know that I would be quite comfortable approving legal fees of $10 or even $15 million based on overall cash recoveries of $30 or $45 million. But I frankly don't know what I would or should do as a class actions judge when the recovery is, say, $150 million and class counsel are asking for $50 million. Although the $50 million legal fees award would be enormous, to say the least, I really can't think of a principled reason for not approving these larger amounts. Fortunately, I don't have to decide this today.

[10] In my view, the judicial acceptance of the contingency fee agreement as presumptively valid would further the development of the class action in at least three ways:

- Class counsel's legal fees would be more easily understood, more principled and more "reasonable" than under the "multiplier" approach.[3]
- The contingency fee approach would inject a much-needed measure of predictability into class counsel's compensation calculus, which in turn would encourage greater use of the class action vehicle, enhancing access to justice.

---

[2] As Strathy J. noted in *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105, 98 C.P.R. (4th) 244, at para. 64: "Personal injury litigation has been conducted in this province for years based on counsel receiving a contingent fee as high as 33%. In such litigation, it is generally considered to reflect a fair allocation of risk and reward as between lawyer and client. It serves as an inducement to the lawyer to maximize the recovery for the client and it is regarded as fair to the client because it is based upon the "no cure, no pay" principle. The profession and the public have for years recognized that the system works and that it is fair. It allows people with injury claims of all kinds to obtain access to justice without risking their life's savings. The contingent fee is recognized as fair because the client is usually concerned only with the result and the lawyer gets well paid for a good result."

[3] The "multiplier" approach requires the court to accept as fair and reasonable monopoly-based hourly rates that are everything but fair and reasonable; and, it asks the court to divine a "multiplier" reflecting the risks incurred which, as already noted, is an almost impossible task on the material that is typically provided, and almost always results in a parody of the judicial process. Fortunately, most class counsel appear to be choosing contingency fees over multipliers in their retainer agreements. In a few years, the latter may (happily) become extinct.

2013 ONSC 7686 (CanLII)

- According presumptive validity to a one-third contingency fee, and thus making class counsel's compensation more certain would take the pressure off certification-motion costs awards as a method for forward-financing the class action lawsuit.[4]

[11] The approach that I have discussed works best when you have, as we do here, an all-cash settlement. An across the board one-third recovery will likely not be available when the settlement is in-kind, or involves vouchers or coupons, or where class counsel compensation is best determined by considering the take-up rate. But to the extent that the retainer agreement provides for a percentage-based fee approach rather than the multiplier approach, I will be one judge that will accept a fully understood one-third contingency fee agreement as presumptively valid.

[12] Returning, then, to the motion before me. I am satisfied that the one-third contingency fee should be approved. The contingency fee retainer agreement was fully understood and agreed to by Michael Cannon, the representative plaintiff. Indeed, Mr. Cannon filed an affidavit strongly supporting the one-third legal fee and no class members have voiced any objections. The one-third contingency is not excessive because it is in line with the percentages that are charged in the personal injury area. And there is no suggestion that the $9.4 million amount that class counsel will receive is unseemly or inherently unreasonable. In short, no reasons have been advanced to rebut the presumption of validity.

Disposition

[13] Class counsel's request for the full one-third contingency fee is granted. My Order of October 18, 2013 shall be amended to reflect this variation.

Belobaba J.

[4] See the discussion in the opening pages of my costs awards in *Dugal v. Manulife Financial*, 2013 ONSC 6354 or *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 6356. I tried to inject a measure of certainty and predictability into the calculation of legal costs for certification motions, just as I am doing here with respect to class counsel's legal fees. In my view, predictability is a good thing in the continuing evolution of the class action. Who knows, maybe in a decade or two, with a class actions bar that has a more confident understanding of the certification proceeding (it was always intended to provide a very low procedural hurdle and was never intended to generate the frenzied over-litigation that currently exists) and with a more competitive legal services market-place, class counsel may be willing to undertake class proceedings on the basis of a 20 per cent or even 10 per cent contingency. (One can hope.)

2013 ONSC 7686 (CanLII)

Date: December 19, 2013

2013 ONSC 7686 (CanLII)

Cassano v. Toronto-Dominion Bank, [2009] O.J. No. 2922

Ontario Judgments

Ontario Superior Court of Justice

M.C. Cullity J.

Heard: April 24, 2009.

Judgment: July 9, 2009.

Court File No. 97-CV-128598 CP

[2009] O.J. No. 2922 | *79 C.P.C. (6th) 110* | *2009 CarswellOnt 4052* | *98 O.R. (3d) 543*

Between Paul Cassano and Benjamin Bordoff, Plaintiffs, and The Toronto-Dominion Bank, Defendant
PROCEEDING UNDER the Class Proceedings Act, 1992.

(64 paras.)

Case Summary

Civil litigation — Civil procedure — Parties — Class or representative actions — Settlements — Approval — Motion for approval of a class action settlement allowed — The defendant bank levied undisclosed charges for foreign currency transactions on Visa cards — The $55 million settlement was negotiated by experienced counsel after 11 years of litigation — The application of $28.4 million in funds cy pres was approved — Promoting access to justice and advancing financial literacy were worthy methods of applying the cy pres amount — A counsel fee of $11 million was approved together with disbursements of $138,000.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, *S.O. 1992, c. 6, s. 26*, s. 29(2)

Income Tax Act, *R.S.C. 1985, c. 1 (5th Supp.)*,

Law Society Act, *R.S.O. 1990, c. L.8, s. 56*(2), s. 59.1

Perpetuities Act, *R.S.O. 1990, c. P.9, s. 16*

Counsel

Harvey T. Strosberg, QC and ***Patricia A. Speight*** -- for the plaintiffs.

Lyndon A. J. Barnes and ***Laura K. Fric*** -- for the defendant.

REASONS FOR DECISION

M.C. CULLITY J.

1 The parties moved for approval of the settlement of this action commenced under the *Class Proceedings Act, 1992, S.O. 1992, c. 6* ("CPA").

2 The claims advanced on behalf of the class concern allegedly undisclosed and unauthorised charges levied by the defendant (the "Bank") for foreign currency transactions conducted with Visa credit cards it had issued. The Bank asserts that these were not fees but rather part of the exchange rates that it was authorized by the provisions of the cardholder agreements to determine from time to time.

3 The proceeding was certified by the Court of Appeal on November 14, 2007. Certification had previously been denied by the Divisional Court and in this court. Actions involving similar claims were previously certified and settlements approved by Winkler J. (now Winkler C.J.O.) in *Gilbert v. Canadian Imperial Bank of Commerce, [2004] O.J. No. 4260* (S.C.J.) and by Brockenshire J. in *Meretsky v. Bank of Nova Scotia* (Unrep. January 23, 2009).

The Settlement

4 Section 29(2) of the CPA provides that a settlement of a class proceeding is not binding unless it is approved by the court. In *Gilbert*, the principles to be applied for this purpose were summarized by Winkler J. (now Winkler C.J.O.) as follows:

> There is a presumption of fairness when a proposed class settlement negotiated at arms length by class counsel is presented to the court for approval. The court will only reject a proposed settlement when it finds that the settlement does not fall within a range of reasonableness.
>
> The test to be applied is whether the settlement is fair and reasonable and in the best interests of the class as a whole. This allows for a range of possible results and there is no perfect settlement. Settlement is a product of compromise, which by definition, necessitates give-and-take. It is a question of weighing the settlement in comparison to the alternative of litigation with its inherent risks and associated costs.
>
> There are a number of factors, not all to be given equal weight, which are to be considered in determining whether to approve a settlement. These include likelihood of success, degree of discovery, the terms of the settlement, recommendation of counsel, expense and duration of litigation, number of objectors, presence of arms length bargaining, extent of communications with the class and the dynamics of the bargaining.

5 It follows that, in all cases, the court must weigh the benefits to be conferred on the class against the risks of continuing the litigation.

6 From the inception of the proceeding, the Bank has denied that the charges were fees rather than part of the exchange rates it was authorised to determine from time to time. It has also asserted that the rates were reasonable and that the plaintiffs' interpretation of the cardholder agreements was contrary to the intentions of the parties, as well as inconsistent with commercial realities and the competitive practices adopted by other financial institutions. At the hearing of the motion, the Bank's counsel emphasised that it was the economic considerations of proceeding to trial and not any acknowledgement of the validity of the claims advanced by the plaintiffs that influenced its agreement to settle. The Bank has not resiled from its position that the alleged charges were disclosed to cardholders.

7 While strongly contesting the correctness of the Bank's characterisation of the charges, class counsel were conscious that, on the main issue, this was all-or-nothing litigation, and that it would be vigorously defended. Even if the plaintiffs were successful in characterising the charges as fees, there were still limitations defences that potentially affected a significant number of the class members' claims. They were also concerned about the length and future expense of the litigation if it proceeded to trial and the difficulty that class members would have in proving their damages if individual determinations were found to be required.

8 In an affidavit sworn for the purpose of the approval motion, one of the plaintiffs' solicitors, Mr Paul J. Pape, indicated that, based on reports prepared for the Bank, class counsel had estimated that the maximum amount recoverable for the class was approximately $161.5 million. After taking into account the risk that the Bank would succeed at trial, class counsel targeted $50 million-$60 million as a reasonable range for settlement. Mr Pape stated that they had this in mind when, in December 2008, they agreed to mediation by the Honourable George Adams. The plaintiffs' subsequent acceptance of the Bank's offer to pay $55 million in settlement of the claims was recommended by the mediator.

9 The settlement amount was negotiated at arm's-length by experienced counsel after more than 11 years of litigation and after extensive productions by the Bank. There is, in my judgment, nothing in the record before me to suggest that the decision to settle for $55 million falls outside the zone of reasonableness and displaces the presumption of fairness referred to by Winkler J. In this case, the most difficult questions relate not to the amount the Bank has agreed to contribute in settlement of the claims advanced by the plaintiffs but rather to the nature and extent of the distributions that are proposed.

10 As in *Markson v. MBNA Canada Bank, [2007] O.J. No. 1684* (C.A.) -- where, again, certification was ordered by the Court of Appeal after having been denied at first instance and in the Divisional Court -- the class consists of several million cardholders whose transactions were entered into over a period of many years. In view of the difficulty of identifying class members with potential claims and quantifying the harm each had suffered, the requirement that the procedure of the CPA must be manageable was given considerable weight in this court and in the Divisional Court. In *Markson*, the proceeding was held be manageable because, it seems, of the Court of Appeal's conclusion that there was a reasonable likelihood that an aggregate assessment of damages would be possible. The question whether difficulties of distributing damages had any bearing on the issue of manageability was not discussed, and it is notable that, in deciding that certification should be granted, the court did not find it necessary to consider whether a "workable" litigation plan had been produced by the plaintiff as required by section 5(1)(e) of the CPA.

11 A similar conclusion that an aggregate assessment of damages might be available was reached by the Court of Appeal in this case where, however, Winkler C.J.O. also concluded that the conditions for certification would have been satisfied if the court at a trial of common issues determined that individual assessments were necessary. Moreover, on either approach to the assessment of damages, it appears that the Chief Justice accepted that problems of distribution may have some relevance to the issue of manageability that is inherent in the requirement that a class proceeding is the preferable procedure. Paras. 67-68 of the reasons of the Court of Appeal read as follows:

> [67] The CPA also provides a range of options for distributing amounts awarded under ss. 24 or 25. For example, s. 26(2)(a) permits the court to require the defendant to distribute monetary relief directly to class members "by any means authorised by the court, including abatement and credit". I draw particular attention to s. 26(3), which states:
>
> > 26(3) In deciding whether to make an order under clause (2)(a), a court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, *including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the Bank.* (emphasis in the original).
>
> [68] Evidently, the CPA provides a procedural mechanism on which the trial judge could rely to distribute amounts awarded under either s. 24 or s. 25. Thus, in my view, the preferable procedure requirement is satisfied in this case regardless of whether the assessment and distribution of damages, if necessary, are to be conducted on an aggregate or individual basis.

12 In this context, I note that the learned Chief Justice attributed no significance to the Bank's evidence that "it would take 1500 people about one year to identify and record the foreign exchange transactions on the cardholder

statements that are available only on microfiche and that this would cost about $48,500,000": para. 48. As in *Markson*, this "economic argument" was specifically rejected.

13 Despite the emphasis given to section 26(3) of the CPA, I do not understand the Chief Justice to have excluded the possibility that the trial judge might rely on other provisions of section 26, including section 26(4) and (6) that read as follows:

> 26(4) The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order.
>
> 26(6) the court may make an order under subsection (4) even if the order would benefit,
>
> (a) persons who are not class members; or
>
> (b) persons who may otherwise receive monetary relief as a result of the class proceeding.

14 These provisions contemplate what are often called cy pres orders by analogy to the cy pres jurisdiction that courts of equity have traditionally applied in cases involving charities and rules against remoteness. As was the case in *Gilbert,* such orders are commonly made in settlements approved by the court by a further analogy to the provisions of section 26. In *Gilbert*, the settlement that was approved by the court provided for a payment of $1 million out of the settlement amount of $16.5 million to the United Way in order to benefit past cardholders who could no longer be identified.

Winkler J. stated (at paras. 15-16):

> One might observe that a situation such as this could be addressed with a settlement that is entirely Cy pres. However, it is not the role of this court to substitute its settlement for that fashioned by the parties. Also, a disadvantage of settlement that is entirely Cy pres is that it does not compensate individual class members.
>
> Past cardholders are not part of the distribution list. The payment to the United Way on their collective behalf is in lieu of this and is acceptable given the peregrinations involved in pursuing these claims. This approach is acceptable in the present circumstances given the impossibility of identifying such class members. The CPA specifically contemplates a cy pres distribution in s. 26(6).

15 Under the proposed settlement in this case, approximately $39,100,000 would be available for distribution for the benefit of class members after the payment of the counsel fees and disbursements requested, the levy payable to the Law Foundation and administrative expenses out of the settlement amount of $55 million. From the amount of $39,150,000, approximately $10,750,000 would be paid directly to cardholders whose cards were issued before certain dates included in the class definition, and who were in good standing and active as of June 1, 2009. The balance of approximately $28.4 million would be applied cy pres as, despite the Court of Appeal's reference to section 26(3) of the CPA, the parties are in agreement that it would be impracticable to attempt to identify more than a relatively small percentage of the class members who are potential claimants.

16 Before finalising their proposals for the division between direct and indirect benefits to class members, counsel devoted considerable time and energy in considering different alternatives. The task of identifying cardholders who had engaged in foreign currency transactions - - as well as the amounts involved -- was hampered by the absence of records including some that had been destroyed inadvertently during the course of the proceeding. The various alternatives were discussed at case conferences prior to the hearing before counsel agreed on a final proposal.

17 I am satisfied that, in the light of these difficulties and when compared with the other alternatives, the proposed division between direct and indirect benefits strikes a reasonable balance between reimbursing class members and

applying funds cy pres and should be approved. Although, as a general rule, cy pres distributions should not be approved where direct compensation to class members is practicable, the allocation of $10.75 million to be paid directly to cardholders is on the generous side as proof that one subgroup of them engaged in foreign currency transactions -- and, in consequence, were within the class definition -- will not be required.

18 As a general rule, the court's jurisdiction on motions under section 29(2) of the CPA is limited to granting, or withholding, approval. Exceptionally in this case, the minutes of settlement provide that, as part of the approval process, the court may change the amount proposed to be applied cy pres, the cy pres recipients and the division of funds between them. This provision reflects the parties' understanding that, in view of the size of the cy pres amount and the nature of the claims in this case, outright payments to charitable or other non-profit organisations -- the most common form of cy pres distributions -- might not be appropriate. For this reason, it was proposed that special purpose gifts would be made in order to ensure that the purposes for which the funds would be applied bore a sufficient relation to the interests and claims of the class members to justify a conclusion that the distribution would be for their benefit.

19 The question of the most appropriate cy pres distributions was discussed in a number of case conferences. Proposals by the plaintiffs with respect to one half of the cy pres amount of $28.4 million, and by the Bank for the other half were considered.

Cy Pres: The Plaintiffs' Proposal

20 The plaintiffs' original proposal involved grants to Canadian common law law schools to be used to foster professionalism and ethical conduct among practising lawyers. The amounts each law school would receive would reflect the distribution of class members across the country. It was suggested that teaching law students to be more professional and ethical in their behaviour when practising law would benefit class members and the public. It was said that:

> Contracts such as those in issue in this action may be more carefully drafted, banks, commercial institutions and all clients may be better advised and, as a result, disputes such as in this action and others may be avoided.

21 Apart from the establishment of a committee of five to seven members of the legal profession, with volunteers from the judiciary, to receive proposals and to disburse the funds to the law schools, no method of supervising or controlling the expenditure of the funds by the recipients was suggested. It may have been contemplated that the use of the funds would be entirely within the discretion of the recipients subject only to a moral obligation to apply them for the approved purposes.

22 Without -- I hope -- being unduly cynical about the optics of the plaintiffs' proposal in the present context, I suggested that a preferable alternative would be to create a trust fund to be administered by the Law Foundation of Ontario for the purpose of advancing public access to justice in Canada. Although in a number of cases -- including *Gilbert* -- cy pres distributions that benefit class members together with other members of the public have been approved, the suggested alternative would confer benefits on the class more directly than the original proposal and would do so in a manner that is consistent with, and would advance, one of the objectives of the CPA. Access to justice was relied on heavily by the Court of Appeal in *Markson* and in this case as a ground for certifying the proceeding. Class members have benefited thereby and they and other members of the public would benefit from its enhancement in the future.

23 This suggestion was discussed with representatives of the Law Foundation -- including the Chair of its Board of Trustees and they have indicated that it is acceptable in principle.

24 The proposal contemplates the creation of a special trust fund to be administered by the Trustees of the Foundation. Section 56(2) of the *Law Society Act, R.S.O. 1990, c. L. 8* provides that the Trustees have power to accept gifts and donations on trust in furtherance of the objects of the foundation. The objects include "legal aid" --

a term that, I am informed, has been construed broadly by the Trustees and has, correctly in my opinion, not been confined to financial aid provided to Legal Aid Ontario -- a corporation that is incorporated pursuant to the Legal Aid Services Act, 1998, S.O. 1998, c. 26 for the purpose of providing access to justice for low-income individuals, and is referred to by name in section 55 of *the Law Society Act*.

25 There are, of course, special difficulties that can be encountered in establishing valid purpose trusts under the laws of Ontario. Such trusts are not valid unless they are exclusively charitable, or can be treated as powers of appointment pursuant to section 16 of the *Perpetuities Act, R.S.O. 1990, c. P. 9*. In my opinion, this limitation is as applicable to trusts created pursuant to an order of the court as it is to other trusts and, if that is not correct, it is still one that the court should respect.

26 Is the purpose of promoting and advancing access to justice a charitable purpose? Given the repeated endorsement by courts, as well as by the Law Reform Commission, of access to justice as a socially valuable objective of the CPA -- and even ignoring some of the rather more dubiously valuable purposes that have been accepted as charitable over the years -- it would, I believe, be extraordinary if it were held that it is not worthy of recognition as a possible object of a valid trust.

27 The law on charities is notoriously technical and arcane. Numerous judicial pleas for legislative intervention have fallen on deaf ears. Judicial attempts in cases such as *Re Laidlaw (1984), 48 O.R. (2d) 549* (Div. Ct.) and *Re Levy (1989), 68 O.R. (2d) 385* (C.A.) to rid the law of its antiquated foundations in the *Statute of Elizabeth, 1601* are uncertain in their effects and, since the comments of Rothstein J. in *A.Y.S.A. Amateur Soccer Association v. Canada, [2007] 3 S.C.R. 217*, at paras 37-39, their correctness is not free from doubt. In one of the most recent cases in the Supreme Court of Canada -- *Vancouver Society of Immigrant and Visible Minority Women v. Canada, [1999] 1 S.C.R. 10* -- the court was divided (5-4) on, among other things, the question whether a purpose of assisting immigrant women to obtain employment was charitable. The lengthy judgments delivered are replete with conflicting views on the same authorities that have been the subject of inconclusive analyses in a legion of cases stretching back over at least two centuries.

28 Access to justice connotes access by persons to whom it would not otherwise be available for the purpose of protecting and enforcing their legal rights. Although barriers to access to justice are very commonly -- although by no means exclusively -- financial in nature, a purpose of removing the barriers cannot, I think, be considered to fall exclusively within the first of the three traditional heads of charity -- the relief of poverty: see the Law Reform Commission's *Report on Class Actions*, pages 119-129. Nor would such a purpose be considered to be religious, or educational even in the expanded sense in which that term was given in *Vancouver Society*. That leaves only the fourth head -- other purposes beneficial to the public -- with, or without, in Ontario, the qualification that they must also be within the spirit and intendment of the *Statute of Elizabeth, 1601*.

29 I do not think there is any doubt that a purpose of providing or promoting access to justice must be considered to be beneficial to the public. As the Law Reform Commission stated, at page 139 of its report:

> Quite clearly, effective access to justice is a precondition to the exercise of all other legal rights.

30 Access to justice is, in other words, an essential component of the rule of law which, in turn, is one of the constitutional underpinnings of our democratic constitutional system of government.

31 If, despite the views expressed in *Re Laidlaw* and *Re Levy,* access to justice will not be a valid charitable purpose unless it is within the spirit and intent of the Elizabethan statute, I believe that requirement is also satisfied.

32 In *Incorporated Council of Law Reporting for England and Wales v. Attorney-General*, [1972] Ch. 73 (C.A.), different approaches for ascertaining whether a purpose was within the spirit and intent of the statue -- or within its "mischief" or "equity" were discussed. The Court of Appeal held that the publication of law reports by a non-profit corporation was a charitable purpose. Russell L.J. placed the purpose under the fourth head of charity. In his view, the correct approach was to apply a presumption that a purpose that benefits the public will be within the equity of

the Statute of Elizabeth, and charitable in the absence of good reasons for a contrary conclusion. Sachs and Buckley JJ. preferred to characterise the purpose as educational but agreed that it would otherwise be upheld on the basis of the reasoning of Russell L.J.

33 Russell L.J. also considered whether the purpose of the Council would fall within the spirit and intendment of the statute if the correct approach was to find an analogy with purposes previously held to be charitable. The judge at first instance had referred to the very early judicial acceptance that the purpose of building a courthouse was charitable and Russell L.J. concluded that no distinction could properly be drawn between the provision of physical facilities for the administration of justice, and a dissemination of knowledge of the law to be administered in them.

34 On either of these approaches, I am satisfied that a trust to provide access to the courts and the administration of justice must be held to be charitable. Access to justice is presupposed by the provisions of the Canadian Charter of Rights and Freedoms and, without it, the provision of courthouses and law reports would be otiose.

35 For these reasons, I am satisfied that the proposed establishment of a fund to promote access to justice would create a valid charitable trust. I am also satisfied that such a trust could properly be administered by the Law Foundation as falling within its corporate object of "legal aid". As I have mentioned, this is consistent with the information provided by the Chair of the board of Trustees of the Foundation that the object has in the past been construed broadly and has not been confined to financial aid provided to Legal Aid Ontario.

36 For reasons of completeness, I note, also, that if, contrary to my opinion, a trust to promote and advance access to justice is not charitable, it could I believe be upheld as a specific non-charitable purpose trust that, pursuant to section 16 of the *Perpetuities Act*, is to be treated as a power of appointment over capital and income for a maximum period of 21 years.

37 The precise terms of the trust will be included in the order approving the settlement but, subject to any further submissions of counsel, or representations of the Law Foundation, my present preference would be for the Trustees of the Foundation to have discretion as to the application of funds for the approved purpose subject only to the limitation that they are not to form part of the Class Proceedings Fund established pursuant to section 59.1 of *The Law Society Act*.

Cy Pres: The Bank's Proposal

38 The bank proposed that the other half of the cy pres amount should be used to improve the financial literacy of low-income and otherwise economically disadvantaged Canadians. For this purpose, the funds would be paid to, and administered and distributed by, a non-profit charitable organisation, Social and Enterprise Development Innovations ("SEDI").

39 SEDI was incorporated as a corporation without share capital under Part III of the *Corporations Act* on March 14, 1995. Its objects, as amended by supplementary letters patent of April 21, 1997, are as follows:

1. To establish, maintain and supervise non-profit centres for the encouragement of people who are both poor and unemployed to develop self-employment projects with the objective of preventing and reducing unemployment and its attendant poverty;
2. To provide counselling and supportive services for the benefit of persons who are both poor and unemployed and otherwise economically disadvantaged persons including youth;
3. To set up programmes to carry out the foregoing objects;
4. To consult with other charitable, non-profit community and governmental agencies and organisations in developing programmes to carry out the foregoing objects and to provide funding for same;

40 SEDI is registered as a charitable organisation within the meaning of the *Income Tax Act* (Canada). It complies

with the annual reporting obligations under the statute. To date it has been funded largely through grants and donations from federal, provincial and municipal governments, banks and other financial institutions, and private charitable foundations.

41 The promotion of financial literacy has been one of SEDI's principal activities since its creation. To this end it has worked with governmental agencies and community organisations to develop courses, programmes and projects and to train personnel whose employment brings them in contact with unemployed, poor and otherwise disadvantaged Canadians. SEDI's activities are founded on a conviction that there are social, market and governmental pressures that limit the ability of such persons to make informed financial decisions that are essential to their well-being and their capacity to become economically self-sufficient. Accordingly, financial literacy, in the sense understood by SEDI, refers to the knowledge, skills and ability to understand, analyse and use information to make informed judgments about financial decisions. Such decisions range from simple budgeting skills, to understanding choices between banking and credit products, to understanding rights and obligations created by financial documents such as credit card agreements, to understanding how to effectively save for retirement, home-ownership, or post-secondary education.

42 SEDI is administered under the supervision of a nine-member board of directors who serve without remuneration. In 2008 it had ten permanent and four part-time employees.

43 By a resolution of the board of directors of October 9, 2008, SEDI's financial literacy activities were expanded and organised by the creation of a new internal division known as the "Canadian Centre for Financial Literacy" (the "Centre"). This is dedicated to assisting and training the staff of community organisations to deliver literacy counselling and supportive services to needy and otherwise disadvantaged groups in society.

44 The Bank's proposal is for 50 per cent of the cy pres amount to be paid to SEDI. $3.5 million of this would be used for the support of the Centre for a period of five years and the balance would be held as a fund (the "TD Financial Literacy Fund") that, over a period of six years, would be applied in making grants to non-profit organisations who work with economically disadvantaged groups -- such grants to be used by the recipients to promote and support financial literacy among the members of such groups. All such grants would require the approval of SEDI's directors.

45 Counsel for the bank made submissions and filed extensive material in support of its proposals. This included a description of SEDI's activities during the past five years, the annual reports filed with Canada Revenue Agency, explanation of its financial reporting, and a legal opinion of SEDI's solicitor, Fasken Martineau, that the promotion of financial literacy is charitable in law as educational and for the relief of poverty, and is within the objects of SEDI. I share that opinion.

46 In addition, letters attesting to the valuable work performed by SEDI in promoting financial literacy among low-income Canadians were provided by five individuals who have either participated in SEDI's activities, or occupied positions with governmental organisations that have been involved with them.

47 On the basis of the submissions of counsel and the material filed, I am satisfied that the advancement of financial literacy is a worthy method of applying the cy pres amount for the benefit of the class members. I am also satisfied that SEDI is an appropriate entity to administer the funds for this purpose.

48 For the purpose of settling the terms of the approval order, counsel should consider whether it is necessary to have a trust agreement between the Bank and SEDI with respect to the administration of the funds. In view of the relatively simple and short-term obligations of SEDI, in may be possible to define those obligations adequately in the body of the order. It must, however, be made clear that the funds provided to the Centre for the support of its work are intended to enhance it and not simply to make available for SEDI's other purposes funds that would otherwise be used for the support of the Centre. Given the provisions of the *Law Society Act* that govern the administration of gifts received by the Trustees of the Law Foundation, a separate trust agreement with respect to the other half of the cy pres amount should not be necessary to complement the provisions of the order.

49 Subject to settling the terms of the order, the settlement will be approved.

Fees of Class Counsel

50 Counsel have requested a fee of $11 million which represents 20 per cent of the settlement amount and approximately 28 percent of the net amount that would be distributable to, or for the benefit of, class members.

51 Provision for a fee of 20 per cent of the gross recovery was made in retainer agreements with Dr Cassano and Dr Bordoff executed in April 2002 and September 2004 respectively. These written agreements are said to reflect the terms of an oral agreement made at the inception of the proceeding with Dr Cassano in 1997. Dr Bordoff was added as a plaintiff on March 9, 2005.

52 Each of the plaintiffs has supported the request for approval of a fee of $11 million and has expressed appreciation of the quality of the services performed by their counsel.

53 Contingent fee agreements that provide for fees to be calculated as a percentage of gross recovery have been approved in many class proceedings in this jurisdiction, and an application of percentages in excess of 20 per cent has been approved in several of them. In *Garland v. Enbridge Gas Distribution Inc*, *[2006] O.J. No. 4907* (S.C.J.), for example, I considered the fee awarded to represent approximately 26.7 per cent of the value of the compensation and other benefits recovered for the class members. In *Stastny v. Southwestern Resources Corporation* (Unrep. November 3, 2008) and *Casselman v. CIBC World Markets Inc.* (Unrep. December 21, 2007) percentages in excess of 20 per cent were approved by Brockenshire J., and, in *Meretsky* -- one of the companion actions to this case -- the same learned judge indicated that 20 per cent was acceptable.

54 Counsel's intention to request a fee of 20 per cent of the gross recovery was communicated to the numerous class members who contacted counsel at different times throughout this lengthy litigation, the information was provided on its website and it was disclosed in the notice of the fairness hearing. Only one member of the class of several million persons has objected to the size of the fee.

55 This was hard-fought litigation -- conducted with tenacity and skill by counsel who, in effect, snatched victory from the jaws of defeat by persevering with it through successive appeals from the initial decision that denied certification. It is inherent in percentage of recovery agreements that counsel may receive large fees where, as here, the degree of success achieved is substantial. Equally, of course, they take the risk that the results achieved will provide them with little or no compensation.

56 Taking into account the course of the litigation, the risks accepted by counsel and the extent of the recovery achieved for the class, a fee of $11 million will be approved together with the disbursements claimed of $138,000.

57 There are three other matters on which I believe I should comment.

58 The first is that Dr. Cassano is the spouse of Ms. Pat Speight who is a "non-equity partner" in the firm of Sutts Strosberg who acted as co-counsel for the plaintiffs. A relationship of this kind is one that in some cases will call for close examination and, perhaps, suspicion. It was, however, disclosed at the hearing of the certification motion, and again at the fairness hearing, and Dr. Cassano was accepted as a suitable representative plaintiff and, with Dr. Bordoff, was appointed as such in the order of the Court of Appeal. In these circumstances, I see no reason for considering the relationship to be a factor that should have any bearing on the amount of counsel's fee.

59 The second matter is that the fee of $11 million represents the application of a multiplier of approximately 5.5 to counsel's approved time. This might well be considered to be excessive if the retainer agreements had provided for the adoption of the "lodestar approach" reflected in section 33 of the CPA. They did not do this.

60 While it has been said that the appropriateness of a fee calculated in the lodestar manner might be tested by

comparing it with the percentage of gross recovery it represents, I would be hesitant to use the lodestar method as a firm indicator of the reasonableness of a fee determined by the application of a percentage to the amount recovered. In *Martin v. Barrett*, *[2008] O.J. No. 2105* (S.C.J.), at paras. 38-39, I referred to criticisms of the lodestar method. One of these that has been repeatedly mentioned in other cases in this jurisdiction and elsewhere is that the application of a multiplier to a base fee may not only encourage an inefficient use of time and a padding of dockets, it may also fail to reward efficient time-management and the exercise of superior skill by class counsel.

61 As Smith J. stated in *Endean v. Canadian Red Cross Society, [2000] B.C.J. No. 1254* (B.C.S.C.), at para. 74:

> Good counsel should not be penalised for their acuity and efficiency by basing their fees only on the amount of time it took them to accomplish their client's objectives.

62 In contrasting the percentage of recovery approach with the application of a multiplier, Cumming J. stated in *VitaPharm Canada Ltd v. Hoffman -- La Roche Ltd*, *[2005] O.J. No. 1117* (S.C.J.), at para. 107:

> Using a percentage calculation in determining class counsel fees properly places the emphasis on quality of representation, and the benefit conferred on the class. A percentage-based fee rewards "one imaginative, brilliant hour" rather than "one thousand plodding hours".

63 Of course, if counsel accept a retainer on the basis that the lodestar method is to apply, the requirements of section 33 -- including that of a reasonable base fee -- must be observed. Class counsel did not choose to adopt that method and, having achieved an excellent result, they submit that it would be unreasonable to reduce their fee by reference to the time they expended to do so. They had accepted their retainers on the basis of a fee calculation that would vary directly according to the degree of success that was achieved. The percentage of recovery to be applied was not unreasonable, the risks were considerable, the degree of success was substantial, and there is nothing in the manner in which the proceeding was conducted that, in my judgment, would justify a refusal to approve a fee determined in accordance with the terms on which the retainers were accepted.

64 The final matter relates to the contents of the objection received from Mr Andrew Martin of Toronto. This was the only objection received from the members of the enormous class. I have not commented on it previously in the above reasons because, to the extent that his criticisms have not been met by the changes I have made to the proposed cy pres distributions, I believe that the authorities I should properly follow foreclose acceptance of them. At the same time, Mr. Martin's comments address quite fundamental issues relating to settlements of class actions such as this. As it may be that his views are shared by other class members who thought it useless, or just too much trouble, to voice their objections, I have included the substance of Mr. Martin's email letter as an appendix to these reasons together with my brief comments

M.C. CULLITY J.

* * * * *

APPENDIX

From: Andrew Martin

To: [Objections]

I am writing to object to the proposed settlement.

My reasons relate to the overall terms of the settlement. The amount that will be paid may (or may not) be appropriate relative to the allegations, but I do not believe that this settlement is in the interests of the plaintiff class. Specifically:

-- Either TD did or did not levy unauthorised, undisclosed or inadequately disclosed charges. This needs to be determined so that in future, conditions of use can be drafted and interpreted correctly. [While no one could deny that clarification is desirable, the class action procedure has costs and risks for the representative plaintiffs and their counsel that are not shared by the other class members who, in effect, have a free ride. Simply as one example, the plaintiffs incurred an expense of approximately $67,000 in respect of the fees of the firm of chartered accountants who received and dealt with the 11,500 cardholders who opted out of the litigation.]

-- In my personal view, given that certain costs were going to be charged in respect of these uses of the credit cards, the plaintiff class has not been disadvantaged and I suspect would have used the cards in any circumstances. The consequences of this litigation may well be to increase future charges. [I do not disagree but the Court of Appeal did, or did not consider these considerations to be relevant.]

-- I strongly object to the proposal to distribute $14 million to charitable organisations. The purpose of a settlement should be to compensate people to who have suffered actual loss, and while these are laudable charitable purposes, I see no way reason for a publicly-owned financial institution, as custodian of its shareholders' money, should make such a payment as part of a class action settlement. [Mr Martin does not indicate his preferred position on the facts of this case that involve more than 4.5 million cardholders of whom only a relatively small number of those who entered into foreign currency transactions can be identified.]

-- I also object to the proposal to distribute $14 million to law schools. This is highly offensive and, again, an inappropriate use of shareholder money (to support what are presumably ethical shortcomings of lawyers). It also poses a conflict of interest for the judiciary, which might feel reluctant to query or disallow such a proposal giving their own ties to the profession. [I do not disagree.]

-- The proposal to pay up to $11 million to the lawyers is outrageous. While only (only!) 20 per cent of the total, it is a huge multiple of legal fees likely to have been incurred. This does not seem a particularly complicated case and cannot have consumed that much time. For instance, if it is a 4x multiplier that suggests 7,000 bars at $400/hour. This seems unrealistic, and so the multiplier is presumably much higher. And yet the risk in a case like this is, historically, quite low. I therefore object to any payment of legal fees in excess of 3x docketed hours at a reasonable hourly rate. Any excess between that and $11 million can either be added to the distribution to cardholders, or distributed to organisations providing free legal services to those unable to pay the fees now charged by lawyers. [I am not sure why Mr Martin believes the risk in cases like this is, historically, quite low. His support of imposing the multiplier approach irrespective of the terms of counsel's agreement with the plaintiffs, the criticism to which the approach has been subjected, and the difficulties of applying it in practice, is not consistent with the provisions of the CPA as judicially interpreted in previous cases.]

It is not currently my intention to appear at the hearing on April 24.

Andrew Martin

⚠ *Mondor v. Fisherman; CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman, [2002] O.J. No. 1855*

Ontario Judgments

Ontario Superior Court of Justice

Cumming J.

Heard: May 2, 2002.

Judgment: May 10, 2002.

Court File Nos. 00-CV-193345CP, 00-CV-186800CP, 01-CV-209418,

99-CL-3424, 00-CV-202036-CM

[2002] O.J. No. 1855 | [2002] O.T.C. 317 | 26 B.L.R. (3d) 281 | 22 C.P.C. (5th) 346 | 114 A.C.W.S. (3d) 16 | 2002 CanLII 49647

PROCEEDING UNDER The Class Proceedings Act, 1992 Between Roger Mondor and Amit M. Karia, plaintiffs, and Igor Fisherman, Jacob G. Bogatin, Kenneth Davies, Michael Schmidt, Harry W. Antes, Frank Greenwald, R. Owen Mitchell, David R. Peterson, Daniel E. Gatti, James J. Held, Guy R. Scala, Parente, Randolph, Orlando, Carey & Associates, Deloitte & Touche LLP, National Bank Financial Inc., formerly known as First Marathon Securities Limited, Griffiths McBurney & Partners, Cassels, Brock & Blackwell and Lawrence Wilder, defendants, and Fogler, Rubinoff LLP, YBM Magnex International, Inc. through its independent Litigation Supervisor, Paul Farrar, YBM Magnex International, Inc. by its Receiver and Manager Ernst & Young YBM Inc., Decision Strategies LLC, Pepper Hamilton LLP, Connor Clark & Lunn Investment Management Ltd., third parties, And between Royal Trust Corporation of Canada, in its capacity as Trustee of the CC&L Dedicated Enterprise Fund, Royal Trust Corporation of Canada, in its capacity as Trustee of the CC&L Balanced Canadian Equity Fund, Connor Clark & Lunn Investment Management Ltd. and The British Columbia Investment Management Corporation, plaintiffs, and Igor Fisherman, Jacob G. Bogatin, Kenneth Davies, Michael Schmidt, Harry W. Antes, Frank Greenwald, R. Owen Mitchell, David R. Peterson, Daniel E. Gatti, Parente, Randolph, Orlando, Carey & Associates, Deloitte & Touche LLP, National Bank Financial Inc., Griffiths McBurney & Partners, Scotia Capital Inc., Canaccord Capital Corporation, HSBC Securities (Canada) Inc., Cassels Brock & Blackwell and Lawrence Wilder, defendants, and Fogler, Rubinoff LLP, YBM Magnex International, Inc. through its Independent Litigation Supervisor, Paul Farrar, Decision Strategies LLC and Pepper Hamilton LLP, third parties And between YBM Magnex International, Inc. through its independent Litigation Supervisor, Paul Farrar, plaintiff, and Jacob Bogatin, Igor Fisherman, Harry Antes, Kenneth Davies, Frank Greenwald, R. Owen Mitchell, David Peterson, Michael Schmidt, Cassels, Brock & Blackwell, Parente, Randolph, Orlando, Carey & Associates, Deloitte & Touche LLP, National Bank Financial Corp., formerly First Marathon Securities Limited, Griffiths McBurney & Partners, Scotia-McLeod Inc., Canaccord Capital Corporation and HSBC James Capel Inc., formerly Gordon Capital Corporation, defendants, and Connor Clark & Lunn Investment Management Ltd., third party And between YBM Magnex International, Inc. by its Receiver and Manager Ernst & Young YBM Inc., plaintiff, and Jacob Bogatin, Igor Fisherman, Michael Schmidt, Kenneth Davies, Frank Greenwald, Guy Scala, Daniel Gatti, James Held, Robert Ventresca and Harry Antes, defendants And between Deloitte & Touche LLP, plaintiff, and YBM Magnex International, Inc., Jacob G. Bogatin, Daniel E. Gatti, R. Owen Mitchell, Cassels Brock & Blackwell, First Marathon Securities Ltd., defendants

(56 paras.)

Case Summary

Practice — Persons who can sue or be sued — Individuals and corporations, status or standing — Class actions, certification, evidence and proof.

Motion by the proposed representative plaintiffs for certification of two class proceedings and to approve a settlement made pursuant to the terms of a settlement agreement. The plaintiffs alleged that there was a massive conspiracy and fraud perpetrated upon the investors in YBM Magnex International by organized crime. In particular, the plaintiffs in the prospectus class action claimed that members of Russian organized crime caused YBM to enter into a series of contracts and transactions that were simply a mechanism to siphon cash out of YBM including the proceeds of a 1997 prospectus. It was alleged that there were misrepresentations through statements set out in the 1997 Prospectus and that Prospectus Class Members suffered losses arising out of their purchase or acquisition of shares pursuant to the 1997 Prospectus. There were also allegations of negligent misrepresentations against other defendants who were involved in the public offering of shares by YBM. With respect to the general class action, there were allegations that YBM was a fraud and was used as a vehicle for money laundering and other criminal activities. The general class action was brought on behalf of a class of persons who dealt in shares of YBM on the secondary market between July 1, 1994 and May 14, 1998 and suffered a loss as a result thereof. Both class actions were commenced in late 1998 and early 1999 and settled in February 2002.

HELD: Application allowed.

The criteria set out in section 5 of the Class Proceedings Act as mandatory prerequisites to certification were met. Further, the proposed settlement was fair, reasonable and in the best interests of all class members. There was significant risk and cost to the plaintiffs and the defendants in proceeding to trial. No objections to the settlement were raised. There was effective communication with class members through publication and mailings of the notice of the settlement approval hearing. The net amount available for distribution to class members was approximately $110 million. It was in the best interests of the class members to gain the recovery available through court approval of the proposed settlement. Further, the legal fees and disbursements in this matter were reasonable, taking into account the complexity of the proceedings, the risks involved, the success achieved and the degree of skill and competence demonstrated by class counsel. The total fees amounted to about five per cent of the amount available to the claimants as a result of the settlement.

Statutes, Regulations and Rules Cited:

Alberta Securities Act, S.A. 1981, c. S.6.1, s. 168.

British Columbia Securities Act, S.A. 1981, c. S.6.1, s. 131.

Class Proceedings Act, 1992, *S.O. 1992, c.6, ss. 5*, 17(6), 29(2), 32, 33.

Competition Act, R.S.C. 1985, c. C.34.

Ontario Rules of Civil Procedure, Rule 7.08(4).

Ontario Securities Act, *R.S.O. 1990, c.S.5, ss. 128*, 130.

Quebec Securities Act, R.S.Q. c. V.1.1, Regulation 29, ss. 218, 219, 230.

Counsel

Harvey T. Strosberg, Q.C., for the plaintiffs. Michael Statham, for Jacob G. Bogatin. Kelly Charlebois, for Kenneth Davies. Randy Bennett, for Deloitte & Touche LLP. David F. Bell, for Parente, Randolph, Orlando, Carey & Associates. Karen Mitchell, for Daniel E. Gatti, James Held and Guy R. Scala. Jessica Kimmel, for Griffiths McBurney & Partners. Bonnie A. Tough, for National Bank Financial Inc. Linda L. Fuerst, for Cassels Brock & Blackwell and Lawrence Wilder. Alan Mersky and Jeremy Devereux, for Scotia Capital Inc. W.A. Kelly, Q.C., for Fogler Rubinoff LLP. Peter F.C. Howard, for YBM Magnex International Inc. through its Independent Litigation Supervisor, Paul Farrar and by its Receiver and Manager Ernst & Young YBM Inc. and for Pepper Hamilton. Laura F. Cooper, for Decision Strategies LLC. Earl A. Cherniak, Q.C., Lisa Munro, and Melanie Schweizer, for Connor Clark & Lunn Investment Management Ltd. (00-CV-193345CP). Earl A. Cherniak, Q.C., Lisa C. Munro and Melanie D. Schweizer, for the plaintiffs (00-CV-186800CP). David Whitten, for Canaccord Capital Corporation.

CUMMING J.

The Motions

1 The motions to be dealt with arise in respect of two class proceedings under the Class Proceedings Act, 1992, *S.O. 1992, c. 6* ("CPA"), being:

(1) Royal Trust Corporation of Canada in its capacity as Trustee of the CC&L Dedicated Enterprise Fund et al. v. Igor Fisherman, Jacob G. Bogatin et al. (Court File No. 00-CV-186800) (the "prospectus class action"). This is a class action under the CPA on behalf of all persons in Canada who purchased or acquired common shares in YBM Magnex International Inc. ("YBM") distributed by a prospectus dated November 17, 1997 (the "1997 Prospectus") and suffered a loss as a result thereof; and

(2) Roger Mondor and Amit M. Karia v. Jacob Bogatin et al. (Court File No. 00-CV-193345 (the "general class action"). This is a class action under the CPA brought on behalf of the class of persons in Canada who dealt in shares of YBM in the secondary market between July 1, 1994 and May 14, 1998 and suffered a loss as a result thereof.

2 YBM is an Alberta corporation, with its head office in Newtown, Pennsylvania.

3 There have been extensive proceedings to date in this court in respect of the two class actions and other related actions involving YBM. See CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman *[2001] O.J. No. 598*; CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman *[2001] O.J. No. 637*; CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman *[2001] O.J. No. 4621*; CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman *[2001] O.J. No. 4622*; and Mondor v. Fisherman *[2001] O.J. No. 4620*. The many allegations and extensive background relating to the class actions at hand are dealt with at length in my Reasons for Decisions in these earlier proceedings.

4 A class action was also commenced by shareholders in the United States District Court for the Eastern District of Pennsylvania, John Paraschos et al. v. YBM Magnex International (5 December 2000) (E.D.Penn.) which has now been stayed upon motion by the defendants in that action on the basis of the principle of comity. A motion for reconsideration was denied (8 February 2001) (E.D.Penn.), appeal pending (the "Paraschos" class action).

5 The total approximate loss to all persons who dealt in YBM shares is in excess of $360 million. The estimated loss to purchasers under the public offering pursuant to the 1997 Prospectus is more than $100 million. The estimated loss to persons who purchased shares in the secondary market is in excess of $250 million.

6 The plaintiffs in the prospectus class action assert, inter alia, a statutory claim for damages as against all defendants pursuant to s. 130 of the Ontario Securities Act, R.S.O. 1990, c. S.5, s. 168 of the Alberta Securities Act, S.A. 1981, c. S.6.1, s. 131 of the British Columbia Securities Act, S.A. 1981, c. S.6.1 and Regulation 29 and ss. 218, 219 and 230 of the Quebec Securities Act, R.S.Q. c. V.1.1. The plaintiffs assert that there were misrepresentations through statements set out in the 1997 Prospectus and documents incorporated by reference therein.

7 In brief, the plaintiffs in the prospectus class action claim that members of Russian organized crime caused YBM to enter into a series of contracts and transactions which were simply a mechanism to siphon cash out of YBM, including the proceeds of the 1997 Prospectus. They allege that, "YBM was a money laundering operation and the sales, revenues and profits were fictitious". (para. 3 of Amended Fresh as Amended Statement of Claim) The plaintiffs allege negligent misrepresentations and negligence against the defendant auditors, underwriters, lawyers, directors and officers who were involved in the public offering of shares by YBM.

8 In brief, the plaintiffs in the general class action assert that the insiders, auditors, lead financial advisors and lawyers for YBM caused the public to believe that YBM was a legitimate business with income only from legitimate business activities. They say that, in reality, YBM was a fraud and was used as a vehicle for money laundering and other criminal activities. They say that one purpose of the fraud was to promote the sale of shares of YBM in the public market through the Alberta and Toronto stock exchanges during the period July 1, 1994 to May 14, 1998.

9 The general class action plaintiffs do not allege that the defendants, apart from Igor Fisherman and Jacob C. Bogatin as alleged insiders, were intentionally dishonest. Rather, the general class action plaintiffs allege negligent and reckless misrepresentation against the remaining defendants. In particular, the general class action plaintiffs allege that the conduct of the defendants, when coupled with their immediate pecuniary interests, was such as to constitute knowledge in law or be considered reckless or wilfully blind. The plaintiffs further allege that this thereby makes the defendants parties to the conspiracy and liable in damages for the conspiracy and misrepresentation.

10 On June 7, 1999 YBM pleaded guilty to a charge of conspiracy to commit fraud in the United States.

11 The proposed representative plaintiffs in the two Canadian class actions bring a motion (1) to certify these two class proceedings and (2) to approve the settlement thereof, pursuant to the terms of an agreement to settle these class actions. The agreement to settle includes a disposition of other YBM-related litigation in Ontario and the United States. Orders were made March 13 and 18, 2002 which resulted in a widely-published notice to the current and former shareholders of YBM of this certification and settlement approval hearing.

12 This is the first case in Canada where there is a proposed settlement of a class action relating to trading in the secondary market. These class actions are also unique for Canada in including class members who are located throughout the world. The jurisdiction of this court is not contested. Indeed, Judge Clarence C. Newcomer in Parachos, supra, held that because Canada has a greater interest than the United States in the subject matter, the American action should be dismissed, "in deference to Canadian law and the Canadian courts on the basis of international comity". (at 13)

13 These actions have not proceeded through to a trial. There are no findings of liability. The plaintiffs' pleadings allege that there was a very sophisticated, multi-layered conspiracy and massive fraud perpetrated upon the public through the utilization of YBM by organized crime. Indeed, the level of complexity and fraud of the alleged overall scheme seems unparalleled in Canadian experience and may well rival any such scheme seen on the international scene. See the several Reasons for Decision, supra.

14 The class actions were commenced in late 1998 and early 1999. All defendants have filed defences except Igor Fisherman, who has been noted in default. Some defendants have issued third party claims, crossclaims and counterclaims. Several amendments have been made to the pleadings. By Order dated October 1, 2001 the certification motions were to be heard during the weeks of February 18 and 25, 2002. However, by Order dated

November 19, 2001 counsel for all parties in the two class actions were also directed to appear before Mr. Justice Winkler of this court for a settlement conference to consider the possibility of resolving some or all of the several issues. The settlement conferences commenced January 16, 2002 and were concluded successfully February 7, 2002.

The Proposed Certification

15 Section 5 of the CPA sets forth the five criteria to be met as mandatory prerequisites to certification. The defendants conditionally consent to certification, dependent upon approval of the proposed settlement. In my view, and I so find, the criteria of s. 5 are met and certification is appropriate. I turn to the question of approval of the proposed settlement.

The Proposed Settlement

16 The defendants, notwithstanding their consent to the proposed settlement, have denied and continue to deny any wrongdoing or liability.

17 A settlement of a class action is not binding unless approved by the court: C.P.A., s. 29(2). The resolution of complex litigation through the compromise of claims is favoured as a matter of public policy. Ontario New Home Warranty Program et al. v. Chevron Chemical Company et al. *(1999), 46 O.R. (3d) 130* at 147 (S.C.J.)

18 A court in exercising an objective and independent assessment must find that the settlement is fair, reasonable, and in the best interests of the class. Dabbs v. Sun Life Assurance Co. of Canada *(1998), 40 O.R. (3d) 429* at 444 (Gen. Div.), aff'd *(1998), 41 O.R. (3d) 97* (C.A.), leave to appeal to S.C.C. dismissed October 22, 1998, *[1998] S.C.C.A. No. 372*; Directright Cartage Ltd. v. London Life Insurance Co. *[2001] O.J. No. 4073*.

19 There is a prima facie presumption of fairness when a proposed settlement is negotiated at arms-length. Manual for Complex Litigation, 3rd ed. (Federal Judicial Centre: West Publishing, 1995) at 30.42. This is particularly so when the settlement negotiations have taken place through the auspices of the court.

20 There are significant uncertainties of law and fact in the litigation at hand with corresponding risks and costs necessarily inherent in pursuing the litigation to trial. I refer briefly to some of these risks.

21 There are particular problems inherent to any action in Canada based upon alleged misrepresentations relating to the purchase of shares in the secondary market. The law is fundamentally different in the United States. See Mondor v. Fisherman *[2001] O.J. No. 4620* at paras. 57 to 71.

22 There is a risk to class members in the general class action because of the necessity in Canada of proving individual, actual reliance upon the alleged misrepresentation. There is uncertainty whether reliance could be established by the simple act of purchase of the shares or whether each shareholder would have to establish individually that he or she relied upon a misrepresentation that YBM was a legitimate business.

23 The issue of negligence in respect of certain defendants, in particular, securities counsel and the auditors, may be problematical under the test set forth in Hercules Management Ltd. v. Ernst & Young *(1997), 146 D.L.R. (4th) 577* (S.C.C.) at 586; Mondor v. Fisherman *[2001] O.J. No. 4620* at paras. 32 to 71.

24 The claim advanced in the general class action under the misleading advertising provisions of the Competition Act, R.S.C. 1985, c. C.34 is novel and seems problematic and tenuous. See Mondor v. Fisherman *[2001] O.J. No. 4620* at paras. 72 to 85.

25 There is also a risk that a portion of the statutory claim brought by the representative plaintiffs in the prospectus class action might not succeed on the basis that their purchase of YBM shares was not made pursuant to the 1997

Prospectus or in reliance upon the Prospectus, as required under the securities legislation. A limitation of actions defence, while doubtful, is raised with respect to all the prospectus claimants.

26 There is a risk that the plaintiffs would not be able to establish liability for negligence on the part of some or all of the defendants. The defendants assert that YBM was such a sophisticated fraud that they could not, through their own reasonable due diligence, have discovered the fraud.

27 Those insurance policies ascertained by the plaintiffs' counsel to be in place for some defendants provide that legal costs paid reduce the amounts of coverage otherwise available to meet claims. The estimate is that a trial of the common issues could well last at least a year with much of the insurance monies otherwise available being consumed in legal costs. It could quite possibly take three or four years for a determination of all the issues before there could be any final judgment. Plaintiffs' counsel state that the defendants with the deepest pockets' have the strongest defences.

28 There are also claims for indemnity brought by defendants against the Receiver for YBM, a third party in each of the class actions. Some defendants assert that there are contractual obligations on the part of YBM to provide indemnity.

29 The Receiver is a party to the settlement. The Receiver and the Independent Litigation Supervisor for YBM recommended the proposed settlement and the Receiver's involvement in the administration of the Plan to the court in Alberta where the bankruptcy proceedings in respect of YBM are taking place. By Order dated March 14, 2002 Mr. Justice Sulatycky of the Court of Queen's Bench of Alberta approved the recommendation of the Independent Litigation Supervisor to implement the proposed settlement.

30 In summary, there is a significant risk and cost to the plaintiffs (as there is to the defendants) in proceeding to trial. This is well-recognized by all the parties.

31 Mr. William Dermody, a lawyer, was appointed as a friend of the court to receive any objections to the settlement and was named for this purpose in the published notice in respect of this settlement approval hearing. Mr. Dermody advises that no objections have been received.

32 There has been effective communication with class members through publication and mailings of the notice of this settlement approval hearing. Class counsel have communicated with the class members by the operation of a website containing all pleadings, records (including the materials in the motions for approval of the settlement through this hearing) and decisions (www.ybmclassaction.com) and a toll-free telephone number with a recorded message. Class counsel have met with some twenty institutional investors who are class members and who expressly support the settlement. The representative plaintiffs, including those in the Paraschos action, have all provided affidavits supporting the settlement.

33 The settlement achieved in respect of these class actions is quite remarkable, given all the circumstances. There has been necessarily a very large number of parties, with very disparate interests and issues, involved in the settlement negotiations. An earlier mediation effort toward settlement by a very skilled and well-respected mediator was not successful.

34 The significant details of the proposed settlement are seen in the Judgment attached to these Reasons for Decision and the agreed-to "Plan" for the administration of the settlement, being Schedule "2" to the Judgment. Ernst & Young YBM Inc., the current Receiver of YBM, is to be appointed as Administrator of the settlement. The court will supervise the administration and operation of the Plan.

35 A person will only be eligible to participate in the distribution if that person suffered a net loss trading in shares of YBM and did not contribute to the wrongdoing involving YBM that gave rise to the class actions.

36 Class members may opt out of the settlement. There is a so-called blow-up' clause whereby if a certain number

of class members opt out then a condition subsequent may be operative such that the settlement is rendered null and void.

37 The total settlement through contributions by some of the defendants and third parties is $85 million. (The identity of particular defendants and third parties contributing, and the respective amounts to be contributed, are not disclosed.) Against this amount is debited approximately $8,500,000 for legal fees and administration costs, as discussed below. However, to the net amount of $76,500,000 available for distribution to the class members must also be added the estimated net amount of $33,500,000. This is available from the YBM estate in bankruptcy and is freed up for the benefit of members of the classes by virtue of the resolution of all litigation. Thus, the estimated net total for distribution to class claimants is approximately $110 million.

38 The purchasers through the 1997 Prospectus will collectively receive a premium of $7.5 million from the settlement funds to reflect their relatively stronger chance of success if the litigation had proceeded. This is based upon the statutory regime in securities legislation applicable to misrepresentations in a prospectus. It is estimated that this will result in a pro rata priority payment of $0.07 for each $1.00 of net loss.

39 The balance remaining of an estimated $102.5 million will be shared on a pro rata basis amongst all class members. It is estimated that this general distribution should result in a recovery of about $0.20 per $1.00 of loss.

40 Thus, it is estimated that prospectus class member claimants will recover about $0.27 and general class action members will receive about $0.20 for each $1.00 of net loss.

41 In my view, and I so find, the proposed settlement is fair, reasonable and in the best interests of class members. I turn now to the question of legal fees, disbursements and costs.

Legal fees and disbursements, costs of the notice program and administration and distribution costs

42 Sections 32 and 33 of the CPA set forth the regime for the approval of legal fees and disbursements. The underlying central criterion is that of reasonableness in the context of all the relevant circumstances.

43 Legal fees and disbursements sought, together with the costs of the notice program and the projected costs of administration in implementing the Plan, are estimated at about $8,500,000. Counsel for the general class action had a retainer agreement which provided for fees on the basis that payment was contingent upon success. Counsel for the prospectus class action was retained on the basis that fees would be paid by the representative plaintiffs in all events.

44 Fees of $3,000,000 are requested by counsel for the general class action; fees of $1,500,000 are requested by the counsel for the prospectus class action; and fees of U.S. $1,000,000 (approximately Cdn. $1,600,000) are requested by counsel in the United States action. Thus, total legal fees are sought of about Cdn. $6,100,000. In addition, applicable G.S.T. and disbursements are requested.

45 There is also the amount of $44,446.58 plus G.S.T. of $2,927.81 paid by two of the representative plaintiffs in respect of legal fees to counsel who preceded the present class counsel in the prospectus class action. I allow reimbursement for this amount. The role of two executives of these representative plaintiffs was instrumental in work done in the conduct of the case. They were actively involved in achieving a satisfactory settlement to the class actions for the benefit of all class members. This exceptional role was attested to by class counsel in both class actions and by counsel for the Receiver. Accordingly, I allow compensation to these two representative plaintiffs of $20,930.00 on a quantum meruit basis and $18,366.94 plus G.S.T. in the amount of $557.24 for related travelling expenses.

46 These two representative plaintiffs in the prospectus class action also seek $59,369.76 for the interest value on those legal fees paid to their counsel, calculated at a 10% rate from the date of payment to February 7, 2002, the date the proposed settlement was announced. They argue that there is an interest value, or opportunity cost, to

these paid legal fees. I do not accept this claim for reimbursement from the common fund available to all class members. In my view, it is reasonable that any claimed opportunity cost relating to legal fees be borne by the representative plaintiffs. Their claims constitute a very significant percentage of the claims of the prospectus class claimants. It is noted that the prospectus class has gained a particular benefit through the negotiated premium in the settlement payable to the members of that class alone. The normative approach for a successful litigant who is being indemnified for legal fees is for that litigant to bear any arguable opportunity cost relating to a retainer paid to its own counsel.

47 A condition to the settlement being finalized is that the pending appeal by the plaintiffs in Paraschos be dismissed. Counsel in the Canadian class actions advise that there has been a cooperative approach by all class counsel and that the assistance of American counsel for the plaintiffs in Paraschos has been integral to achieving the overall settlement.

48 No class member has objected to the requested fees. Notice of the requested fees was set out in the notice to class members of this settlement approval hearing. All representative plaintiffs have expressly agreed to the requested fees.

49 Dockets have been filed by counsel in the two Canadian class actions. The multiplier sought in respect of the general class action amounts to less than three times the base fee and for the prospectus class action amounts to less than 1.5 times the base fee. The premium for counsel in the prospectus class action is based simply upon the success achieved. Payment of this premium to counsel in the prospectus class action is supported by counsel for the plaintiffs in the general class action. The premium is modest, reflecting the fact that there was an agreement by the representative plaintiffs to pay counsel fees in all events.

50 The total fees amount to about 8% of the gross total of $85 million received directly through the settlement, and about 5% of the total $118.5 million available ($85,000,000 plus an estimated $33,500,000 freed up from the YBM estate in bankruptcy) to claimants as a result of the settlement.

51 Given the amounts claimed and recovered, the complexity of the proceedings, the responsibility assumed by counsel, the risks involved, the success achieved, the importance of the issues and the degree of skill and competence demonstrated by class counsel, in my view, and I so find, the requested fees are reasonable and are approved.

Conclusion and Overall Disposition

52 The plaintiffs allege that there was a massive conspiracy and fraud perpetrated upon the investors in YBM by organized crime. There are two defendants (Messrs. Fisherman and Bogatin) who are alleged to have been intentional insider participants in this scheme by organized crime. The remaining defendants are directors and officers, legal advisors, auditors and underwriters. The essence of the allegations against this group of defendants is that they were negligent and made negligent misrepresentations. That is, the plaintiffs allege that the directors and officers, underwriters, auditors and legal advisors knew (or were wilfully blind), or should through reasonable due diligence have known, of the intended unlawful conduct by the intentional wrongdoers such that the fraud could have been prevented.

53 The plaintiffs allege that about November, 1995 articles began appearing in newspapers in Russia and Britain that linked leaders of Russian organized crime to YBM and/or its subsidiaries. The plaintiffs allege that there were indications to the directors of YBM as early as August, 1996 of a significant risk that YBM was being used for unlawful purposes and that it was known then that there was an ongoing criminal investigation of YBM by the United States' Department of Justice. The plaintiffs allege that an investigation on behalf of the board of directors of YBM disclosed in January, 1997 that there was credible information that members of Russian organized crime were involved in YBM. See Reasons for Decisions in the earlier proceedings, in particular, CC&L Enterprise Fund (Trustee of) v. Fisherman *[2001] O.J. No. 4622* at paras. 22 to 27.

54 The plaintiffs in the class actions allege that the defendant directors, officers, legal advisors, auditors and underwriters each had duties and obligations relating to protecting YBM and its investors. Each of these defendants says that there was no negligence on his or its part. Some also defend on the basis that they were relying upon the due diligence of others, including the Ontario Securities Commission ("OSC"). Indeed, a special audit by the defendant, Deloitte & Touche LLP, initiated at the request of the OSC, did not manage to uncover the fiction created by the wrongdoers behind YBM. However, it is also to be noted that the pleadings in related proceedings brought by some defendants against the OSC for indemnity - in the event those defendants might be found liable to the plaintiffs in the class actions - allege that there was some evidence before the OSC, prior to the OSC authorizing the 1997 Prospectus, that suggested a risk of fraud.

55 There are many significant questions that remain unresolved because of the settlement of this litigation, including whether some defendants or the OSC did not take reasonable care in all the circumstances such that innocent persons were put at risk in investing in YBM. Such unresolved questions are a necessary consequence of any agreed-to settlement. In some situations, the fact that there are unresolved questions might be a reason for not approving a proposed settlement. That is not the case in the situation at hand. In my view, it is in the best interests of the class members in the three class actions to gain the recovery available through court approval of the proposed settlement.

56 For the reasons given, I find that the proposed settlement is fair, reasonable and in the best interests of all class members. Accordingly, the certification of the two class proceedings is granted and the settlement is approved. It is to be implemented and given force by the terms of the Judgment attached hereto signed today. The "Notice" attached thereto as Schedule 1 shall be published forthwith as required.

CUMMING J.

* * * * *

APPENDICES

Court file No. 00-CV-193345CP

ONTARIO

SUPERIOR COURT OF JUSTICE

THE HONOURABLE MR. JUSTICE	)	THURSDAY, THE 2ND DAY
PETER A. CUMMING	)	OF MAY, 2002
	)	

BETWEEN

ROGER MONDOR and AMIT M. KARIA

Plaintiffs

- and -

IGOR FISHERMAN, JACOB G. BOGATIN, KENNETH DAVIES, MICHAEL

SCHMIDT, HARRY W. ANTES, FRANK GREENWALD, R. OWEN MITCHELL, DAVID R. PETERSON, DANIEL E. GATTI, JAMES J. HELD, GUY R. SCALA, PARENTE, RANDOLPH, ORLANDO, CAREY & ASSOCIATES, DELOITTE & TOUCHE LLP, NATIONAL BANK FINANCIAL INC., formerly known as FIRST MARATHON SECURITIES LIMITED, GRIFFITHS McBURNEY & PARTNERS, CASSELS, BROCK & BLACKWELL and LAWRENCE WILDER

Defendants

- and

FOGLER, RUBINOFF LLP, YBM MAGNEX INTERNATIONAL, INC. through its independent Litigation Supervisor, Paul Farrar, YBM MAGNEX INTERNATIONAL, INC. by its Receiver and Manager ERNST & YOUNG YBM INC., DECISION STRATEGIES LLC, PEPPER HAMILTON LLP, CONNOR CLARK & LUNN INVESTMENT MANAGEMENT LTD.

Third Parties

Proceeding under the Class Proceedings Act, 1992

Court file No. 00-CV-186800CP

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN

ROYAL TRUST CORPORATION OF CANADA, in its capacity as Trustee of the CC&L Dedicated Enterprise Fund, ROYAL TRUST CORPORATION OF CANADA, in its capacity as Trustee of the CC&L Balanced Canadian Equity Fund, CONNOR CLARK & LUNN INVESTMENT MANAGEMENT LTD. and THE BRITISH COLUMBIA INVESTMENT MANAGEMENT CORPORATION

Plaintiffs

- and -

IGOR FISHERMAN, JACOB G. BOGATIN, KENNETH DAVIES, MICHAEL SCHMIDT, HARRY W. ANTES, FRANK GREENWALD, R. OWEN MITCHELL, DAVID R. PETERSON, DANIEL E. GATTI, PARENTE, RANDOLPH, ORLANDO, CAREY & ASSOCIATES, DELOITTE & TOUCHE LLP, NATIONAL BANK FINANCIAL INC., GRIFFITHS MCBURNEY & PARTNERS, SCOTIA CAPITAL INC., CANACCORD CAPITAL CORPORATION, HSBC SECURITIES (CANADA) INC., CASSELS BROCK & BLACKWELL and LAWRENCE WILDER

Defendants

- and

FOGLER, RUBINOFF LLP, YBM MAGNEX INTERNATIONAL, INC. through its independent Litigation Supervisor, Paul Farrar, DECISION STRATEGIES LLC and PEPPER HAMILTON LLP

Third Parties

Proceeding under the Class Proceedings Act, 1992

Court file No. 01-CV-209418

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN

YBM MAGNEX INTERNATIONAL, INC.

THROUGH ITS INDEPENDENT LITIGATION SUPERVISOR,

PAUL FARRAR

Plaintiff

- and -

JACOB BOGATIN, IGOR FISHERMAN, HARRY ANTES, KENNETH DAVIES,

FRANK GREENWALD, R. OWEN MITCHELL, DAVID PETERSON, MICHAEL SCHMIDT, CASSELS, BROCK & BLACKWELL, PARENTE, RANDOLPH, ORLANDO, CAREY & ASSOCIATES, DELOITTE & TOUCHE LLP, NATIONAL BANK FINANCIAL CORP., FORMERLY FIRST MARATHON SECURITIES LIMITED, GRIFFITHS MCBURNEY & PARTNERS,

SCOTIA-MCLEOD INC., CANACCORD CAPITAL CORPORATION and HSBC JAMES CAPEL INC., FORMERLY GORDON CAPITAL CORPORATION

Defendants

- and

CONNOR CLARK & LUNN INVESTMENT MANAGEMENT LTD.

FOGLER RUBINOFF LLP, DECISION STRATEGIES LLC and PEPPER HAMILTON LLP

Third Parties

Court file No. 99-CL-3424

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

BETWEEN

YBM MAGNEX INTERNATIONAL, INC.

by its Receiver and Manager ERNST & YOUNG YBM INC.

Plaintiff

- and -

JACOB BOGATIN, IGOR FISHERMAN, MICHAEL SCHMIDT, KENNETH DAVIES, FRANK GREENWALD, GUY SCALA, DANIEL GATTI, JAMES HELD, ROBERT VENTRESCA and HARRY ANTES

Defendants

Court file No. 00-CV-202036-CM

ONTARIO

SUPERIOR COURT OF JUSTICE

DELOITTE & TOUCHE LLP

Plaintiff

and

YBM MAGNEX INTERNATIONAL, INC., JACOB G. BOGATIN, DANIEL E. GATTI, R. OWEN MITCHELL, CASSELS BROCK & BLACKWELL, FIRST MARATHON SECURITIES LTD., and LAWRENCE WILDER

Defendants

JUDGMENT

THIS MOTION, made by the Plaintiffs for certification of the General Class Action and the Prospectus Class Action and for judgment pursuant to subsection 29(2) of the Act approving the settlement of the Class Actions, and dismissing the General Class Action, the Prospectus Class Action, the YBM Action, the YBM Insider Trading Action and the Deloitte Action, all in accordance with the terms of this judgment, was heard on May 2, 2002 at Toronto, Ontario.

ON READING the following:

(a) the notice of motion and record returnable May 2, 2002;

(b) the Consent and Agreement, filed,

(c) the order of the Alberta Court, dated March 14, 2002, issued in the Alberta Action, authorizing the Receiver and Independent Litigation Supervisor to consent to this Judgment,

(d) the letter from the General Counsel to the Public Guardian and Trustee, dated May 1, 2002;

(e) the letter from Counsel to the Children's Lawyer, dated April 30, 2002; and

(f) the affidavits of:

(i) Leslie Swartman, sworn the 3rd day of April, 2002;

(ii) Franca Mazzulla, sworn the 10th day of April, 2002;

(iii) Teri Prince, sworn the 3rd day of April, 2002;

(iv) Brian Denega, sworn the 12th day of March, 2002;

(v) Paul Farrar, sworn the 12th day of March, 2002;

(vi) Paul Farrar, sworn the 11th day of April, 2002;

(vii) Roger Mondor, sworn the 5th day of April, 2002;

(viii) Amit M. Karia, sworn the 2nd day of April, 2002;

(ix) Patricia A. Speight, sworn the 6th day of April, 2002;

(x) John Paraschos, sworn the 2nd day of April, 2002;

(xi) Sheldon Kapustin, sworn the 3rd day of April, 2002;

(xii) Ralph A. Sutton, sworn the 3rd day of April, 2002;

(xiii) Stephen K. Leff, sworn the 5th day of April, 2002:

(xiv) Claude Bergeron, a representative of Caisse de Depot et Placement du Quebec sworn the 5th day of April, 2002:

(xv) Brian J. Wallace, Q.C., sworn the 10th day of April, 2002;

(xvi) Douglas G. Pearce, a representative of The British Columbia Investment Management Corporation, sworn the 11th day of April, 2002;

(xvii) Gordon H. MacDougall, a representative of Connor Clark & Lunn Investment Management Ltd. sworn the 10th day of April, 2002:

(xviii) Fidel Hinds, a representative of Royal Trust Corporation of Canada, sworn the 12th day of April, 2002;

(xix) Robert V. Moses, sworn the 12th day of April, 2002:

(xx) Patricia A. Speight, sworn the 24th day of April, 2002;

(xxi) Amit Karia, sworn the 2nd day of April, 2002;

(xxii) Roger Mondor, sworn the 2nd day of April, 2002;

(xxiii) Russel Beatie, sworn the 16th day of April, 2002;

(xxiv) Sandra Szabo, sworn the 23rd day of April, 2002;

(xxv) Sandra Szabo, sworn the 1st day of May, 2002; and

(xxvi) Brian J. Wallace, sworn the 22nd day of April, 2002,

AND ON HEARING the submissions of counsel for the Plaintiffs, Defendants, except Igor Fisherman, Third Parties, and William Dermody, the friend of the court

AND ON BEING ADVISED THAT:

(a) all parties, except Igor Fisherman, to the Actions submit to the jurisdiction of the Ontario Court;

(b) the Plaintiffs in each of the Actions consent to this Judgment;

(c) the Defendants (except Igor Fisherman), Third Parties, Receiver and the Independent Litigation Supervisor consent to this Judgment;

(d) the Receiver consents to being appointed Administrator;

(e) Reva Devins consents to being appointed Referee;

(f) the U.S. Plaintiffs' Executive Committee and the U.S. Plaintiffs, in accordance with the Consent and Agreement and the Stipulation of Dismissal signed by counsel for all parties to the Paraschos Action, except Igor Fisherman, undertake and agree to take the necessary steps to dismiss, with prejudice, the appeal in Paraschos, et al. v. YBM Magnex et al. No. 01-1390, No. 01-1621 and No. 01-1634 now pending in the United States Court of Appeals for the Third Circuit forthwith if this Judgment remains in full force and effect and is not rendered null and void pursuant to paragraph 36 of the Judgment;

(g) counsel for the U.S. Plaintiffs, Prospectus Class Counsel and General Class Counsel have undertaken not to act for, or render any assistance to, any person who opts out of the Class Actions in any action relating, directly or indirectly, to YBM;

(h) the Independent Litigation Supervisor's Counsel has undertaken and agrees not to act for any person who opts out of the Class Actions in any actions relating, directly or indirectly, to YBM and not to voluntarily render assistance to any such person and only to render assistance if so ordered by the Alberta Court by order made on notice to the Defendants and Third Parties;

(i) OSC Staff has undertaken that upon this Judgment issuing and not being rendered null and void pursuant to paragraphs 32 and 36 or pursuant to paragraph 51, the OSC Staff will not seek authorization from the OSC to pursue any order under section 128 of the Securities Act that would require any further monetary contribution to be made by any party to the Actions, including any orders for payment of damages, disgorgement, restitution or repayment of monies, but excluding any order as to costs; and

(j) Connor Clark, Decision Strategies LLC and Pepper Hamilton LLP have not contributed to the Settlement Monies,

And without any admission of liability on the part of any of the Defendants and Third Parties, all Defendants and Third Parties having denied liability.

1. THIS COURT ORDERS AND DECLARES that for the purposes of this Judgment, the following definitions apply:

(a) "Act" means the Class Proceedings Act, *S.O. 1992, c. 6*;

(b) "Actions" means collectively the General Class Action, the Prospectus Class Action, the YBM Action, the YBM Insider Trading Action, the Deloitte Action, the Paraschos Action, the third party claims, crossclaims and counterclaims, if any, in each of these actions;

(c) "Administrator" means Ernst & Young YBM Inc. or its successor as appointed by this court;

(d) "Alberta Action" means action No. 9801-16691 in the Alberta Court;

(e) "Alberta Court" means the Court of Queen's Bench of Alberta, Judicial District of Calgary;

(f) "Class Actions" means collectively the General Class Action and the Prospectus Class Action;

(g) "Class Counsel" means Sutts, Strosberg LLP and Lerner & Associates LLP;

(h) "Connor Clark" means Connor Clark & Lunn Investment Management Ltd.;

(i) "Defendants" means Jacob G. Bogatin, Kenneth Davies, Michael Schmidt, Harry W. Antes, Frank Greenwald, R. Owen Mitchell, David R. Peterson, Daniel E. Gatti, James J. Held, Guy R. Scala, Parente, Randolph, Orlando, Carey & Associates, Deloitte & Touche LLP, National Bank Financial Inc., formerly known as First Marathon Securities Limited, Griffiths McBurney & Partners, Cassels, Brock & Blackwell, now known as Cassels, Brock & Blackwell LLP, Lawrence Wilder, HSBC Securities (Canada) Inc., Scotia Capital Inc., previously known as ScotiaMcLeod Inc., Canaccord Capital Corporation and HSBC James Capel Inc., formerly Gordon Capital Corporation;

(j) "Deloitte Action" means action No. 00-CV-202036-CM in the Ontario Court;

(k) "Excluded Persons" means the Defendants, the Third Parties (except Connor Clark, Pepper Hamilton LLP and Decision Strategies LLC) and any person claiming, directly or indirectly, on behalf of any Excluded Person, any entity in which any Excluded Person has a controlling interest and the legal representatives, heirs, predecessors, successors and assigns of any Excluded Person, but shall not include any person, not otherwise named in this definition, for whose benefit a person named in this definition is holding Shares;

(l) "General Class Action" means action No. 00-CV-193345CP in the Ontario Court;

(m) "General Class Counsel" means Sutts, Strosberg LLP;

(n) "General Class Members" means each and every person, wherever resident, except Excluded Persons, who, during the period July 1, 1994 to May 14, 1998, Traded in Shares but not including Shares purchased or acquired pursuant to the YBM prospectus dated November 17, 1997;

(o) "Hodgson Tough" means Hodgson Tough Shields DesBrisay O'Donnell LLP;

(p) "Independent Litigation Supervisor" means Paul Farrar appointed as Independent Litigation Supervisor by order of the Alberta Court dated October 11, 2000;

(q) "Independent Litigation Supervisor's Counsel" means Stikeman, Elliott;

(r) "Mr. Justice Cumming" means the Honourable Mr. Justice Peter A. Cumming of the Ontario Court or such other justice of the Ontario Court as may be designated by the Chief Justice of the Ontario Court to act in his stead in this matter;

(s) "Mr. Justice Winkler" means the Honourable Mr. Justice Warren K. Winkler of the Ontario Court or such other justice of the Ontario Court as may be designated by the Chief Justice of the Ontario Court to act in his stead in this matter;

(t) "Notice" means notice of the Judgment generally in accordance with the form attached as Schedule 1 to this Judgment;

(u) "Net Losses" for the purposes of paragraphs 32 and 36 of this Judgment means the greater of: (i) the aggregate of the losses of each person who opts out of the Class Actions, pursuant to the terms of this Judgment, calculating each person's net loss in accordance with the following formula: cost of all Shares purchased or acquired (including brokerage fees) minus proceeds of the sale or disposition of all Shares (including brokerage fees); or (ii) such Trading losses as Mr. Justice Cumming recognizes or accepts for purposes of the motion contemplated by paragraph 36 of this Judgment which will be brought on notice to all of the parties to the Actions (except Igor Fisherman) and to any person who has opted out of the Class Actions whose rights may be affected on that motion;

(v) "Net Settlement Monies" means the Settlement Monies plus interest resulting from the investments directed by paragraph 25 of this Judgment minus the payments authorized by paragraph 27 of this Judgment and paragraph 8 of the Order;

(w) "Ontario Court" means the Ontario Superior Court of Justice;

(x) "Order" means the order of the Honourable Mr. Justice Cumming dated March 13, 2002;

(y) "OSC" means the Ontario Securities Commission;

(z) "OSC Staff" means staff of the OSC;

(aa) "Paraschos Action" means Paraschos et al. v. YBM Magnex, et al, U.S.D.C., E.D., Pa. consolidated action No. 98-CV-6444 and all actions related thereto;

(bb) "Plan" means the plan which is annexed as Schedule 2 to this Judgment;

(cc) "Prospectus" means the prospectus of YBM dated November 17, 1997;

(dd) "Prospectus Class Action" means action No. 00-CV-186800CP in the Ontario Court;

(ee) "Prospectus Class Counsel" means Lerner & Associates LLP;

(ff) "Prospectus Class Members" means each and every person, wherever resident, except Excluded Persons, who purchased or acquired Shares pursuant to the Prospectus dated November 17, 1997;

(gg) "Receiver" means Ernst & Young YBM Inc.;

(hh) "Referee" means the person or persons appointed by the court to determine disputes with respect to the calculations of net loss and entitlement to participate in the Plan;

(ii) "Securities Act" means Securities Act, R.S.O. 1990, c. S-5, as amended;

(jj) "Settlement Monies" means CDN $75,000,000 plus U.S. $6,205,000;

(kk) "Shares" includes all securities of YBM or its predecessor Pratecs Technologies, Inc.;

(ll) "Third Parties" means Fogler Rubinoff now known as Fogler, Rubinoff LLP, YBM, Decision Strategies LLC, Pepper Hamilton LLP and Connor Clark;

(mm) "Trade," "Traded" and "Trading" include the acquisition, the purchase, the disposition or the sale of Shares;

(nn) "U.S. Plaintiffs" means Caisse de Depot et placement du Quebec, John Paraschos, Sheldon Kapustin, Ralph A. Sutton, and Stephen K. Leff;

(oo) "U.S. Plaintiffs' Executive Committee" means the law firms designated as the Executive Committee of Plaintiffs' Counsel by order of the United States District Court for the Eastern District of Pennsylvania dated March 30, 1999 and entered on April 1, 1999 in the Paraschos Action;

(pp) "YBM" means YBM Magnex International, Inc., through and including its Receiver and Manager, Ernst & Young YBM Inc., and its Independent Litigation Supervisor, Paul Farrar, and its subsidiaries and affiliates;

(qq) "YBM Action" means action No. 01-CV-209418 in the Ontario Court; and

(rr) "YBM Insider Trading Action" means action No. 99-CL-3424 in the Ontario Court.

2. THIS COURT ORDERS that the General Class Action be and is hereby certified as a class proceeding.

3. THIS COURT ORDERS that the class in the General Class Action is defined as:

> Each and every person, wherever resident, except Excluded Persons, who, during the period July 1, 1994 to May 14, 1998, Traded in Shares but not including Shares purchased or acquired pursuant to the YBM prospectus dated November 17, 1997.

4. THIS COURT DECLARES that Roger Mondor and Amit Karia are representative parties of the class and APPOINTS them as the representative plaintiffs in the General Class Action.

5. THIS COURT DECLARES that the common issue in the General Class Action is:

> What claims, if any, do the General Class Members have against the Defendants, or any of them, arising out of Trading in Shares?

6. THIS COURT ORDERS that the Prospectus Class Action be and is hereby certified as a class proceeding.

7. THIS COURT ORDERS that the class in the Prospectus Class Action is defined as:

> Each and every person, wherever resident, except Excluded Persons, who purchased or acquired Shares pursuant to the Prospectus dated November 17, 1997.

8. THIS COURT DECLARES that Royal Trust Corporation of Canada, in its capacity as Trustee of the CC&L Dedicated Enterprise Fund, Royal Trust Corporation of Canada, in its capacity as Trustee of the CC&L Balanced Canadian Equity Fund, Connor Clark and the British Columbia Investment Management Corporation are representative parties of the class and APPOINTS them as the representative plaintiffs in the Prospectus Class Action.

9. THIS COURT DECLARES that the common issue in the Prospectus Class Action is:

> What claims, if any, do the Prospectus Class Members have against the Defendants, or any of them, arising out of their purchase or acquisition of Shares pursuant to the Prospectus dated November 17, 1997?

10. THIS COURT DECLARES, for greater certainty, that a person may be both a General Class Member and a Prospectus Class Member.

11. THIS COURT ORDERS AND ADJUDGES that the proposed settlement of the Class Actions as particularized in this Judgment and the Plan, which is annexed as Schedule 2, is fair, reasonable, adequate, and in the best interests of the General Class Members and the Prospectus Class Members.

12. THIS COURT ORDERS that the Plan, which is incorporated by reference into this Judgment, is hereby approved and shall be implemented.

13. THIS COURT DECLARES that, pursuant to the Act and the Plan, Mr. Justice Winkler shall supervise the implementation of the Plan, the execution of this Judgment, and the administration, operation of, and the distribution pursuant to the Plan. Without limiting the generality of the foregoing, Mr. Justice Winkler may issue orders, in such form as are necessary, to implement and enforce the provisions of the Plan and this Judgment.

14. THIS COURT ORDERS that Ernst & Young YBM Inc. be and is hereby appointed as the Administrator of the Plan, until further order of Mr. Justice Winkler, on the terms and conditions and with the powers, rights, duties and responsibilities set out in the Plan.

15. THIS COURT ORDERS that each General Class Member and each Prospectus Class Member who does not opt out in accordance with the provisions of paragraphs 30 and 31 of this Judgment and who is eligible pursuant to the provisions of the Plan shall be paid in accordance with the Plan.

16. THIS COURT DECLARES that each General Class Member and each Prospectus Class Member who does not opt out in accordance with the terms of this Judgment, and his or her heirs, legal representatives and assigns or its past and present parents, subsidiaries and related or affiliated entities, employees, agents, officers, directors, shareholders, partners, attorneys, insurers, representatives, executors, administrators, predecessors, successors, transferees and assigns have released and shall be conclusively deemed to have fully, finally and forever released the Receiver, the Independent Litigation Supervisor, the Defendants and the Third Parties (except YBM Magnex International, Inc.), and each of their respective past and present parents, subsidiaries and related or affiliated entities, and their respective employees, agents, officers, directors, shareholders, partners, principals, members, attorneys, insurers, subrogees, representatives, executors, administrators, predecessors, successors, heirs, transferees and assigns from any and all actions, causes of action, common law and statutory liabilities, contracts, claims and demands of every nature or kind, available, asserted, or which could have been asserted, whether known or unknown, including for damages, contribution, indemnity, costs, expenses and interest, which they ever had, now have or may hereafter have, directly or indirectly, or in any way relating to or arising, directly or indirectly, by way of any subrogated or assigned right or otherwise or in any way relating to or arising from:

(a) Trading in Shares;

(b) YBM's business operations;

(c) any claims asserted, or which could have been asserted, whether known or unknown, in any of the Actions including, without limiting the generality of the foregoing:

(i) any claims arising from the facts and circumstances related to the subject matters of the Actions;

(ii) any claims under the laws of the United States of America or any of the States therein, including but not limited to claims pursuant to State and/or Federal securities law, rules, and/or regulations;

(d) any advice or service provided by the Defendants or Third Parties or their respective predecessors to each other or to YBM, directly or indirectly, or to the General Class Members or to the Prospectus Class Members, directly or indirectly, relating in any way to YBM;

(e) any duty, fiduciary or otherwise, owed by such Defendants or Third Parties or their respective predecessors relating in any way to YBM; and

(f) any claims arising out of the Plan and the administration of the Plan;

provided that nothing in this Judgment shall release the Receiver, when acting as Administrator, from any claims arising out of the administration of the Plan and providing that nothing in this Judgment affects the right of a General Class Member and a Prospectus Class Member to claim against YBM in the Alberta Action.

17. AND THIS COURT DECLARES, for greater certainty, that the releases referred to in paragraph 16 and the order referred to in paragraph 20 bind each General Class Member and each Prospectus Class Member who does not opt out in accordance with the terms of this Judgment whether or not he, she or it submits a claim to the Administrator, whether or not he, she or it is eligible under the Plan or whether the claim is accepted in whole or in part.

18. THIS COURT DECLARES that the Defendants and the Third Parties, each of their respective past and present parents, subsidiaries and related or affiliated entities, and their respective employees, agents, officers, directors, shareholders, partners, attorneys, insurers, heirs, subrogees, representatives, executors, administrators, predecessors, successors, transferees and assigns have released and shall be conclusively deemed to have fully, finally and forever released each other (excepting that a Defendant or a Third Party does not hereby release his, her or its own insurer) from any and all actions, causes of action, common law and statutory liabilities, contracts, claims and demands of every nature or kind, available, asserted, or which could have been asserted, whether known or unknown, including for damages, contribution, indemnity, costs, expenses and interest, which they ever had, now have or may hereafter have, directly or indirectly, or in any way relating to or arising, directly or indirectly, by way of any subrogated or assigned right or otherwise or in any way relating to or arising from:

(a) Trading in Shares;

(b) YBM's business operations;

(c) any claims asserted, or which could have been asserted, in any of the Actions, including, without limiting the generality of the foregoing:

(i) any claims arising from the facts and circumstances related to the subject matters of the Actions;

(ii) and any claims that have been or could have been asserted by any Defendant or Third Party arising out of the OSC proceeding initiated by notice of hearing issued on November 1, 1999;

(iii) any claims under the laws of the United States of America or any of the States therein, including but not limited to claims pursuant to State and/or Federal securities law, rules, and/or regulations;

(d) any advice or service provided by the Defendants or Third Parties or their respective predecessors to each other or to YBM, directly or indirectly, or to the General Class Members or to the Prospectus Class Members, directly or indirectly, relating in any way to YBM; and

(e) any duty, fiduciary or otherwise, owed by such Defendants or Third Parties or their respective predecessors relating in any way to YBM;

and the Defendants and Third Parties have represented and warranted that they have not assigned any such claims and providing that nothing in this Judgment affects the rights of Connor Clark to claim against YBM in the Alberta Action.

19. THIS COURT DECLARES that the Defendants and the Third Parties (except Connor Clark) have each released and shall be conclusively deemed to have fully, finally and forever released YBM and its respective past and present parents, subsidiaries and related or affiliated entities, employees, agents, officers, directors, shareholders, partners, principals, members, attorneys, insurers, heirs, subrogees, representatives, executors, administrators, predecessors, successors, transferees and assigns, except persons determined to be ineligible under the Plan or persons who opt out of the Class Actions in accordance with the terms of this Judgment, from any and all actions, causes of action, common law and statutory liabilities, contracts, claims and proofs of claim filed with the Receiver in the Alberta Action, claims and demands of every nature or kind, available, asserted, or which could have been asserted, whether known or unknown, including for damages, contribution, indemnity, costs, expenses and interest, which they ever had, now have or may hereafter have, directly or indirectly, or in any way relating to or arising, directly or indirectly, by way of any subrogated or assigned right or otherwise or in any way relating to or arising from:

(a) Trading in Shares;

(b) YBM's business operations;

(c) any claims asserted, or which could have been asserted, whether known or unknown, in any of the Actions including, without limiting the generality of the foregoing:

(i) any claims arising from the facts and circumstances related to the subject matters of the Actions;

(ii) claims under the laws of the United States of America or any of the States therein, including, but not limited to claims pursuant to State and/or Federal securities law, rules and/or regulations;

(d) any advice or service provided by the Defendants or Third Parties or their respective predecessors to each other or to YBM, directly or indirectly, or to the General Class Members or to the Prospectus Class Members, direct or indirectly, relating in any way to YBM;

(e) any indemnity agreements to which YBM was a party;

(f) any proofs of claim filed with the Receiver;

(g) any distribution that the Receiver may make;

(h) any duty, fiduciary or otherwise, owed by such Defendants or Third Parties or their respective predecessors relating in any way to YBM;

excepting, however, any claim that Decision Strategies LLC or its predecessors and/or Pepper Hamilton LLP may have against YBM for payment for services rendered.

20. THIS COURT ORDERS that each General Class Member and each Prospectus Class Member who does not opt out in accordance with the terms of this Judgment, the Defendants and the Third Parties and each of their respective past and present parents, subsidiaries and related or affiliated entities, employees, agents, officers, directors, shareholders, partners, principals, members, attorneys, insurers, subrogees, heirs, executors, administrators, legal representatives, transferees, predecessors, successors and assigns shall not commence or continue any action or take any proceeding relating to or arising from:

(a) Trading in Shares;

(b) YBM's business operations;

(c) any claims asserted, or which could have been asserted, whether known or unknown, in any of the Actions including, without limiting the generality of the foregoing:

(i) any claims arising from the facts and circumstances related to the subject matters of the Actions;

(ii) any claims under the laws of the United States of America or any of the States therein, including but not limited to claims pursuant to State and/or Federal securities law, rules, and/or regulations;

(iii) any claims that have been or could have been asserted arising out of the OSC proceeding initiated by notice of hearing issued on November 1, 1999;

(d) any advice or service provided by the Defendants or Third Parties or their respective predecessors to each other or to YBM or to the General Class Members or to the Prospectus Class Members, directly or indirectly relating in any way to YBM;

(e) any duty, fiduciary or otherwise, owed by such Defendants or Third Parties or their respective predecessors relating in any way to YBM;

(f) any indemnity agreements to which YBM was a party;

(g) any claims arising out of the Plan, the administration of the Plan, and the administration of the YBM receivership provided that nothing in this Judgment shall release the Receiver, when acting as Administrator, from any claims arising out of the Plan and the administration of the Plan;

against any person or persons who will or could be in or in connection with any such action or proceeding, bring or commence or continue any claim, crossclaim, claim over or any claim for contribution, indemnity or any other relief against any one of the Defendants, Third Parties, the Independent Litigation Supervisor, the Receiver and/or YBM, providing that nothing in this Judgment affects the right of a General Class Member and a Prospectus Class Member to claim against YBM in the Alberta Action and provided that nothing in the foregoing shall preclude a Defendant from asserting a claim alleging an intentional tort by a person who is not a party to the Actions, provided that any such Defendant undertakes to and agrees to wholly indemnify any Defendant or Third Party to the Actions from any and all costs, expenses, damages and expenditures of any nature and kind resulting from the claim and shall, at the request of any affected Defendant or Third Party, post a bond in an amount fixed by the court or pay such amount ordered by the court at any stage of the proceeding, to cover all such costs, expenses, damages and expenditures.

21. THIS COURT ORDERS AND DECLARES that each General Class Member and each Prospectus Class Member who does not opt out in accordance with the terms of this Judgment, any Defendant and any Third Party who has commenced any action or taken any proceeding against any party to any of the Actions or against any other person relating to or arising from Trading in Shares and/or YBM's business operations, and/or any advice or service provided to YBM, and/or any indemnity agreement, and/or any duty, fiduciary or otherwise, and/or relating in any other way to YBM which is not dismissed by this Judgment shall consent and shall be deemed to have consented to its dismissal without costs and with prejudice.

22. THIS COURT DECLARES that YBM and its past and present parents, subsidiaries and related or affiliated entities, successors and assigns have released and shall be conclusively deemed to have fully, finally and forever released the Defendants and the Third Parties, and each of their respective past and present parents, subsidiaries and related or affiliated entities, employees, agents, officers, directors, shareholders, partners, principals, members, attorneys, insurers, subrogees, heirs, executors, administrators, legal representatives, transferees, predecessors, successors and assigns from any and all actions, causes of action, common law and statutory liabilities, contracts, claims and demands of every nature or kind, available, asserted, or which could have been asserted, whether known or unknown, including for damages, contribution, indemnity, costs, reimbursement or repayment of fees, expenses and interest, which it ever had, now has or may hereafter have, directly or indirectly, or in any way relating to or arising, directly or indirectly, by way of any subrogated or assigned right or otherwise or in any way

relating to or arising from:

(a) Trading in Shares;

(b) YBM's business operations;

(c) any claims asserted, or which could have been asserted, whether known or unknown, in any of the Actions including, without limiting the generality of the foregoing:

(i) any claims arising from the facts and circumstances related to the subject matters of the Actions;

(ii) any claims under the laws of the United States of America or any of the States therein, including but not limited to claims pursuant to State and/or Federal securities law, rules, and/or regulations;

(d) any advice or service provided by the Defendants or Third Parties or their respective predecessors to each other or to YBM, directly or indirectly, or to the General Class Members or to the Prospectus Class Members, directly or indirectly, relating in any way to YBM;

(e) any duty, fiduciary or otherwise, owed by such Defendants or Third Parties or their respective predecessors relating in any way to YBM; and

(f) any claims arising out of the Plan and the administration of the Plan,

and YBM has represented and warranted that it has not assigned any such claims, and providing that nothing in this Judgment shall release the Receiver, when acting as Administrator, from any claims arising out of the administration of the Plan and providing that nothing in this Judgment affects the right of a General Class Member and a Prospectus Class Member to claim against YBM in the Alberta Action.

23. THIS COURT ORDERS AND DECLARES that YBM, its past and present parents, subsidiaries, related or affiliated entities, its successors and assigns may not commence any action or take or continue any proceeding relating to or arising from:

(a) Trading in Shares;

(b) YBM's business operations;

(c) any claims asserted, or which could have been asserted, whether known or unknown, in any of the Actions including, without limiting the generality of the foregoing:

(i) any claims arising from the facts and circumstances related to the subject matters of the Actions;

(ii) any claims under the laws of the United States of America or any of the States therein, including but not limited to claims pursuant to State and/or Federal securities law, rules, and/or regulations;

(iii) any claims that have been or could have been asserted arising out of the OSC proceeding initiated by notice of hearing issued on November 1, 1999;

(d) any advice or service provided by the Defendants or Third Parties or their respective predecessors to each other or to YBM, directly or indirectly, or to the General Class Members or to the Prospectus Class Members, directly or indirectly relating in any way to YBM;

(e) any duty, fiduciary or otherwise, owed by such Defendants or Third Parties or their respective predecessors relating in any way to YBM;

(f) any indemnity agreements to which YBM was a party;

against any person or persons who could, on a basis that would survive a motion to strike, in or in connection with

any such action or proceeding, bring or commence or continue any claim, crossclaim, claim over or any claim for contribution, indemnity or any other relief against any one of the Defendants, Third Parties, the Independent Litigation Supervisor or the Receiver.

24. THIS COURT DECLARES that some of the Defendants and Third Parties have contributed to the Settlement Monies paid to the Prospectus Class Counsel, in trust, pursuant to paragraph 4 of the Order, and that such payments satisfy the obligations, if any, of the Defendants and the Third Parties to the General Class Members, to the Prospectus Class Members and to YBM.

25. THIS COURT DECLARES that, subject to the payments authorized by paragraph 27, the Prospectus Class Counsel shall maintain CDN $75,000,000 of the Settlement Monies in a trust account in Canadian dollars, and U.S. $6,205,000 in a trust account, in U.S. dollars, and shall invest the monies in accordance with a protocol approved by Mr. Justice Winkler.

26. THIS COURT ORDERS that on or before May 15, 2002, the General Class Members and the Prospectus Class Members shall be given notice of this Judgment, substantially in the form of the Notice, and in the following manner which the court declares is the best notice practicable under the circumstances:

(a) by General Class Counsel placing the Notice in the following newspapers:

(i) The Globe & Mail, national edition;

(ii) The National Post, national edition;

(iii) The Philadelphia Inquirer; and

(iv) The Wall Street Journal, including the European and Asian editions;

(b) by the Administrator sending a copy of the Notice to each person who has filed a claim form with the Receiver in the Alberta Action, and to each other person identified in YBM's share register as being a shareholder of YBM between July 1, 1994 and May 14, 1998 at the address indicated in the register;

(c) by General Class Counsel electronically sending a copy of the Notice to the list of brokers in Canada, attached as Schedule 3 and the list of brokers in the United States, attached as Schedule 4, and asking them to bring the Notice to the attention of their clients who Traded in Shares; and

(d) by General Class Counsel placing a copy of the Notice on-line at the websites listed on Schedule 5.

27. THIS COURT ORDERS that Prospectus Class Counsel shall pay out of the Settlement Monies:

(a) the costs associated with the Notice particularized in paragraph 26 of this Judgment as these expenses are incurred; and

(b) the reasonable costs of the Administrator, incurred in that capacity, after being fixed by Mr. Justice Winkler on notice to all parties.

28. THIS COURT DECLARES that the Notice satisfies the requirements of s. 17(6) of the Act and is the best notice practicable under the circumstances.

29. THIS COURT ORDERS that forthwith after publication and delivery of the Notice required by paragraph 26 of this Judgment, Class Counsel shall file with the court affidavit(s) confirming publication of and delivery of the Notice in accordance with this Judgment.

30. THIS COURT ORDERS that:

(a) the General Class Members and the Prospectus Class Members may only opt out of the Class Actions by sending a written election to opt out, signed by the General Class Member or the Prospectus Class Member or his, her or its designee, by prepaid mail, courier or fax:

(i) in the case of a person, who is not a minor or a mentally incapable person, to the Administrator at Ernst & Young YBM Inc., P.O. Box 251, 222 Bay Street, Ernst & Young Tower, Toronto, Ontario, M5K 1J7, fax: (416) 943-3300 to the attention of Leslea Gordon;

(ii) in the case of a mentally incapable person to the Administrator, at the address above, and to the Public Guardian and Trustee at 800-595 Bay Street, Toronto, Ontario M5G 2M6, fax: (416) 314-2695; and

(iii) in the case of a minor, to the Administrator, at the address above, and to the Children's Lawyer at the Ministry of the Attorney General, 14th Floor, 393 University Avenue, Toronto, Ontario M5G 1W9, fax: (416) 314-8050;

(b) each election to opt out will only be effective if it is received by the recipient(s) referred to in subparagraphs 30(a)(i), (ii) or (iii) on or before July 15, 2002 at 5:00 p.m. E.D.T.; and

(c) if a person opts out of one of the Class Actions, he, she or it shall be deemed to have opted out of the other class action.

31. THIS COURT ORDERS, to enable the court to give effect to paragraph 36 of this judgment, that if a person seeks to opt out, a written election to opt out is of no force and effect unless and until he, she or it provides to the Administrator:

(a) his, her or its full name, current address and telephone number;

(b) documentation evidencing all of his, her or its Trading in Shares;

(c) particulars of each Trade in Shares, including the date, price, number of Shares Traded and the brokerage fees paid; and

(d) if known or reasonably ascertainable:

(i) that person's gains or losses on all Shares purchased or acquired pursuant to the Prospectus, calculated based on the cost of those Shares (including brokerage fees) minus the proceeds of sale of all such Shares (including brokerage fees), if any; and/or

(ii) that person's gains or losses on all Shares purchased or acquired otherwise than pursuant to the Prospectus, calculated based on the cost of those Shares (including brokerage fees) minus the proceeds of sale of all such Shares (including brokerage fees), if any.

32. THIS COURT ORDERS that this Judgment, save and except for this paragraph and paragraphs 36, 51 and 52 is null and void and of no force and effect if General Class Members and Prospectus Class Members having total Net Losses of more than the amount that has been agreed upon by Class Counsel, the Defendants and Third Parties opt out of the Class Actions, unless all of the Defendants and Third Parties who contributed to the Settlement Monies agree to waive this provision.

33. THIS COURT ORDERS that no General Class Member or Prospectus Class Member may opt out of the General Class Action or the Prospectus Class Action unless the written election to opt out is received by the Administrator on or before July 15, 2002 at 5:00 p.m. E.D.T.

34. THIS COURT ORDERS that, notwithstanding the provisions of paragraph 30 of this Judgment, no person may opt out a minor or mentally incapable person without leave of Mr. Justice Cumming.

35. THIS COURT ORDERS that the Administrator shall, on or before July 30, 2002, report to Mr. Justice Cumming by motion and advise as to the names of those persons, if any, who have opted out of the Class Actions, the reasons for the opt out, if known, and the net loss of each opt out, the basis of that calculation, and the Administrator's opinion as to whether the person opting out would have been eligible for payment under the Plan, on seven days' notice to the parties to the Actions, and the Public Guardian and Trustee and/or the Children's Lawyer, as appropriate, in respect of a minor or mentally incapable person and to any person who has opted out of the Class Actions whose rights may be affected by any issue decided on the motion.

36. THIS COURT DECLARES that after the court has received the Administrator's report referred to in paragraph 35 and heard the submissions, if any, of those persons who received notice under paragraph 35 of this Judgment, Mr. Justice Cumming will determine what the total Net Losses are for any person who has opted out of the Class Actions for purposes of paragraph 32 of this Judgment and will issue an order declaring whether this Judgment remains in full force and effect or whether this Judgment is null and void and of no force and effect.

37. THIS COURT ORDERS that each General Class Member and each Prospectus Class Member shall submit his, her or its claim to the Administrator, in accordance with the Plan, on or before September 6, 2002 at 5:00 p.m. E.D.T., and, if he, she or it fails to do so, he, she or it shall not share in any distribution made in accordance with the Plan unless Mr. Justice Winkler orders otherwise.

38. THIS COURT DECLARES that if there is any dispute as to the net loss of any General Class Member or Prospectus Class Member, or as to the entitlement of a person to participate in the Plan, the issue of entitlement and/or the amount of the net loss, if any, shall be determined by the Referee in such manner as she or he directs, with a right to oppose confirmation of the Referee's report, by motion made to Mr. Justice Winkler.

39. THIS COURT ORDERS AND DECLARES that this Judgment and the Plan are binding upon each General Class Member and each Prospectus Class Member who do not opt out, including those persons who are minors or are mentally incapable and the requirements of Rule 7.08(4) of the Rules of Civil Procedure with respect to this Judgment are dispensed with.

40. THIS COURT ORDERS AND DECLARES that no person may bring any action or take any proceedings against the Administrator and members of the Management Committee (as defined in the Plan), their employees, agents, partners, associates, representatives, successors or assigns or against the Referee for any matter in any way relating to the Plan, the administration of the Plan or the implementation of this Judgment except with leave of Mr. Justice Cumming.

41. THIS COURT ORDERS that Reva Devins is appointed as Referee, until further order of this court, with the duties and responsibilities as set out in the Plan.

42. THIS COURT ORDERS AND DECLARES that the Defendants and Third Parties have no responsibility for and no liability whatsoever with respect to the Plan, or any aspect of the administration of the Plan, including, without limiting the generality of the foregoing, the processing and payment of claims and the investment or distribution of the Settlement Monies.

43. THIS COURT DECLARES that any one or more of the Plaintiffs, Defendants or Third Parties in the Actions or the Administrator may apply to Mr. Justice Winkler for directions in respect of the implementation, administration or amendment of the Plan.

44. THIS COURT ORDERS that the United States Attorney for the Eastern District of Pennsylvania be and is hereby granted leave to apply to Mr. Justice Winkler for advice and directions and to be involved in the process of distribution as set out in the Plan.

45. THIS COURT ORDERS that, in accordance with s. 32(2) of the Act, the agreement respecting fees and disbursements made between the General Class Counsel and the plaintiffs, made as at December 16, 1998, be and is hereby approved and:

(a) the fees and G.S.T. of General Class Counsel are fixed at $3,210,000, being $3,000,000 for fees plus $210,000 for G.S.T. thereon;

(b) the disbursements and G.S.T. of General Class Counsel are fixed at $182,349.61, being $170,491.96 for disbursements plus $11,857.65 for G.S.T. thereon; and

(c) General Class Counsel is hereby authorized and directed to submit any further or other disbursements to Mr. Justice Winkler for approval and payment.

46. THIS COURT ORDERS that the amounts particularized in paragraph 45 shall be paid as follows:

(a) the sum of $3,134,849.61, being fees of $2,750,000 plus $192,500 for G.S.T. plus $182,349.61 for disbursements and G.S.T. thereon, shall be paid by the Prospectus Class Counsel to the General Class Counsel from the monies held in trust; and

(b) the sum of $267,500, being fees of $250,000 plus G.S.T. of $17,500, shall be paid to General Class Counsel to be held in an interest bearing trust account until Mr. Justice Cumming authorizes and directs the release of the 267,500 and accrued interest thereon.

47. THIS COURT ORDERS that:

(a) the fees and G.S.T. of Prospectus Class Counsel be and are hereby fixed at $1,621,600.73, being $1,565,376.58 plus $56,224.15 for G.S.T. thereon;

(b) the disbursements and G.S.T. of Prospectus Class Counsel are fixed at $278,628.53, being $273,640.80 for disbursements plus $4,987.73 for G.S.T. thereon; and

(c) Prospectus Class Counsel is hereby authorized and directed to submit any further or other disbursements to Mr. Justice Winkler for approval and payment.

48. THIS COURT ORDERS that the amounts particularized in paragraph 47 shall be paid as follows:

(a) the sum of $1,354,100.73, being fees of $1,315,376.58 plus $38,724.15 for G.S.T. plus $278,628.53 for disbursements and G.S.T. thereon, shall be paid by the Prospectus Class Counsel to the Prospectus Class Counsel from the monies held in trust; and

(b) the sum of $267,500, being fees of $250,000 plus G.S.T. of $17,500, shall be paid to Prospectus Class Counsel to be held in an interest bearing trust account until Mr. Justice Cumming authorizes and directs the release of the $267,500 and accrued interest thereon.

49. THIS COURT ORDERS that the total combined fees and disbursements of all U.S. Plaintiffs' counsel in the Paraschos Action be and are hereby fixed in the amount of U.S. $1,000,000 and that this amount shall be paid by the Prospectus Class Counsel to Beatie & Osborn LLP, in trust, from the monies held in trust and the Defendants and Third Parties have no liability or responsibility for the disbursement of the U.S. $1,000,000 or the manner of distribution among counsel in the Paraschos Action.

50. THIS COURT ORDERS that, after the Administrator reports to the court as required by paragraph 35, and providing that this Judgment remains in full force and effect and providing that the appeal to the United States Court of Appeals for the Third Circuit in Paraschos et al. v. YBM Magnex et al. No. 01-1390, No. 01-1621 and No. 01-1634 is dismissed with prejudice, then, the Prospectus Class Counsel shall forthwith:

(a) pay the amounts particularized in paragraphs 46, 48 and 49; and, then,

(b) pay the Net Settlement Monies to the Administrator.

51. THIS COURT ORDERS that, in the event that the Judgment is declared to be in full force and effect by order of Mr. Justice Cumming as provided for in paragraph 36 of this Judgment, but General Class Counsel is unable, within 90 days of that order or within such other period of time that the court may direct, to obtain the dismissal of the appeal in Paraschos et al. v. YBM Magnex, et al. No. 01-1390, No. 01-1621 and No. 01-1634 now pending in the United States Court of Appeals for the Third Circuit, unless the parties to the Class Actions, except Igor Fisherman, agree otherwise, a further order will issue that this Judgment is then null and void and of no force and effect.

52. THIS COURT ORDERS that, if this Judgment is declared null and void and of no force and effect pursuant to paragraphs 32, 36 and 51, after the Administrator reports to the court as required by paragraph 35, the Prospectus Class Counsel shall pay the Settlement Monies plus interest less payments made pursuant to paragraph 8 of the Order and paragraph 27 of this Judgment to Hodgson Tough, in trust, for each Defendant and Third Party who has contributed a portion of the Settlement Monies, and Hodgson Tough shall forthwith repay that amount to each payor pro rata according to his or its respective contribution to the Settlement Monies, provided however that the pro rata

repayment due to Deloitte & Touche LLP shall be paid by Prospectus Class Counsel directly to Deloitte & Touche LLP.

53. THIS COURT DECLARES that the Consent and Agreement and the settlement were entered into by the Defendants and Third Parties and this Judgment is issued by this court without any admission of liability, that the Defendants and Third Parties deny liability and that the Consent to the settlement is not an admission of liability by conduct by the Defendants and Third Parties and that this Judgment is deemed to be a without prejudice settlement for evidentiary purposes.

54. THIS COURT DECLARES that this Judgment does not affect any claim or causes of action that any party to the Actions has or may have against Igor Fisherman.

55. THIS COURT ORDERS AND ADJUDGES that, save as aforesaid, the Class Actions, including the claims for exemplary and punitive damages and crossclaims, third party actions and counterclaims, if any, be and are hereby dismissed against the Defendants and Third Parties without costs and with prejudice.

56. THIS COURT ORDERS AND ADJUDGES that, save as aforesaid, the YBM Action including crossclaims, counterclaims and third party actions, if any, arising therefrom be and are hereby dismissed without costs and with prejudice.

57. THIS COURT ORDERS AND ADJUDGES that, save as aforesaid, the Deloitte Action including crossclaims, counterclaims and third party actions, if any, be and are hereby dismissed without costs and with prejudice.

58. THIS COURT ORDERS AND ADJUDGES that, save as aforesaid, the YBM Insider Trading Action including crossclaims, counterclaims and third party actions, if any, be and are hereby dismissed without costs and with prejudice.

59. THIS COURT ORDERS that a copy of this judgment be filed in court files No. 00-CV-193345CP, No. 00-CV-186800CP, No. 01-CV-209418, No. 99-CL-3424 and No. 00-CV-202036-CM.

60. THIS COURT ORDERS that General Class Counsel shall send a copy of this Judgment by courier to the Mediation Director of the United States Court of Appeals for the Third Circuit.

Schedule 1 To Judgment

NOTICE TO CURRENT AND FORMER SHAREHOLDERS OF YBM MAGNEX INTERNATIONAL, INC. OF THE CERTIFICATION AND SETTLEMENT OF THE YBM CLASS ACTIONS

This notice may affect your rights. Please read carefully.

NOTICE

This notice is directed to all shareholders and all former shareholders of YBM Magnex International, Inc. and its predecessor Pratecs Technologies, Inc. ("YBM"), wherever resident. Two Class Actions relating to YBM are pending in the Ontario Superior Court of Justice. The actions are Mondor v. Fisherman file no. 00-CV-193345CP (the "General Class Action") and Royal Trust Corporation of Canada v. Fisherman, file no. 00-CV-186800CP (the "Prospectus Class Action").

CERTIFICATION ORDERS

On May 2, 2002 (the "May 2 Hearing"), Mr. Justice Cumming of the Ontario Superior Court of Justice certified the actions as class proceedings, appointed representative plaintiffs and defined the classes as follows:

(1) the General Class as: each and every person, wherever resident, except certain excluded persons, who, during the period July 1, 1994 to May 14, 1998, traded in YBM shares but not including shares purchased or acquired pursuant to the YBM prospectus dated November 17, 1997; and

(2) the Prospectus Class as: each and every person, wherever resident, except certain excluded persons, who purchased or acquired YBM shares pursuant to the YBM prospectus dated November 17, 1997.

YBM shares include all securities of YBM and of Pratecs Technologies, Inc.

A person may be both a General Class Member and a Prospectus Class Member.

Residents of Canada, the United States and other countries are included in the foregoing class definitions and are entitled to make a claim.

If you are a member of either or both of the proposed classes, your rights will be affected. You have until July 15, 2002 to opt out of the settlement of the Class Actions or participate in the settlement by submitting a claim in accordance with a distribution Plan (the "Plan") as approved by the court at the May 2 Hearing.

TERMS OF THE SETTLEMENT

The terms of the settlement are posted at http://www.ybmclassaction.com.

THE SETTLEMENT FUNDS

A summary of the amounts available for distribution follows:

(a) some of the defendants and third parties paid the sum of approximately CDN $85,000,000 in full and final settlement of all claims;

(b) the class members in the Prospectus Class Action will be paid CDN $7,500,000, pro rata, as a priority payment. Based on the information currently available but subject to change, class counsel estimate that this priority will be approximately CDN $0.07 for each CDN $1.00 of net loss;

(c) the class members in the Prospectus Class Action and the General Class Action will then share the balance of the settlement monies, after payment of expenses and lawyers' fees, on a pro rata basis. Based on the information currently available, class counsel estimate that this pro rata distribution, plus the distribution by the Receiver of YBM from the assets remaining in the estate of YBM, will be approximately CDN $0.20 for each CDN $1.00 of net loss; and

(d) the amounts in paragraphs (b) and (c) are estimates only and are made by class counsel without any assumption of liability. The actual priority payment and the payment for each CDN $1.00 of net loss may be substantially different from the estimated amounts depending on the number of claims received, the costs of distribution and the total net losses. The estimated amounts are not intended to be and should not be interpreted to be a guarantee.

RELEASE

Each class member who does not opt out and his or her heirs, legal representatives and assigns or its past and present parent, subsidiary and affiliated corporations, employees, agents, officers, directors, shareholders, partners, attorneys, insurers, heirs, representatives, executors, administrators, successors and assigns shall be conclusively deemed to have released all settling defendants and third parties from all claims of every nature or kind, including any claim in any way relating to or arising directly or indirectly from the trading in YBM shares and/or YBM's business operations and they shall be forever barred from asserting any such claims.

NO ADMISSION OF LIABILITY

The defendants and third parties do not admit any wrongdoing or liability on their part. The settlement is a compromise of disputed claims.

OPT OUTS

Any class member who wishes to opt out of the settlement must do so on or before July 15, 2002 by sending a written election to do so to: Ernst & Young YBM Inc., P.O. Box 251 222 Bay Street, Ernst & Young Tower, Toronto, Ontario M5K 1J7. Attention: Leslea Gordon, fax: (416) 943-3300, tel: (416) 943-3132 stating that he, she or it opts out of the settlement. The written election must be received by 5:00 p.m. EDT on July 15, 2002.

If a person seeks to opt out, a written election to opt out is of no force and effect unless and until he, she or it also delivers to the Administrator his, her or its full name, address, telephone number, documentation evidencing his, her or its trading in shares of YBM, particulars of each trade, including the date, price, number of shares traded, brokerage fees, and if known or reasonably ascertainable, that person's gains or losses on all shares purchased or acquired pursuant to the prospectus dated November 17, 1997 calculated based on the cost of those shares (including brokerage fees) minus the proceeds of sale of all such shares (including brokerage fees) and/or that person's shares purchased or acquired otherwise than pursuant to the prospectus dated November 17, 1997 calculated based on the cost of those shares (including brokerage fees) minus the proceeds of sale of all such shares (including brokerage fees).

No person may opt out a minor or a mentally incapable person without permission of the court after notice to the Public Guardian and Trustee to the attention of Laurie Redden at Office of the Public Guardian and Trustee, 800 595 Bay Street, Toronto, Ontario, M5G 2M6 and/or the Children's Lawyer to the attention of Judith Falkner at The Ministry of the Attorney General, 14th Floor, 393 University Avenue, Toronto, Ontario, M5G 1W9, as appropriate.

All affected persons who do not opt out will be bound by the terms of the settlement whether or not he, she or it makes a claim.

No class member will be permitted to opt out of the Class Actions after July 15, 2002.

If a person opts out of one of the Class Actions, he, she or it will be deemed to have opted out of the other class action.

LEGAL FEES, DISBURSEMENTS AND ADMINISTRATIVE COSTS

The fees and disbursements of class counsel and of counsel in Paraschos et al. v. YBM Magnex, et al. (a class action commenced in the United States) have been fixed by the court in the amount of approximately CDN $7,000,000. This amount will be paid out of the CDN $85,000,000.

The costs of the notice program, the administration of and the distribution under the Plan will also be paid out of the CDN $85,000,000. 2

DISTRIBUTION OF SETTLEMENT FUNDS

A person will only be eligible to participate in the distribution if that person suffered a net loss in trading in shares of YBM and did not contribute to the wrongdoing involving YBM that gave rise to the Class Actions.

Ernst & Young YBM Inc., the current Receiver of YBM, has been appointed as Administrator of the settlement and will operate the Plan. The court will supervise the administration and operation of the Plan and may issue orders as necessary to implement and enforce the provisions of the Plan.

The Administrator will contact known potential class members to inform them of the steps they should take to submit their claims. These names and information about their claims will be posted on a secure web site at www.ybmclassaction.com. Potential class members will receive a password from the Administrator. They should then check to determine if their name, address, net loss information is accurate and, if they are members of the Prospectus Class, whether the information about their purchases pursuant to the YBM prospectus is accurate. If the information is accurate, they should do nothing. If it is inaccurate or if they do not receive a password or cannot access the website, then they must register with the Administrator in accordance with the terms of the Plan. The procedures for registering and processing claims and appealing from decisions made by the Administrator are described in the Plan. The Administrator may be contacted at: Ernst & Young YBM Inc., P.O. Box 251, 222 Bay Street, Ernst & Young Tower, Toronto, Ontario M5K 1J7. Attention: Leslea Gordon, fax: (416) 943-3300, tel: (416) 943-3132, e-mail: ybm@ca.eyi.com

ADDITIONAL INFORMATION

Any questions about the matters in this Notice should not be directed to the court because its administrative structure is not designed to address this type of inquiry. A complete copy of the judgment, which includes the Plan, may be obtained by visiting the website at www.ybmclassaction.com. Requests for information should be directed by telephone or in writing to one of the following:

Administrator
Ernst & Young YBM Inc.
P.O. Box 251
222 bay Street
Ernst & Young Tower
Toronto, Ontario M5K 1J7
Attention: Leslea Gordon
tel: (416) 943-3132
fax: (416) 943-3300
e-mail: ybm@ca.eyl.com

General Class Action
Harvey T. Strosberg, Q.C.
Sutts, Strosberg LLP
tel 1-800-229-5323
fax: (519) 561-6203
hts@strosbergco.com

Prospects Class action
Earl . Cherniak, Q.C.
Lerner & Associates LLP
tel: (416) 867-3076
fax: (416) 867-9192
echerniak@lerner.ca

This notice is approved by the Honourable Mr. Justice Peter A. Cumming of the Ontario Superior Court of Justice.

SCHEDULE 2 To The Judgment

THE PLAN

DEFINITIONS

1. The Definitions in the Judgment are incorporated by reference into this Plan. For ease of reference, the following definitions are included here but, if there is any difference between the definitions in this Plan and a definition in the Judgment, the definition in the Judgment takes precedence:

   (a) "Actions" means collectively the General Class Action, the Prospectus Class Action, the YBM Action, the YBM Insider Trading Action, the Deloitte Action, the Paraschos Action, the third party claims, crossclaims and counterclaims, if any, in each of these actions;

   (b) "Administrator" means Ernst & Young YBM Inc. or its successor as appointed by the Ontario Court to administer this Plan;

   (c) "Alberta Court" means the Court of Queen's Bench of Alberta, Judicial District of Calgary;

   (d) "Class Actions" means collectively the General Class Action and the Prospectus Class Action;

   (e) "Connor Clark" means Connor Clark & Lunn Investment Management Ltd.;

   (f) "Defendants" means Jacob G. Bogatin, Kenneth Davies, Michael Schmidt, Harry W. Antes, Frank Greenwald, R. Owen Mitchell, David R. Peterson, Daniel E. Gatti, James J. Held, Guy R. Scala, Parente, Randolph, Orlando, Carey & Associates, Deloitte & Touche LLP, National Bank Financial Inc., formerly known as First Marathon Securities Limited, Griffiths McBurney & Partners, Cassels, Brock & Blackwell, now known as Cassels, Brock & Blackwell LLP, Lawrence Wilder, HSBC Securities (Canada) Inc., Scotia Capital Inc., previously known as ScotiaMcLeod Inc., Canaccord Capital Corporation and HSBC James Capel Inc., formerly Gordon Capital Corporation;

   (g) "Deloitte Action" means action No. 00-CV-202036-CM in the Ontario Court;

   (h) "Excluded Persons" means the Defendants, the Third Parties (except Connor Clark, Pepper Hamilton LLP and Decision Strategies LLC) and any person claiming, directly or indirectly, on behalf of any Excluded Person, any entity in which any Excluded Person has a controlling interest and the legal representatives, heirs, successors and assigns of any Excluded Person, but shall not include any person, not otherwise named in this definition, for whose benefit a person named in this definition is holding Shares;

   (i) "General Class Action" means action No. 00-CV-193345CP in the Ontario Court;

   (j) "General Class Members" means each and every person, wherever resident, except Excluded Persons, who, during the period July 1, 1994 to May 14, 1998, Traded in Shares but not including Shares purchased or acquired pursuant to the YBM prospectus dated November 17, 1997;

   (k) "Judgment" means the judgment approving the settlement dated May 2, 2002;

   (l) "Net Loss" means for the purpose of the Plan the aggregate of the loss of each person, calculating each person's net loss in accordance with the following formula: cost of all Shares purchased or received (including brokerage fees) minus proceeds of the sale of all Shares (including brokerage fees);

   (m) "Net Settlement Monies" means the Settlement Monies plus interest resulting from the investments directed by paragraph 25 of the Judgment minus the payments authorized by paragraph 27 of the Judgment and paragraph 8 of the Order;

   (n) "Ontario Court" means the Ontario Superior Court of Justice;

   (o) "Order" means the order of the Honourable Mr. Justice Cumming dated March 13, 2002;

   (p) "Paraschos Action" means Paraschos et al. v. YBM Magnex, et al. U.S.D.C., E.D., Pa. consolidated action No. 98-CV-6444 and all actions related thereto;

   (q) "Plan" means this plan, which is annexed as Schedule 2 to the Judgment;

   (r) "Prospectus Class Action" means action No. 00-CV-186800CP in the Ontario Court;

   (s) "Prospectus Class Counsel" means Lerner & Associates LLP;

(t) "Prospectus Class Members" means each and every person, wherever resident, except Excluded Persons, who purchased or acquired Shares of YBM pursuant to the Prospectus dated November 17, 1997;

(u) "Receiver" means Ernst & Young YBM Inc. as appointed by the Alberta Court to administer the estate of YBM;

(v) "Referee" means the person or persons appointed by the court to determine disputes with respect to the calculations of net loss and entitlement to participate in the Plan;

(w) "Settlement Monies" means CDN $75,000,000 plus US $6,205,000;

(x) "Shares" includes all securities of YBM and its predecessor Pratecs Technologies, Inc.; and

(y) "Third Parties" means Fogler Rubinoff now known as Fogler, Rubinoff LLP, YBM, Decision Strategies LLC, Pepper Hamilton LLP and Connor Clark;

(z) "Trade," "Traded" and "Trading" include the acquisition, the purchase, the disposition or the sale of Shares;

(aa) "U.S. Plaintiffs' Executive Committee" means the law firms designated as the Executive Committee of Plaintiffs' Counsel by order of the United States District Court for the Eastern District of Pennsylvania dated March 30, 1999 and entered on April 1, 1999 in the Paraschos Action;

(bb) "YBM" means YBM Magnex International, Inc., through its Receiver and Manager, Ernst & Young YBM Inc., and its Independent Litigation Supervisor, Paul Farrar, and its subsidiaries and affiliates;

(cc) "YBM Action" means action No. 01-CV-209418 in the Ontario Court; and

(dd) "YBM Insider Trading Action" means action No. 99-CL-3424 in the Ontario Court.

PURPOSE

2. The purpose of this Plan is to determine the eligibility of persons making a claim and to distribute the Net Settlement Monies to eligible persons in accordance with the Judgment subject to the terms and conditions set out in this Plan.

PLAN IMPLEMENTATION DATE

3. The Administrator shall implement this Plan on a date to be fixed by Mr. Justice Winkler of the Ontario Court.

BINDING EFFECT

4. This Plan is binding on all General Class Members and Prospectus Class Members except those persons who opt out of the Class Actions.

APPOINTMENT OF ADMINISTRATOR

5. By order dated December 8, 1998, the Alberta Court appointed Ernst & Young YBM Inc. as the Receiver. By order dated March 14, 2002, the Alberta Court approved and directed that the Receiver accept the appointment as Administrator, subject to the direction of the Ontario Court.

6. Mr. Justice Winkler shall have the power to replace the Administrator from time to time as may be necessary for the proper implementation, administration and operation of this Plan. With the leave of Mr. Justice Winkler, the Administrator may resign.

7. The Administrator shall implement and administer this Plan and shall report to Mr. Justice Winkler in a manner that he directs.

ADMINISTRATOR'S RECEIPT AND INVESTMENT OF THE NET SETTLEMENT MONIES

8. After payment of the amounts directed by subparagraph 50(a) of the Judgment, the Prospectus Class Counsel shall pay the Net Settlement Monies to the Administrator. The Administrator shall deposit the Net Settlement Monies with a Schedule A Bank, namely, *, who shall invest the Settlement Monies in accordance with the investment policy set out in paragraph 25 of the Judgment.

THE CLAIMS PROCESS

DEADLINE FOR SUBMITTING CLAIMS

9. The court has set September 6, 2002 at 5.00 pm. EDT ("the Cutoff Date") as the deadline by which class members must submit their claims in the Class Actions in a manner as hereafter described.

ESTABLISHMENT OF THE WEB-BASED DATABASE

10. By the order dated February 1, 2000, as amended by the order dated March 16, 2000, the Alberta Court instructed the Receiver to implement a proofs of claim process in the Alberta receivership proceeding.
11. The Receiver received proofs of claim in the Alberta receivership proceeding from approximately 2000 current and former YBM shareholders and from creditors of YBM.
12. In order to simplify the claims process, the Administrator will cause certain information received from the proofs of claim process in the Alberta receivership proceeding and certain additional information it acquires through the claims process described in this Plan to be converted into a web-based database (the "Database").
13. The Database shall include:
    (a) the name, address and Net Loss of shareholders and former shareholders of YBM whose claims the Receiver received in the Alberta receivership proceeding; and
    (b) the name, address, Net Loss and supporting documents of persons who file a claim in accordance with the provisions of paragraph 19 of this Plan.
14. The Administrator will cause the information in the Database to be posted and accessible at the secure settlement web site http://www.ybmclassaction.com (the "Web Site"), in the manner described hereafter.
15. Information in the Database concerning each class member's claim shall be accessible to that class member either electronically, or in writing by fax or by mail, in accordance with a protocol or protocols to be approved by Mr. Justice Winkler.

PROCESS FOR SUBMITTING CLAIMS BY PERSONS WHOSE CLAIMS WERE RECEIVED IN THE ALBERTA RECEIVERSHIP

16. The Administrator shall provide to each class member whose claim the Receiver received in the Alberta receivership proceeding, in writing, by e-mail or by letter, a user identification name and password to permit the person to access information in the Database concerning his, her or its claim.
17. Each such person shall be deemed to have submitted a claim for purposes of paragraph 26(e) of this Plan.
18. If such person is satisfied with the accuracy of his, her or its name and address, the Administrator's Net Loss determination, eligibility determination, categorization as a General Class Member or Prospectus

Class Member, or both, and the number of shares purchased pursuant to the Prospectus and/or on the secondary market, the person need do nothing more and the Administrator's determinations and calculations made shall be treated as final, absent any objection under paragraph 23.

PROCESS FOR SUBMITTING CLAIMS BY ALL OTHER PERSONS

19. In order to submit a claim, a class member who is not a person described in paragraph 11, must, on or before the Cut Off date:

    (a) register on the Website, or by mail or by fax, with the Administrator; and

    (b) submit documentation to the Administrator supporting his, her or its claim.

20. The particular documents and information required for purposes of paragraph 19 and how they shall be transmitted to the Administrator shall be specified in a protocol to be approved by Mr. Justice Winkler. The name, address and amount claimed by each such person registering at the Web Site in accordance with this paragraph and paragraph 19 shall be added to the Database and the person shall be assigned and provided with an identification name and a password by the Administrator.

DECISIONS ABOUT CLAIMS AND APPEALS FROM DECISIONS

21. In respect of each person described in paragraph 11 and in respect of each person who has registered and submitted a claim in accordance with paragraphs 19 and 20 of this Plan, the Administrator shall decide:

    (a) whether the person is eligible to participate in the distribution process according to the criteria set out in paragraphs 25 and 26;

    (b) the amount of the person's Net Loss; and

    (c) whether the person is a General Class Member or Prospectus Class Member, or both, and if so, determine the number of shares purchased by that person pursuant to the Prospectus.

22. For purposes of paragraph 21, the Administrator shall make a fresh decision, separate and apart from any decision made previously in the Administrator's capacity as Receiver. The Administrator shall post its decisions under paragraph 21 on the Database and/or communicate them electronically or in writing by mail or by fax to the persons affected in accordance with a protocol to be approved by Mr. Justice Winkler.

23. If a person is dissatisfied with the decision of the Administrator relating to eligibility, the determination of Net Loss, or whether the person is a Prospectus Class Member and if so, the number of shares purchased by him, her or it pursuant to the Prospectus, the person may discuss the issue or issues in dispute with the Administrator and/or may appeal the Administrator's decision to the Referee in accordance with a protocol to be approved by Mr. Justice Winkler.

24. The Referee shall hold a hearing in accordance with a protocol to be approved by Mr. Justice Winkler in respect of all appeals pursuant to paragraph 23. The Referee shall deliver a Referee's report containing her decision, which report shall be confirmed at the expiration of 30 days after the date of the report unless a decision of the Referee is appealed to Mr. Justice Winkler in accordance with a protocol to be approved by Mr. Justice Winkler.

ELIGIBILITY

25. A person can be both a General Class Member and a Prospectus Class Member.

26. A person is eligible to participate in the distribution process if he, she or it:

    (a) has suffered a Net Loss in Trading in Shares;

(b) has not, directly or indirectly, caused or contributed to the loss and damage suffered by the General Class Members and the Prospectus Class Members in Trading in Shares;

(c) has not, directly or indirectly, caused or contributed to any loss or damage to YBM;

(d) is not a nominee for a relative of, or an affiliate of, a person who is responsible for or was involved in activity that led to the Guilty Plea Agreement between YBM and the United States Attorney's office for the Eastern District of Pennsylvania. In the case of a relative or an affiliate, that person is eligible if he, she or it proves on the balance of probabilities that he, she or it meets the requirements set out in subparagraphs (b) and (c); and

(e) has submitted a claim in accordance with the provisions of this Plan.

27. Any person affected by the provisions of paragraph 26 of this Plan has the right of appeal as set out in paragraphs 23 and 24 herein.

THE DISTRIBUTION PROCESS

28. The Prospectus Class Members shall be paid $7,500,000 as a priority distribution pro rata in accordance with a protocol to be approved by Mr. Justice Winkler. Then, the General Class Members and the Prospectus Class Members shall share the net amount available for distribution, pro rata, on the basis of his, her or its Net Loss, after taking into consideration the priority distribution.

29. As soon as practicable after the Cutoff Date, the Administrator will, by motion, report to Mr. Justice Winkler the name, address, Net Loss and proposed percentage of distribution for each person entitled to receive a distribution (the "Distribution List").

30. The Distribution List shall be distributed and/or made accessible in accordance with a protocol to be approved by Mr. Justice Winkler.

31. No distribution shall be made by the Administrator until authorized by Mr. Justice Winkler.

32. The Administrator may make interim distributions if authorized by Mr. Justice Winkler.

33. Each person eligible to receive a distribution shall sign such documents as the Administrator may require in accordance with a protocol to be approved by Mr. Justice Winkler as a condition precedent to receiving any distribution.

34. After the Administrator makes its final distribution, it shall report to Mr. Justice Winkler in a manner he directs and shall obtain an order from him, discharging it as Administrator.

ACCESS TO THE DATABASE AND WEB SITE

35. Mr. Justice Winkler, the Alberta Court, the Administrator and the United States Attorney for the Eastern District of Pennsylvania shall have access to the Database, all parts of the Web Site and all reports generated from the Database.

THE MANAGEMENT COMMITTEE

36. A committee shall be appointed by Mr. Justice Winkler (the "Management Committee"). The Management Committee shall have such powers, rights, duties and responsibilities as Mr. Justice Winkler directs, including:

(a) establishing any necessary protocols, which must be approved by Mr. Justice Winkler for the acceptance, processing and payment of claims;

(b) receiving information from the Administrator;

(c) having access to the Database in a manner directed by Mr. Justice Winkler; and

(d) applying to Mr. Justice Winkler for advice and directions.

THE COSTS OF THE PLAN

37. The fees, disbursements and other costs of:

(a) the Administrator for work as Administrator;

(b) the establishment and maintenance of the Web Site and Database;

(c) the members of the Management Committee for work done after May 2, 2002 and any work done before May 2, 2002 in respect of the development of protocols and the implementation and development of the Plan; and

(d) such other persons at the direction of Mr. Justice Winkler;

shall be paid out of the Net Settlement Monies at a time, in a manner and in an amount approved by Mr. Justice Winkler.

NO ASSIGNMENT

38. Any amount payable under this Plan cannot be assigned without the written consent of the Administrator.

THE ALBERTA COURT MAY USE THE DATABASE

39. The Receiver will cause to be prepared from the Database any report or list as the Alberta Court requires.

40. The Receiver may use the Database for the distribution of monies in the Alberta receivership proceeding at the cost of the Receiver.

PROTOCOLS AND AMENDMENTS TO THE PLAN

41. This Plan may be amended and protocols established by order of Mr. Justice Winkler on notice to the Plaintiffs, the Administrator, the Defendants, the Third Parties and the U.S. Plaintiffs' Executive Committee.

42. Any one or more of the General Class Counsel, Prospectus Class Counsel, counsel for the Defendants or Third Parties in the Actions, the U.S. Plaintiffs' Executive Committee or the Administrator may apply to Mr. Justice Winkler for directions in respect of the implementation, administration or amendment of this Plan.

End of Document

CITATION: Clegg v. HMQ Ontario, 2016 ONSC 2662
COURT FILE NO.: CV-14-506423-CP
DATE: 20160428

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Sharon Clegg as Litigation Guardian of Marlene McIntyre, Representative Plaintiff of Certified Class Action

AND:

Her Majesty the Queen in Right of the Province of Ontario, Defendant

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Kirk Baert, Celeste Poltak and David Rosenfeld* for the Plaintiff

Robert Ratcliffe and Sonal Gandhi for the Defendant

HEARD: April 25, 2016

Proceeding under the *Class Proceedings Act, 1992*

SETTLEMENT AND LEGAL FEES APPROVAL

[1] This is the fourth in a series of class actions, dealing with abuses in provincial "Schedule 1" facilities,[1] that has settled before trial. In each of the other three cases, *Huronia, Rideau* and *Southwestern*, Conway J. found the settlements to be fair and reasonable and in the best interests of the class.[2]

[2] I certified this fourth class action on consent in August, 2015.

---

[1] That is, the provincially owned and operated facilities set out in Schedule 1 of the *Developmental Services Act, 1974,* S.O. 1974, c.2.

[2] *Slark v. HMQ Ontario*, 2013 ONSC 6686 (Huronia); *McKillop and Bechard v HMQ Ontario,* 2014 ONSC 1282. (Rideau and Southwestern).

2016 ONSC 2662 (CanLII)

[3] The proposed settlement before me implements the same structure and compensation template as in the other three. Given that this settlement, in essence, has already been judicially approved three times, this court could have simply approved this fourth iteration without any further discussion or explanation.

[4] However, as was the case in the first three settlements, the victims in this particular class action deserve to have their story told. As Conway J. noted in the *Huronia* settlement:

> [T[hese were important cases. To the class members the issues were enormous and immensely personal. These class actions provided a means for them to bring their claims before the court and to create public awareness of the history of these institutions and the alleged experiences of the residents there.[3]

2016 ONSC 2662 (CanLII)

[5] The background facts as set out by the representative plaintiff in her factum are as follows.

Background

[6] The claims advanced in this omnibus action pertain to the defendant's alleged negligence and breach of fiduciary duty in the funding, operation, management, administration, supervision and control of twelve named "Schedule 1" facilities that are now closed but at one time housed persons (many were children) labelled as developmentally challenged or developmentally delayed. The facilities were intended to provide a residential program of hospital care, activity, education and adult training to these individuals. Many of the facilities housed such individuals for their entire life.

[7] The 12 facilities and the applicable class periods are set out below:

St. Lawrence Regional Centre April 1, 1975 – June 30, 1983	**L.S. Penrose Centre** April 1, 1974 – March 31, 1977	**D'Arcy Place** Sept. 1, 1963 – Dec. 31, 1996
Oxford Regional Centre April 1, 1974 – March 31, 1996; and the "Mental Retardation Unit" or "MR Unit" between Jan, 1, 1969 – March 31, 1974	**Midwestern Regional Centre** Sept. 1, 1963 – March 31, 1998	**Adult Occupational Centre (Edgar)** Jan. 1, 1966 – March 31, 1999
Durham Centre for Developmentally	**Muskoka Centre** Aug. 28, 1973 – June 30, 1993	**Prince Edward Heights** Jan. 1, 1971 – Dec. 31, 1999

[3] *Dolmage, McKillop and Bechard v. HMQ Ontario,* 2014 ONSC 1283 at para. 10.

Handicapped April 1, 1974 – Sept. 28, 1986		
Northwestern Regional Centre April 1, 1974 – March 31, 1994	**Bluewater Centre** April 1, 1976 – Dec. 20, 1983	**Pine Ridge** Sept. 1, 1963 – Aug. 31, 1984

2016 ONSC 2662 (CanLII)

[8] The plaintiff says that the defendant breached the standards of care in the operation of these facilities by (a) knowing of and condoning overcrowding; (b) knowing of and condoning understaffing or unqualified staffing; (c) failing to implement abuse prevention policies; and (d) deliberately exploiting residents for the defendant's own benefit.

[9] The plaintiff further alleges that, notwithstanding numerous reports and recommendations over many years relating to these very issues, no steps were taken to improve the quality of care or living at these facilities. Even if some of the recommendations were followed, the measures proved to be inadequate and failed to meet the standards of care which were applicable in the circumstances. According to the plaintiff, these 12 facilities suffered from the same systemic failings as in *Huronia, Rideau* and *Southwestern*.

Mediation and settlement

[10] The settlement in this action was achieved after two days of mediation before the same mediator who had successfully mediated the settlement discussions in *Huronia*, *Rideau* and *Southwestern*. The terms of the settlement agreement in this action generally mirror the terms of the other three settlements and, as class counsel point out, achieve overall parity and virtually identical compensation schemes.

Overview of the settlement

[11] The key terms of the settlement agreement are these:

- a $35.9 million settlement fund;
- the claims application process is paper-based and does not require former residents to testify or appear in person;
- the minimum amount that a claimant can receive is $2000 and the maximum is $42,000;
- the defendant will pay for the cost of notice to the class and administration of the claims process; and

- the compensation awards will not be subject to tax or government claw-backs.

[12] As in *Huronia*, *Rideau* and *Southwestern,* the settlement agreement provides a claims-based compensation scheme with two streams for compensation – Section A and Section B claims. Section A claims only require a claimant to solemnly declare that he or she was harmed without providing any further details. Section A claims are eligible to receive $2,000 in compensation (and Section A claims in the aggregate can receive up to a maximum of 25% of the settlement fund after fees and disbursements are deducted).

[13] Section B claims require the claimant to provide details of the harm or abuse suffered while at the Schedule 1 institution(s). The description of harm can come from resident files, the class member, or from a personal representative. Compensation for a Section B claim will be awarded based on the severity of the harm.

[14] As was the case in *Huronia*, *Rideau* and *Southwestern*, the Hon. Ian Binnie will serve as the appointed overseer of the claims administration process. Mr. Binnie, together with Crawfords Class Action Services acting as the administrator, will create protocols and procedures for reviewing and evaluating all claims and assigning points pursuant to the Settlement Agreement. The fact that both Mr. Binnie and Crawfords were involved in administering the claims process in *Huronia*, *Rideau* and *Southwestern* will obviously be a significant benefit in the administration of this settlement.

[15] Claims will be accepted at face value and claimants will not be required to testify or appear in person in any manner. The only response permitted from the defendant is a submission of documents from the resident's file, without argument. The administrator will then calculate the amount of compensation to be provided to each claimant based on the points associated with their claims.

[16] If the compensation calculated for all Section B claims does not exhaust the settlement fund (after legal fees, disbursements, the CPF Levy and all taxes are deducted), then each claimant will receive an increase of up to 20% of their allotted compensation, or until the settlement fund is exhausted. The maximum that a claimant can receive is $42,000.

Non-monetary benefits

[17] Because of the settlements in *Huronia, Rideau* and *Southwestern*, the class in this action has benefited from two important non-monetary aspects. The first is the apology from the Premier of Ontario that was delivered in the provincial legislature on December 9, 2013. That apology, although given before the action herein was commenced, extended beyond the *Huronia, Rideau* and *Southwestern* class actions and included an apology for the Schedule 1 system as a whole. Premier Wynne offered "an apology to the men,

2016 ONSC 2662 (CanLII)

women and children of Ontario who were failed by a model of institutional care for people with developmental disabilities."

[18] The second non-monetary benefit is the resulting public access to approximately 63,000 documents from the *Huronia* litigation. According to class counsel, a significant proportion of the documents included ministerial level documents that applied to the entire Schedule 1 system, including the 12 facilities in this action.

Assistance with claims

[19] The administrator is an experienced settlement administrator, particularly in institutional abuse claims and has undertaken to run workshops in various locations to answer questions or assist class members in completing their claim forms. The administrator and class counsel will also operate websites, telephone hotlines and email accounts to help class members make their claims. Both the administrator and class counsel will remain available after the claims deadline to provide whatever further assistance is required.

[20] Class members will also be able to receive assistance from ARCH Disability Law Centre and Community Living Ontario, as was the case in the *Huronia*, *Rideau* and *Southwestern* settlements.

Results of the Huronia, Rideau, and Southwestern settlements

[21] The claims process in *Huronia*, *Rideau* and *Southwestern* has been concluded. In all, the administrator assessed about 3500 claims and approved over 3,400. A total of 3,427 cheques were mailed totaling just over $37.5 million.

[22] Here the settlement amount is $35,989,646. After the deduction of class counsel fees and the CPF levy, the funds available to the class will be approximately $28,916,951. The total class size and compensation paid out in the *Huronia, Rideau and Southwestern* class actions is exactly comparable to this action on a pro rata basis. The per capita average in all four settlements is $3711 with actual payments ranging from $2000 to a maximum of $42,000.

[23] In other words, the settlement in this action will provide class members with the same level of compensation as did the settlements in the previous three actions. Not surprisingly, the plaintiff submits that the settlement agreement is fair and reasonable and very much in the best interests of the class.

[24] I agree.

Approval of the settlement agreement

2016 ONSC 2662 (CanLII)

[25] Section 29(2) of the *Class Proceedings Act*[4] requires court approval of every class action settlement before it can take effect. Judges must be satisfied that the proposed settlement is fair and reasonable and in the best interests of the class.[5]

[26] Most class action settlements materialize just before or just after certification. In most of the cases, documents have not been exchanged, discoveries have not taken place and class counsels' information or knowledge about the risks and rewards of going further is, to say the least, at a minimum. Add to this the fact that most class counsel draft retainer agreements that provide for a generous contingency recovery (of 20 or 30 per cent) whether the action is settled quickly or decided after a prolonged trial. The contingency fee recovery (which I actually favour[6]) creates a significant conflict of interest for class counsel. Should class counsel continue to press for more compensation for class members even if it means losing at trial and getting no contingency, or settle for a less than optimal amount but pocket a guaranteed contingency?

[27] A major American class action study published in 2000 concluded that class action attorneys were often more interested "in finding a settlement price that defendants would agree to – rather than finding out … how likely it was that the defendants would actually be held liable if the suit were to go to trial, and negotiating a fair settlement against that background."[7]

[28] It has long been understood that class action settlements, and especially early stage settlements, should be viewed with suspicion and "seriously scrutinized by judges."[8] The problems of "sweetheart" and "blackmail" settlements are well-known and have been the subject of study in the legal literature.[9]

---

[4] *Class Proceedings Act, 1992,* S.O. 1992, c. 6.

[5] *Dobbs v. Sun Life Assurance,* (1998) 40 O.R. (3d) 429 (Gen. Div.), aff'd (1998) 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused Oct. 22, 1998.

[6] *Cannon v. Funds for Canada Foundation,* 2013 ONSC 7686.

[7] Hensler et al, *Class Action Dilemmas: Pursuing Public Goals for Private Gain,* (Rand Report, 2000) at 424.

[8] *Dobbs, supra,* note 5, at para. 30 (Gen. Div.).

[9] See, for example, Hay and Rosenberg, *"Sweetheart and Blackmail Settlements in Class Actions: Reality and Remedy"* (2000) 75 Notre Dame L. Rev. 1377; Erichson, *"The Problem of Settlement Class Actions"* (2014) 82 Geo. Wash. L.Rev. 951; and Koniak, *"How like a Winter – The Plight of Absent Class Members Denied Adequate Representation"* (2004) 79 Notre Dame L. Rev. 1787.

2016 ONSC 2662 (CanLII)

[29] In the vast majority of early stage class action settlements, the court hears "a one-sided presentation about how wonderful the settlement is and how aggressively class counsel championed the absent class's cause."[10] Class counsel generally set out a list of self-serving "boiler-plate" reasons why the settlement should be approved - the litigation risks; the hard-fought negotiation; the arm's length settlement and, of course, class counsel's vast experience.

[30] This boiler-plate, as I concluded in two recent settlement approval decisions,[11] reduced to its essence is this: *"We're experienced class counsel; we negotiated the best possible deal for the class members; trust us."*

[31] In early stage settlements, judges must continue to encourage class counsel to actually explain why the settlement falls within a zone of reasonableness[12] and is in the best interests of the class. It is no longer correct or appropriate for judges to succumb to the aforementioned "boiler-plate" or blithely assume in the class action context that there is a "strong initial presumption of fairness" when the settlement is negotiated at arm's length and is recommended by experienced class counsel.[13] That may work for conventional two-party settlements but it is an unwarranted assumption in the class action context.

[32] Happily, this was not an early stage class action settlement. I will explain. The settlement herein mirrors the structure and compensation amounts that were approved in the *Rideau* and *Southwestern* settlements, which in turn mirrored the structure and compensation amounts that were approved in *Huronia.* The settlement herein is fair and reasonable and in the best interests of the class only if the settlement in *Huronia* was fair and reasonable and in the best interests of the class.

[33] What is it about the *Huronia* settlement that persuades me that the mediated settlement in that case fell within a zone of reasonable settlements? The answer is this: *Huronia* was not an early stage class settlement. The settlement in *Huronia* was achieved just a few days before the start of the common issues trial. At that point, both class and defence counsel had reviewed literally thousands of documents, had completed days of

---

[10] Koniak, *supra,* note 9, at 1798.

[11] *Sheridan Chevrolet v. Furakawa Electric,* 2016 ONSC 729 and *Leslie v. Agnico-Eagle Mines*, 2016 ONSC 532.

[12] *Dobbs, supra*, note 5, at para. 30 (Gen. Div.)

[13] *Slark, supra,* note 2, at para. 26.

2016 ONSC 2662 (CanLII)

discovery, and had fully researched and understood the many issues of law (duty of care, limitation periods etc.) that would be litigated in the upcoming trial.

[34] When the parties agreed to mediation just before the start of the *Huronia* trial, their counsel were as informed as they ever could be about the "risks of going to trial." Their knowledge base going into the mediation was as high as it ever would be, short of completing the trial and reading the reasons of the trial judge. In short, the mediation that led to this settlement was based on layers and layers of actual, and not just imagined, information about the risks and rewards of further litigation.

[35] Class counsel negotiated the *Huronia* settlement (which became the template for the three actions that followed) from a significant knowledge base that is simply not available when class actions are settled before certification or shortly thereafter. Put bluntly, the closer that class counsel is to trial, the more credible are their assertions about risk and reward. The closer the trial, the more likely that the class action settlement is fair and reasonable and in the best interests of the class.

[36] I am therefore persuaded that *Huronia* settlement is a settlement that was not only in the best interests of that class but is a settlement that could be used as a legitimate template for *Rideau* and *Southwestern,* and more importantly, for the class action settlement herein.

[37] Only two written objections were received by class counsel - one from an individual who was not a class member - who criticized the fact that the class action was even brought and the other from a class member who would have preferred a larger settlement amount. My response to the latter is the same response that Conway J. provided in *Huronia:* a settlement is a compromise that reflects the risks, delays and expense of continuing litigation.[14] I am satisfied that the settlement amount herein is within the zone of reasonableness and is very much in the best interests of the class. [15]

---

[14] *Slark, supra,* note 2, at para. 36.

[15] A third objector, Marilyn Dolmage, voiced her concerns both orally at the hearing and later in an email that was forwarded to me by class counsel. Although not a class member, she is nonetheless an informed observer because she was the litigation guardian for the representative plaintiff in *Huronia.* Ms. Dolmage's main criticism, based on certain perceived discrepancies in class counsels' affidavit material, was that parity had in fact not been maintained; and that class member compensation in *Huronia* was on average almost $2000 more than the per capita $3711 amount herein. Class counsel responded in writing to each of her points, corrected many of them, and confirmed the accuracy of the $3711 "parity" assertion. Ms. Dolmage also noted that the provincial apology and the commemorative plaques that were part of the *Huronia* settlement were not included in the settlement herein. This is

2016 ONSC 2662 (CanLII)

[38] I am pleased to approve the proposed settlement.

Approval of class counsels' legal fees

[39] Class counsel also seek approval from this court of their legal fees in the amount of $3.7 million (plus HST). This amounts to a contingency fee of 9.67 per cent of the total settlement value (including notice and administration). In my view, this request is fair and reasonable.

[40] Based on the retainer agreement, class counsel were entitled to a 30 per cent recovery for legal fees. They have wisely reduced their request to about 10 per cent, no doubt because of the legal fee payments already received from the *Huronia*, *Rideau* and *Southwestern* settlements.

[41] The total amount recovered for class members in the first three settlements was about $67.7 million. The overall total, when one adds the settlement herein, is about $103.7 million. When the 10 per cent being sought herein is added to the 20 per cent that was approved in the first three settlements, the overall recovery for legal fees is about $17.7 million or about 17 per cent.

[42] As I noted in *Cannon*,[16] the contingency fee approach to class counsel compensation is much more principled than the "multiplier" approach and should be the preferred method for class counsel compensation.

[43] I have no difficulty approving class counsels' request for legal fees.

Disposition

[44] The proposed settlement is fair and reasonable and in the best interests of the class. As is class counsels' request for legal fees.

[45] Both the settlement and the legal fees are approved.

---

true. But these differences were not mentioned by any of the class members and, in my view, do not amount to a good enough reason to deny settlement approval.

[16] *Cannon, supra,* note 6.

2016 ONSC 2662 (CanLII)

Belobaba J.

Date: April 28, 2016

2016 ONSC 2662 (CanLII)

Bird and Paul on behalf of the members of the class described as Crown Bay Hotel Limited Partnership et al. v. Zurich Indemnity Company of Canada

[Indexed as: Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada]

40 O.R. (3d) 83
[1998] O.J. No. 1891
Court File No. 95-CQ-59846

Ontario Court (General Division)
Winkler J.
May 8, 1998

Civil procedure -- Costs -- Class proceedings -- Contingency fees -- Contingency fee based on a percentage of a settlement is within contemplation of Act -- Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 32, 33.

The defendant had provided a bond with respect to the construction of a hotel in the Caribbean. When the bond was not paid, the defendant was sued in class proceedings, but the action settled before trial. The court approved the settlement, and counsel for the plaintiffs moved for approval of the counsel fee provided for in a written agreement with the plaintiffs. The agreement provided that the legal fees for the class proceedings shall be based upon the contingency of success and shall comprise 20 per cent of the total amount of any settlement or award inclusive of any costs or pre-judgment interest which may be awarded.

Held, the motion should be granted.

Subject to approval by the court, a contingency fee based on a percentage of the settlement is within the contemplation of

1998 CanLII 14842 (ON SC)

the Act. The application of a multiplier is not the only permissible form of contingency fee and there may be other types of contingent fee arrangements.

Cases referred to

Nantais v. Telectronics Proprietary (Canada) Ltd. (1996), 28 O.R. (3d) 523, 7 C.P.C. (4th) 189 (Gen. Div.); Serwaczek v. Medical Engineering Corp. (1996), 3 C.P.C. (4th) 386 (Ont. Gen. Div.)

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 32, 33

MOTION for approval of a class counsel fee under ss. 32 and 33 of the Class Proceedings Act, 1992, S.O. 1992, c. 6.

Morris Cooper, for plaintiffs.
Ronald Birken, for defendant.

WINKLER J.: -- This is a motion for approval of a class counsel fee as required by ss. 32 and 33 of the Class Proceedings Act, 1992, S.O. 1992, c. 6.

By order of this court dated June 28, 1995, this action was certified as a class proceeding. By the terms of that order the class represented by the plaintiffs was described as the limited partners of Crown Bay Hotel Limited Partnership, Crown Bay Suites Associates Limited Partnership and Provo Club Villas Limited Partnership. The claim in the action was for recovery under a performance bond issued by Zurich Indemnity Company of Canada on June 10, 1991 in the amount of U.S.$1,300,000.

The statement of claim was issued on January 16, 1995, the statement of defence filed February 27, 1995 and subsequently amended by order of this court on December 4, 1995. The trial

1998 CanLII 14842 (ON SC)

of the common issues was scheduled to commence on March 9, 1998 and was expected to last from seven to 10 days. On the eve of trial, at the request of both counsel, a pre-trial conference was held before this court which produced a full settlement of all claims advanced in the action. Minutes of settlement were executed on March 12, 1998. On March 25, 1998 the settlement was approved by order of this court. This matter, involving as it does a discrete group of investors with relatively small claims which would be uneconomical to pursue, is a classic case for application of the CPA. These reasons address the issues arising out of the companion motion for approval of the class counsel fee.

A brief summary of the background circumstances leading up to this proceeding are instructive. The class members are limited partners in three limited partnerships formed in 1990 to participate in the construction of a hotel in the Turks and Caicos, a British colony in the eastern Carribean. The transaction was unique in that it provided that if the deal was not completed by the developer North Beach Development Co. Ltd. within a specified time the investors would receive a refund of their investment less $5,000. To this end the investment funds were held in escrow pending satisfaction of the terms of the offering memorandum by the developer.

When the developer could not satisfy the escrow terms within the stated time, Zurich, which had provided additional financing to the project in the amount of U.S.$17,000,000, offered to assist the developer by providing a bond in the amount of the funds held in escrow. The bond was put into place thereby permitting the developer to free up the funds. The terms of the bond extended the escrow period giving the developer additional time to meet the conditions of the offering. Before the conditions were met or the time expired the deal collapsed. The instant proceeding by the investors in the limited partnerships is to recover as against Zurich in the amount of the bond.

It is the agreement respecting fees and disbursements between Morris Cooper, counsel for the plaintiffs, and the plaintiffs, dated December 21, 1994, which is now before this court for

1998 CanLII 14842 (ON SC)

approval. This agreement provides, inter alia, that the legal fees for the class proceeding shall be based upon the contingency of success and shall comprise 20 per cent of the total amount of any settlement or award inclusive of any costs or pre-judgment interest which may be awarded. This is the first instance in which a percentage contingency fee has come before this court for approval.

Fees which are contingent upon the success in a class proceeding are expressly permitted by the CPA and require court approval. Sections 32 and 33 of the CPA provide in pertinent part:

> 32(1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,
>
> (a) state the terms under which fees and disbursements shall be paid;
>
> (b) give an estimate on the expected fee, whether contingent on success in the proceeding or not; and
>
> (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.
>
> (2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.
>
> . . . . .
>
> 33(1) Despite the Solicitors Act and An Act Respecting Champerty, being chapter 327 of the Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.
>
> (2) For the purpose of subsection (1), success in a class proceeding includes,

1998 CanLII 14842 (ON SC)

(a) a judgment on common issues in favour of some or all class members; and

(b) a settlement that benefits one or more class members.

(3) For the purposes of subsections (4) to (7),

"base fee" means the result of multiplying the total number of hours worked by an hourly rate;

"multiplier" means a multiple to be applied to a base fee.

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.

(5) A motion under subsection (4) shall be heard by a judge who has,

(a) given judgement . . .

(b) approved a settlement . . .

. . . . .

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

(a) shall determine the amount of the solicitor's base fee;

(b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and

. . . . .

1998 CanLII 14842 (ON SC)

(8) In making a determination under clause (7)(a), the court shall allow only a reasonable fee.

At issue on this motion is the question of whether a contingency fee based on a percentage of the settlement is within the contemplation of the Act. In my view it falls within the ambit of s. 32 of the Act, subject to approval by the court. The use of the term "otherwise" in cl. (c) of s-s. (1) in reference to the method of payment, when considered in the context of the terms "lump sum" and "salary", support this view. Clause (b) makes reference to the estimated fee, ". . . whether contingent on success . . . or not". It is within the discretion of the judge, in the exercise of his or her discretion as set out in s. 32 of the legislation, to approve such a fee arrangement in the appropriate circumstances.

Section 32 of the act is mandatory. It requires that an agreement respecting fees and disbursements:

(a) state the terms under which fees and disbursements are to be paid;

(b) estimate the expected fee, whether or not contingent on success;

(c) state the method of payment

The agreement is not enforceable unless, upon motion to the court by the solicitor, it receives court approval.

Section 33(1) permits a solicitor and a representative party to enter into a written agreement providing for payment only in the event of success in a class proceeding. The remainder of the section deals with the court's jurisdiction to grant a multiplier to the base fee where the parties have so agreed. This raises the question of whether the application of a multiplier is the only permissible form of contingent fee arrangement available to a solicitor and a representative party, so as to preclude any other arrangement such as the percentage fee in the present agreement. This issue was

1998 CanLII 14842 (ON SC)

addressed squarely by Brockenshire J. in Nantais v. Telectronics Proprietary (Canada) Ltd. (1996), 28 O.R. (3d) 523, 7 C.P.C. (4th) 189 (Gen. Div.), leave to appeal to the Court of Appeal denied. That was a class action involving a products liability claim. Subsequent to certification the plaintiff's counsel entered into a contingency fee arrangement with the representative plaintiffs which provided that if the plaintiffs were successful, their counsel would get a lump sum and party and party costs. The plaintiffs moved for an order that the fee arrangement did not affect their right to recover costs. The defendants argued in resistance to this motion that the fee arrangement was not authorized by the CPA as the multiplier provision of the Act is the only permitted contingency arrangement. In granting the motion Brockenshire J. rejected this argument at pp. 527-28:

> In my view, this interpretation flies in the face of the wording of the Act. I find the wording to be clear, but also find the arrangement of the sections somewhat confusing. The special provisions as to costs are found in ss. 32 and 33 of the Act. In my view it would have been clearer if s. 33(1) and (2) had come first, followed by s. 32 and then followed by s. 33(4) through (9). Section 33(1) and (2) make it clear that generally under the Act, despite the Solicitors Act and the Act Respecting Champerty, there can be an agreement between a solicitor and a representative party (on behalf of that party and those represented by that party) for the payment of fees and disbursements only in the event of success. Section 32 makes it clear that any fee arrangement entered into is not enforceable unless approved by the court, and unless it estimates the expected fee, whether contingent or not, and states the method by which payment is to be made, whether by lump sum, salary or otherwise. If so approved, any amounts owing thereunder are a first charge on any settlement funds or monetary award. Section 33(3) through (9), in my view, creates a special type of "otherwise" under s. 32(1)(c) -- an arrangement under which hourly rates are quoted, with a provision for applying to the court after the fact, for an increase in such hourly rate, based on the risk incurred in undertaking the case under an agreement to be paid only if successful.

1998 CanLII 14842 (ON SC)

I do not view the special provisions relating to "multipliers" for hourly rates as preventing, in any way, other arrangements as specifically authorized under s. 32(1)(c). I view s. 33(1) and (2) as permitting, despite other statutes, all kinds of fee arrangements contingent upon success, and not just hourly rate multipliers. I reject the contention that the fee agreement is illegal, as not authorized under the Act.

I agree with the reasoning of Brockenshire J. The scheme of the CPA seems to envisage that ss. 32 and 33 operate independently of one another. Hence the duplicate provisions for court approval. Moreover, a restrictive construction of the Act is contrary to the policy of the statute, one of the purposes of which is to promote judicial economy. A contingency fee arrangement limited to the notion of a multiple of the time spent may, depending upon the circumstances, have the effect of encouraging counsel to prolong the proceeding unnecessarily and of hindering settlement, especially in those cases where the chance of some recovery at trial seems fairly certain. On the other hand, where a percentage fee, or some other arrangement such as that in Nantais, is in place, such a fee arrangement encourages rather than discourages settlement. In the case before this court the settlement averted a seven- to ten-day trial. Fee arrangements which reward efficiency and results should not be discouraged.

However, it seems to me to be equally clear that ordinarily the fee arrangement ought not to be approved by the court until after the judgment is rendered on the common issues or the settlement concluded. It is only then that a court can be satisfied that it has all of the relevant facts before it necessary for approval of the fee arrangement. Given that a percentage arrangement represents a melding of a base fee and multiplier, the court will determine a reasonable percentage having regard to the degree of risk undertaken by counsel, the degree of success in the proceeding, and the other criteria enunciated in Serwaczek v. Medical Engineering Corp. (1996), 3 C.P.C. (4th) 386 (Ont. Gen. Div.).

1998 CanLII 14842 (ON SC)

This matter took the better part of four years to reach trial. The resourcefulness and tenacity of plaintiffs' counsel in investigating the matter and uncovering the existence of the bond contributed greatly to the successful resolution of the action. His extensive preparation of the case for trial was evident. The class members will recover almost all of their initial investment, net of fees, and the success of the settlement from their viewpoint is compelling. The affidavit of the representative plaintiffs in support of this motion is persuasive. The fee arrangement is accordingly approved.

Order accordingly.

□

1998 CanLII 14842 (ON SC)

CITATION: Dolmage, McKillop and Bechard v. HMQ, 2014 ONSC 1283
COURT FILE NO.: CV-09-376927CP00, CV-10-41191, CV-10-41734300CP
DATE: 20140304

2014 ONSC 1283 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **Marilyn Dolmage as Litigation Guardian of Marie Slark and Jim Dolmage as Litigation Guardian of Patricia Seth,** Plaintiffs

and

Her Majesty The Queen in Right of the Province of Ontario, Defendant

AND RE: **David McKillop by his Litigation Guardian Christine Victoria Grace Clarke,** Plaintiff

and

Her Majesty The Queen in Right of the Province of Ontario, Defendant

AND RE: **Rosalind Bechard as Litigation Guardian of Mary Ellen Fox,** Plaintiff

and

Her Majesty The Queen in Right of the Province of Ontario, Defendant

BEFORE: Conway J.

COUNSEL: *Kirk M. Baert, Celeste Poltak* and *David Rosenfeld*, for the Plaintiffs

Robert Ratcliffe, John Kelly and *Jonathan Sydor*, for the Defendant

HEARD: February 25, 2014

Proceedings under the *Class Proceedings Act, 1992*

REASONS FOR DECISION
(re: Class Counsel Fee Approval)

Conway J.

[1] Class counsel moves for approval of its fees on these three actions pursuant to sections 32 and 33 of the *Class Proceedings Act, 1992*, S.O. 1992, c.6 (the "**Act**"). At the conclusion of the

motion, I approved class counsel fees, disbursements and taxes, for oral reasons with written ones to follow. I have now signed the orders. These are my written reasons.

[2] These actions relate to three provincially operated residential facilities for individuals with developmental disabilities: Huronia Regional Centre ("**Huronia**"), Rideau Regional Centre ("**Rideau**") and Southwestern Regional Centre ("**Southwestern**"). In each action, the plaintiffs allege that the defendant (the "**Crown**") was negligent and breached its fiduciary duties in the funding, operation, management, administration, supervision and control of the facility.

[3] The parties settled the actions. I approved the settlements pursuant to s. 29(2) of the Act.[1] All settlements have the same principal terms, which I set out in detail in my reasons approving the settlements. Among the key terms are the following:

- an apology from the Crown;
- a cash settlement fund to pay class members' claims – $35 million (Huronia), $20.6 million (Rideau) and $12.1 million (Southwestern), for a total settlement fund of $67.7 million (the "**Total Settlement Fund**"). In addition, the Crown will pay the cost of notice to the class and administration of the claims process, approximately $3 million. The Crown's total cash payment on these settlements is therefore approximately $70.7 million (the "**Total Cash Value**");
- the compensation awards will not be subject to tax or government claw-backs;
- the application process is paper-based and does not require former residents to testify or appear in person;
- the documents produced in the actions will be accessible for scholarly research; and
- there are various commemorative initiatives, including commemorative plaques and, in the case of Huronia, maintenance of the on-site cemetery and opportunities for scholars to attend and archive artifacts from the facility.

Global Fee and Allocation Among the Actions

[4] Class counsel seeks a global fee for the actions in the amount of **$14 million**, plus disbursements of approximately $1.6 million and taxes of $1.78 million. The global fee sought is **20.68%** of the $67.7 million Total Settlement Fund and **19.8%** of the Total Cash Value.

---

[1] The Huronia action was settled on September 17, 2013 and approved on December 3, 2013: *Dolmage v. HMQ*, 2013 ONSC 6686. The Rideau and Southwestern actions were settled on December 23, 2013 and approved on February 24, 2014: *McKillop and Bechard v. HMQ*, 2014 ONSC 1282.

2014 ONSC 1283 (CanLII)

[5] Class counsel proposes that the fees be allocated among the actions in proportion to the relative sizes of the settlement funds. The rationale is that Rideau and Southwestern benefitted greatly, if not entirely, from the prosecution of the Huronia action right up to trial. The litigation guardians support this allocation. The proposed allocation is as follows:

Action	**Settlement Fund**	**Proposed Fee (20.68% of Settlement Fund)**	**Percentage of Global Fee Allocated to Action**
Huronia	$35 million	$7.24 million	51.7%
Rideau	$20.6 million	$4.27 million	30.5%
Southwestern	$12.1 million	$2.49 million	17.8%
Total:	$67.7 million	$14 million	100%

2014 ONSC 1283 (CanLII)

Facts Relied on by Class Counsel

[6] Class counsel relies on the following facts, among others, on its motions for fee approval:

- The actions spanned approximately five years.
- The Huronia action settled on the first day of what was to be a four month trial. The Rideau and Southwestern actions were scheduled to go to trial in March 2015, also for four months.
- The plaintiffs received the Crown's first settlement offer, in the Huronia action, only two months before the scheduled trial date.
- Extensive documentary production was made in all cases (63,000 documents in Huronia and 67,700 in the Rideau and Southwestern actions).
- There were 10 days of discoveries (plus 688 written interrogatories) in the Huronia action and 15 days of discoveries in the Rideau and Southwestern actions.
- In the Huronia action, the parties retained a total of 13 sets of experts to deliver 21 expert reports and intended to call each expert at trial. The plaintiffs and Crown intended to call 29 and 23 fact witnesses, respectively.
- Class counsel spent a total of 16,543 hours of lawyer, student and clerk time in prosecuting these actions. At counsel's hourly rates, this amounts to approximately $5.89 million in legal fees. The fees sought represent a multiplier of 2.38.

- The retainer agreements with the representative plaintiffs (approved by their litigation guardians) are contingency fee arrangements. Fees, disbursements and taxes are to be deducted from any settlement funds recovered.

  In the Huronia action, the contingency fee is at least the sum of 3.0 and .01 for every month between the date of the agreement and the date of settlement approval – in this case, the applicable multiplier is 3.5. Under the retainer agreement, class counsel would be entitled to fees of $15,556,016.

  In the Rideau and Southwestern actions, the retainer agreements provide for the greater of a 4.0 multiplier or a percentage of any settlement – in this case, the applicable percentage is 30%. According to the percentages in the retainer agreements, class counsel would be entitled to fees of $6,185,700 for Rideau and $3,624,300 for Southwestern.

- In January 2014, after the amount of the Total Settlement Fund was known, the litigation guardians in all three actions approved the amount of class counsel's fees and disbursements and the *pro rata* allocation among the actions. They acknowledged that the fees sought were less than what class counsel is entitled to receive under the retainer agreements.

- Class counsel will be incurring additional time and disbursements in seeing the settlements through to completion, for which it will not be seeking recovery. Class counsel undertook at the hearing to hold payment of $1 million of the approved fees in its trust account until such time as the settlement has been completed, to ensure class counsel's continued involvement in the administration of the settlement.

[7] Class counsel made extensive submissions on the subject of risk, both those inherent in prosecuting class actions and those specific to these cases. I have already recognized the numerous and complex legal challenges in my reasons approving the settlements.[2] Class counsel submits that the fee award in this case must account for these risks and fairly compensate counsel for assuming them.

Legal Principles

[8] In determining whether to approve class counsel's legal fees, the court must determine whether the fees are fair and reasonable. The factors to be taken into account in making this determination are well known:

- the factual and legal complexities of the matters dealt with;

- the risk undertaken, including the risk that the matter might not be certified;

---

[2] *Dolmage*, at para. 31; *McKillop and Bechard*, at para. 27.

2014 ONSC 1283 (CanLII)

- the degree of responsibility assumed by class counsel;
- the monetary value of the matters in issue;
- the importance of the matter to the class;
- the degree of skill and competence demonstrated by class counsel;
- the results achieved;
- the ability of the class to pay;
- the expectations of the class as to the amount of the fees;
- the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

See *Smith Estate v. National Money Mart Co.*, [2011] O.J. No. 1321 (C.A.), at para. 80.

Analysis

[9] Class counsel started this litigation five years ago. It was a risky proposition indeed, a case against a provincial government alleging institutional abuse over a period of decades. The legal issues were complex and novel. The class proceeding vehicle itself presented challenges at each step.

[10] But these were important cases. To the class members the issues were enormous and immensely personal. These class actions provided a means for them to bring their claims before the court and to create public awareness of the history of these institutions and the alleged experiences of the residents there.

[11] It is important that qualified class counsel be properly compensated for bringing these types of cases forward and assuming the risks of doing so. In these cases the risks were even more pronounced as the settlements did not occur until the first day of the Huronia trial. Class counsel had to do an enormous amount of work in seeing these cases through certification, productions, discoveries and trial preparation, without any assurance that it would ultimately succeed at trial or recover its fees and disbursements.[3]

[12] With these settlements, the Total Settlement Fund of $67.7 million has been secured for the class members. The Total Cash Value is actually $70.7 million when the $3 million in notice and administration costs are factored in. That is only the cash value of the settlement – it does not account for the other benefits to the class in these settlements, most importantly the apology

[3] The only costs awarded to the plaintiffs in these actions have been a total of $132,000 in respect of the successful certification motion and denial of leave to appeal.

2014 ONSC 1283 (CanLII)

from the Premier of Ontario and the preservation and archiving of documents related to this litigation.

[13] Class counsel seeks 20.68% of that fund for its fees. That percentage is reduced to 19.8% when the notice and administration costs are added in.

[14] The fees sought are well below what class counsel is entitled to recover under its retainer agreements entered into at the start of this litigation. The amount of these fees has further been approved by the litigation guardians in all three actions recently, in January 2014, after the settlement figures were known. The fees are certainly within the expectations of the class.[4]

[15] Finally, a contingency fee of 20.68% on the Total Settlement Fund falls squarely within the range of fee percentages awarded in other class actions and is closer to the lower end of that range.[5] This is even more significant when I consider that most of those cases involved a settlement at the certification stage, not on the eve of a four month trial.

[16] I therefore approve these fees as fair and reasonable. I further approve the requested disbursements, set out in the detailed briefs, as fair and reasonable. I also approve the *pro rata* allocation of the fees and disbursements among the three actions.

[17] In the signed orders, I have approved the requested fees, disbursements and taxes. I further approved the amount of disbursements to be repaid to the Law Foundation of Ontario and the 10% levy payable pursuant to Regulation 771/92 of the *Law Society Act*. In accordance with class counsel's undertaking, the orders provide that a total of $1 million of the fees are to be held in class counsel's trust account until the claims process pursuant to the settlements are completed and court approval has been obtained for payment of such holdback amount.

Conway J.

Date: March 4, 2014

[4] The only objections with respect to fees were (i) the Crown should be paying them on top of the settlement fund – I addressed this objection in *Dolmage*, at para. 35 and *McKillop and Bechard*, at footnote 14; and (ii) class counsel should be doing this work on a *pro bono* basis –I disagree, as set out in these Reasons.

[5] Strathy J. (as he then was) stated that fees in the range of 20% to 30% are "very common" in class proceedings: *Baker (Estate) v. Sony BMG Music (Canada) Inc.* 2011 ONSC 7105, at para. 63. In *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, Belobaba J. approved fees of 33% based on the retainer agreement ($9.4 million on a settlement of $28.2 million). Regional Senior Justice Morawetz recently canvassed the percentage ranges in *Labourers' Pension Fund of Central and Eastern Canada v. Sino Forest Corporation*, 2014 ONSC 62, at paras. 43, 44 and approved the requested fees of $17.8 million, representing 17% of the settlement fund attributable to the Canadian claims.

2014 ONSC 1283 (CanLII)

Citation: Endean v. CRCS; Mitchell v. CRCS 2000 BCSC 971

Date: 20000622

Docket: C965349
Registry: Vancouver

2000 BCSC 971 (CanLII)

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ANITA ENDEAN, as representative Plaintiff

PLAINTIFF

AND:

THE CANADIAN RED CROSS SOCIETY, HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA, and THE ATTORNEY GENERAL OF CANADA

DEFENDANTS

AND:

PRINCE GEORGE REGIONAL HOSPITAL, DR. WILLIAM GALLIFORD, DR. ROBERT HART DYKES, DR. PETER HOUGHTON, DR. JOHN DOE, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, AND HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

THIRD PARTIES

Docket: A981187
Registry: Vancouver

BETWEEN:

CHRISTOPHER FORREST MITCHELL

PLAINTIFF

AND:

THE CANADIAN RED CROSS SOCIETY, THE ATTORNEY GENERAL OF CANADA, AND HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE K. SMITH

Counsel for the Plaintiff, Anita Endean:	J.J. Camp, Q.C. David P. Church Sharon D. Matthews Bruce W. Lemer
Counsel for the Plaintiff, Christopher Forrest Mitchell:	Marvin R.V. Storrow, Q.C. David E. Gruber
Counsel for the Defendant/Third Party, Her Majesty the Queen in Right of the Province of British Columbia:	Gordon Turriff D. Clifton Prowse Keith Johnston
Counsel for the Defendant, The Attorney General of Canada and the Third Party, Her Majesty the Queen in Right of Canada:	Gordon Turriff John R. Haig, Q.C.
Place and Dates of Hearing:	Vancouver, B.C. December 8, 9, 10, 1999 January 18, 19, 20, 2000 And written submissions filed

2000 BCSC 971 (CanLII)

[1] This application raises the question of the proper approach to the compensating of plaintiffs' counsel in class actions brought in British Columbia.

2000 BCSC 971 (CanLII)

I. INTRODUCTION

[2] These are two of six parallel lawsuits commenced in British Columbia, Quebec, and Ontario on behalf of residents of Canada infected directly and secondarily with Hepatitis C virus ("HCV") by the Canadian blood supply between January 1, 1986, and July 1, 1990. The Endean action concerns those British Columbia residents whose claims result from transfusion and the Mitchell action deals with infected haemophilic residents of the province. The background of these actions is described in ***Endean v. Canadian Red Cross Society*** (1997), 148 D.L.R. (4th) 158, [1997] 10 W.W.R. 752, 36 B.C.L.R. (3d) 350, 37 C.C.L.T. (2d) 242, 11 C.P.C. (4th) 368, rev'd in part (1998), 157 D.L.R. (4th) 465, [1998] 9 W.W.R. 136, 106 B.C.A.C. 73, 48 B.C.L.R. (3d) 90, 42 C.C.L.T. 222 (C.A.), leave to appeal granted, [1998] S.C.C.A. No. 260 (S.C.C.) ("***Endean No. 1***"), wherein I certified the Endean action as a class proceeding pursuant to the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50.

[3] A settlement was ultimately reached between the plaintiffs and the Federal, Provincial, and Territorial Governments (the "FPT Governments") in one pan-Canadian negotiation and was approved by orders granted in each of the British Columbia Supreme Court, the Ontario Superior Court of Justice, and the Quebec Superior Court. The terms of the settlement and the reasons for approval are described in my decision in ***Endean v. Canadian Red Cross Society*** (1999), [2000] 1 W.W.R. 688, 68 B.C.L.R. (3d) 350, the decision of Winkler J. in ***Parsons v. Canadian Red Cross Society***, [1999] O.J. No. 3572 (Q.L.) (S.C.J.), and the decision of Morneau J. in ***Honhon c. Canada (Procureur général)***, [1999] J.Q. No. 4370 (Q.L.) (S.C.).

[4] The settlement agreement requires the FPT Governments to pay monies into a trust fund to be invested and managed for the benefit of the class plaintiffs. Payment of fees to class counsel is provided for in clause 13.03 of the agreement as follows:

> The fees, disbursements, costs, GST and other applicable taxes of Class Action Counsel will be paid out of the Trust. Fees will be fixed by the Court in each Class Action on the basis of a lump sum, hourly rate, hourly rate increased by a multiplier or otherwise, but not on the basis of a percentage of the Settlement Amount.

2000 BCSC 971 (CanLII)

Although it was not spelled out in the formal agreement, the parties agreed, as well, that the fees as approved by the courts shall not exceed $52,500,000 in total.

[5] Counsel for the plaintiffs have agreed among themselves to seek approval of fees of $7,500,000 for those representing the haemophilic classes and $45,000,000 for those representing the transfused classes. Mr. Camp and Mr. Lemer, counsel for Ms. Endean and the class she represents, seek approval of a fee of $15,000,000 plus disbursements. From their fee, they will pay the fees of several other lawyers who acted for particular members of the British Columbia transfused class. Mr. Storrow, counsel for the plaintiffs in the Mitchell action, seeks approval of a fee of $500,000 plus disbursements. Each of the applicants has a contingent-fee contract with his representative plaintiff providing for payment of a lump-sum fee in the amount claimed and disbursements.

2000 BCSC 971 (CanLII)

II. THE LAW

1. The *Class Proceedings Act*

[6] The applications are brought pursuant to s. 38 of the ***Class Proceedings Act***, which provides, in relevant part, as follows:

38. (1) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff must be in writing and must

(a) state the terms under which fees and disbursements are to be paid,

(b) give an estimate of the expected fee, whether or not that fee is contingent on success in the class proceeding, and

(c) state the method by which payment is to be made, whether by lump sum or otherwise.

(2) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court, on the application of the solicitor.

. . .

(7) If an agreement is not approved by the court, the court may

(a) determine the amount owing to the solicitor in respect of fees and disbursements,

(b) direct an inquiry, assessment or accounting under the Rules of Court to determine the amount owing,

(c) direct that the amount owing be determined in any other manner, or

(d) make any other or further order it considers appropriate.

[7] The agreements in question satisfy the requirements of s-s. 38(1). The issue is whether they should be approved pursuant to s-s. 38(2) and, if not, what disposition should be made pursuant to s-s. 38(7).

2000 BCSC 971 (CanLII)

[8] The ***Class Proceedings Act*** provides no guidance as to how the court should approach the approval. Accordingly, the statutory and common law of general application in respect of solicitors' fees must apply. I will return to this aspect of the discussion after considering the approach proposed by Mr. Turriff on behalf of the FPT Governments.

2000 BCSC 971 (CanLII)

2. The approach proposed by the FPT Governments

[9] I preface these comments by observing that I requested the assistance on this application of counsel for the FPT Governments. In my view, they are in a uniquely advantageous position to comment on the litigation risks run by plaintiffs' counsel and on the value of the contributions made by them to the ultimate settlement, which are the two issues upon which Mr. Turriff focussed his submissions. However, Mr. Turriff did not put before me any evidence of the opinions or observations of Messrs. Whitehall, Haig, or Prowse, who carried these actions for the FPT Governments and negotiated the settlement with plaintiffs' counsel. That is unfortunate, as I remain of the view that their opinions would have been helpful.

[10] Mr. Turriff suggested a method of assessing lawyers' fees based on an approach that has been used in Ontario and in the United States, known in those jurisdictions respectively as the "base-fee/multiplier" approach and the "lodestar/multiplier" approach. In Mr. Turriff's submission, this method is grounded in economic theory and is a rational and scientific approach to the assessment of lawyers' fees. He contrasted this with the traditional approach in British Columbia, which he characterized as based on "intuition and impression."

2000 BCSC 971 (CanLII)

[11] As the multiplier method has a history in Ontario and in the United States, I will first consider the situation in those jurisdictions.

[12] The Ontario ***Class Proceedings Act, 1992***, S.O. 1992, c. 6, provides, in s-s. 33(1), that lawyers for a representative plaintiff may enter into fee agreements providing for payment of fees only in the event of success. Sub-sections 33(3) to (8) provide for the multiplier approach advocated by Mr. Turriff. "Base fee" is defined in s-s. (3) as the product of the total number of hours worked by the solicitor and an hourly rate, and "multiplier" is defined as a multiple to be applied to the base fee. Sub-sections (4) through (8) enact that the solicitor may apply to have his or her fees increased

by a multiplier and that, on such an application, the court must determine a "reasonable" base fee and may then apply a multiplier that "results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding."

[13] However, contingent fees derived other than from a base fee/multiplier are not prohibited in class actions in Ontario: see ***Nantais v. Telectronics Proprietary (Canada) Ltd.*** (1996), 28 O.R. (3d) 523 (Gen. Div.) and ***Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada*** (1998), 40 O.R. (3d) 83 (Gen. Div.). In the latter decision, Winkler J. approved a percentage contingent fee and observed, at p. 88, that percentage contingent fees may be desirable to promote the policy objective of judicial economy in that they encourage efficiency in the litigation and discourage unnecessary work that might otherwise be done by the lawyer simply in order to increase the base fee.

[14] Mr. Justice Winkler's observation has support in the American experience, which is discussed in the decision of the United States Court of Appeals, District of Columbia Circuit, in ***Swedish Hosp. Corp. v. Shalala***, 1 F.3d 1261 (D.C. Cir. 1993). In that case, the Court observed, at pp. 1265-66, that the percentage-of-the-fund method of calculating fees was the

2000 BCSC 971 (CanLII)

most common approach in the United States until 1973. The rationale underlying this method is that plaintiffs' attorneys who create a common fund for a class of individuals should be paid a reasonable fee from the fund as a whole in order to avoid the unjust enrichment of class members who would not otherwise contribute to the legal costs [p. 1265].

2000 BCSC 971 (CanLII)

[15] The Court recounted that, in ***Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.***, 487 F.2d 161 (3d Cir. 1973), the Third Circuit introduced the "lodestar/multiplier" approach in reaction to a perception that percentage fees sometimes resulted in large fee awards. The lodestar, like the base fee in Ontario, is the product of the hours reasonably spent and a reasonable hourly rate. Under this approach, the lodestar is to be adjusted upward or downward by a multiplier to reflect such factors as the contingency nature of the case and the quality of the lawyers' work.

[16] The Court went on to explain, at p. 1266, that the lodestar approach gained predominance in the United States until the Third Circuit appointed a task force to compare the respective merits of the two approaches. The task-force report described the lodestar method as a "cumbersome, enervating, and often surrealistic process of preparing and

evaluating fee petitions that now plagues the Bench and Bar." The report enumerated several criticisms of the lodestar approach, which are summarized at pp. 1266-67 as follows:

> 1) it "increases the workload of an already overtaxed judicial system"; 2) the elements of the process "are insufficiently objective and produce results that are far from homogeneous"; 3) the process "creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law"; 4) the process "is subject to manipulation by judges who prefer to calibrate fees in terms of percentages of the settlement fund or the amounts recovered by the plaintiffs or of an overall dollar amount"; 5) the process, although designed to curb abuses, has led to other abuses, such as "encouraging lawyers to expend excessive hours engag[ing] in duplicative and unjustified work, inflat[ing] their 'normal' billing rate[s], and includ[ing] fictitious hours"; 6) it "creates a disincentive for the early settlement of cases"; 7) it "does not provide the district court with enough flexibility to reward or deter lawyers so that desirable objectives, such as early settlement, will be fostered"; 8) the process "works to the particular disadvantage of the public interest bar" because, for example, the "lodestar" is set lower in civil rights cases than in securities and antitrust cases; and 9) despite the apparent simplicity of the lodestar approach, "considerable confusion and lack of predictability remain in its administration."

[17] The task force concluded, as is set out at p. 1267, that the lodestar approach should be retained in "statutory fee" cases but that the percentage fee was the best approach for "common fund" cases. This distinction is significant for the present analysis, and is explained in ***In Re Prudential Ins.***

2000 BCSC 971 (CanLII)

Co. of America Sales Litigation, 148 F.3d 283 (3d Cir. 1998) at p. 333:

> … The percentage-of-recovery method is generally favored in cases involving a common fund, and is designed to allow courts to award fees from the fund "in a manner that rewards counsel for success and penalizes it for failure." … The lodestar method is more commonly applied in statutory fee-shifting cases, and is designed to reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation…. It may also be applied in cases where the nature of the recovery does not allow the determination of the settlement's value necessary for application of the percentage-of-recovery method….

2000 BCSC 971 (CanLII)

Clearly, the actions presently under consideration are analogous to the common fund cases in the American jurisprudence.

[18] Class actions are new to British Columbia: the ***Class Proceedings Act*** was enacted in 1995 and the Ontario ***Class Proceedings Act, 1992***, from which it drew heavily, was enacted in 1992. In M. Eiezenga, M. Peerless, and C. Wright, ***Class Actions Law and Practice*** (Markham: Butterworths, 1999) at § 1.12, p. 1.4, the authors noted that class actions for damages first became available in the United States in 1938 and observed:

> The American experience is thus more mature than its newer Canadian counterpart and was available as relevant background for Canadian legislators to draw upon.

Accordingly, there is much to be learned from the long experience of American courts with the methods of compensating successful class counsel, and the cases that I have just mentioned provide a valuable context in which to view the issue presently up for decision.

[19] I reject Mr. Turriff's submission that the base-fee/multiplier approach should be imported into British Columbia as the method of assessing the fees of plaintiffs' class counsel pursuant to s. 38 of the ***Class Proceedings Act***. The deficiencies in this methodology were identified by the Third Circuit task-force report, *supra*, and its introduction into our jurisprudence is undesirable and unnecessary. Its role should be confined to serving in appropriate circumstances as a tool for testing the court's initial assessment.

[20] One of the disadvantages inherent in the multiplier approach is exemplified in this case, where Mr. Turriff applied for an order compelling production for his inspection of all plaintiffs' files and plaintiffs' counsels' billing records in the transfusion action and for leave to cross-

2000 BCSC 971 (CanLII)

examine Mr. Camp on his affidavit. I reserved judgment on the application to cross-examine Mr. Camp, and I will come to that shortly. I dismissed the application for production of records because it would have constituted an unwarranted invasion by the defendants of the plaintiffs' solicitor-client privilege and, as well, because it was unnecessary.

2000 BCSC 971 (CanLII)

[21] I reiterate the opinion that I expressed in that oral ruling that the review of fees pursuant to s. 38 of the ***Class Proceedings Act*** is similar to the review of fees in an infant settlement conducted pursuant to the ***Infants Act***, R.S.B.C. 1996, c. 223, and that the approach should therefore be similar. I referred to ***Harrington (Guardian ad litem of) v. Royal Inland Hospital*** (1995), 131 D.L.R. (4th) 15, 69 B.C.A.C. 1, 14 B.C.L.R. (3d) 201, 45 C.P.C. (3d) 105 (C.A.) and, in particular to the remarks of Finch J.A. at para. 253 to the effect that, except in unusual cases, it is not necessary to examine the lawyers' files and accounting records. In that case, the solicitor obtained approval of his fee from a judge of this Court after another judge had adjourned his initial application and requested further submissions. When this anomaly came to light, the second judge revoked her approval and the first judge embarked on an examination of the solicitors' files from which he concluded that the solicitor

had grossly exaggerated the amount of time that he had claimed to have spent on the matter.

[22] There has been no suggestion of any conduct of that sort here, and I remain of the opinion that the type of discovery sought by Mr. Turriff is not appropriate in this context. The course that Mr. Turriff was set upon would have resulted in a separate, lengthy, and complex proceeding to assess the reasonableness of the proposed fees and would set a precedent that is neither necessary nor contemplated by s. 38 of the ***Act***.

2000 BCSC 971 (CanLII)

[23] As well, I give no weight to the evidence of the economist, Mr. Ross, which was offered by Mr. Turriff as expert opinion on, as Mr. Ross described it in his written report:

> ... the appropriate framework for determining the amount, if any, that should be added to what would otherwise be a reasonable market value fee for professional legal services provided by plaintiffs' counsel to ensure an economic incentive for competent lawyers to take on class action contingency work that should be taken forward.

[24] Mr. Ross advocated formulae for the mathematical calculation of fees. They involved, at the first stage, an "earnings equivalent multiplier" to be used to calculate the base fee using "judgmental probability", that is, the

probability that the action will succeed. At the second stage, a "risk aversion multiplier" was offered to measure such things as the particular lawyer's risk of erratic long-term income resulting from a series of unsuccessful contingency cases. The proper fee in any given case, according to Mr. Ross, is the result produced by the following formula:

> REASONABLE FEE = Reasonable hours worked X reasonable hourly rates X (earnings equivalent multiplier X risk aversion multiplier)

where the multipliers change as the risks change from time to time throughout the retainer.

[25] The chance of success in a given lawsuit and the risks to be run by an individual lawyer in taking it involve a myriad of objective factors and many quintessentially subjective considerations. These chances and risks are incapable of scientific calculation. The proposal advanced by Mr. Ross gives the impression of mathematical precision but, at its heart, is no less arbitrary and subjective than the approach conventionally followed by the courts of this province. The economic opinion evidence is, therefore, not helpful.

[26] As I understand Mr. Turriff's submission, his application to cross-examine Mr. Camp on his affidavit is not based on the usual ground that Mr. Camp's assertions of fact were put in

2000 BCSC 971 (CanLII)

issue by contrary evidence from Mr. Turriff's clients. There was no such evidence. Rather, he wished to investigate Mr. Camp's actions and state of mind at various times throughout his retainer for the purpose of establishing a factual basis for the application of the formula offered by Mr. Ross. As I have rejected the formula, there is no need for the cross-examination. Moreover, any attempt to quantify changes in litigation risk as events transpired would likely be futile and would consume an unwarranted amount of time. Accordingly, the application to cross-examine Mr. Camp is dismissed.

2000 BCSC 971 (CanLII)

[27] Mr. Turriff's submissions on the effects of changing risks deserve comment. He identified a number of events that he characterized as "risk-reducing." All of them, but one, related to the evolving settlement agreement. It is true that the parties were moved along the path to settlement by such things as the publication in November 1997 of the ***Final Report of the Commission of Inquiry on the Blood System in Canada*** (the "Krever report") and the announcement in March 1998 by the FPT Governments of the availability of $1,100,000,000 to settle these actions. However, I cannot accept that these events reduced the risk of failure of the negotiations in any real or measurable way. The risk of failure continued to hinge on a multitude of factors any one of which could have

aborted the negotiations, a danger that continued even after the settlement had received court approval.

[28] The other "risk-reducing" factor identified by Mr. Turriff was the certification of the Endean action. However, it would be wrong to treat counsel's success on this application as justification for reducing the contingent fee on the theory that the skill and effort of counsel have made a successful result more probable. At the outset of the retainer, counsel and clients knew that the enterprise would fail if certification were denied. The chance of success or failure at this stage was therefore a factor in the percentage fee initially agreed upon and, as well, by reason of the settlement agreement, in the lump sum fee that was later substituted for it. It would be wrong to use hindsight to give different weight to that risk than the lawyers and clients gave to it at the outset.

2000 BCSC 971 (CanLII)

2. The proper approach to assessing reasonableness

[29] Mr. Turriff began his submission with the proposition that the courts of Quebec, Ontario, and British Columbia must consider and weigh the evidence presented in all jurisdictions in order to ensure "that no lawyer in any of the three jurisdictions becomes entitled to a fee which does not

accurately reflect his or her relative contribution towards the pan-Canadian settlement agreement." In his submission, there is a possibility for conflicting judgments in this respect that, he contends, would impair the integrity of all three awards and would undermine the legitimacy of all three courts.

[30] I agree that gross inconsistency between the fee awards in the three provinces should be avoided if possible. On the other hand, it cannot be forgotten that each province has its own laws and traditions in respect of solicitors' fees. I must act on the evidence presented in this Court and I must apply the laws of British Columbia to arrive at my decision. However, in doing so, I must have appropriate regard to the national context in which the legal actions have been resolved.

[31] Section 66 of the ***Legal Profession Act***, S.B.C. 1998, c. 9 governs contingent fee agreements. Sub-section 66(2) provides that the benchers may make rules respecting contingent fee agreements, including rules regulating the limits to lawyers' charges. By s-s. 68(2), the client has the right to have the registrar examine a fee agreement and, by s-s. 68(6), the registrar is empowered to modify or cancel the agreement if it

2000 BCSC 971 (CanLII)

is found to be unfair or unreasonable "under the circumstances existing at the time the agreement was entered into."

[32] Part 8 of the ***Law Society Rules***, entitled "Lawyers' Fees", sets up a standard of fairness and reasonableness. The relevant provisions say:

> **8-1** (1) A lawyer who enters into a contingent fee agreement with a client must ensure that, under the circumstances existing at the time the agreement is entered into,
>
> (a) the agreement is fair, and
>
> (b) the lawyer's remuneration provided for in the agreement is reasonable.
>
> (2) A lawyer who prepares a bill for fees earned under a contingent fee agreement must ensure that the total fee payable by the client
>
> (a) does not exceed the remuneration provided for in the agreement, and
>
> (b) is reasonable under the circumstances existing at the time the bill is prepared.

[33] In addition to the statute law, the court has inherent jurisdiction to review the reasonableness of solicitors' fees arising out of contingent fee agreements and, as well, inherent *parens patriae* jurisdiction to ensure the reasonableness of legal fees incurred on behalf of class members who are under legal disability: see ***Harrington (Guardian ad litem of) v. Royal Inland Hospital***, *supra* at p. 264, para. 192 and pp. 266-67, paras. 197-99.

2000 BCSC 971 (CanLII)

2000 BCSC 971 (CanLII)

[34] The meanings of the words "fair" and "reasonable" were considered in ***Commonwealth Investors Syndicate Ltd. v. Laxton*** (1990), 50 B.C.L.R. (2d) 186 (C.A.) ("***Commonwealth No. 1***"). There, the Court was considering a predecessor of s. 66 of the ***Legal Profession Act***, namely, s. 99 of the ***Barristers and Solicitors Act***, R.S.B.C. 1979, c. 26, which, for present purposes, did not differ in any material way. At pp. 198-99 of ***Commonwealth No. 1***, the Court set out a two-step inquiry:

> The first step investigates the mode of obtaining the contract and whether the client understood and appreciated its contents. . . .
>
> The second inquiry, assuming the contract is found to be "fair" involves an investigation of the "reasonableness" of the contract. On this investigation, extending from the time of the making of the contract until its termination or its completion, all of the ordinary factors which are involved in the determination of the amount a lawyer may charge a client are to be considered . . . .

Thus, "reasonableness" relates to the amount of the fee.

[35] In a second appeal in the ***Commonwealth*** case, reported as ***Commonwealth Investors Syndicate Ltd. v. Laxton*** (1994), 94 B.C.L.R. (2d) 177 (C.A.), app. for leave to appeal dis'd, [1994] S.C.C.A. No. 427, March 30, 1995 ("***Commonwealth No. 2***"), the Court dealt with the meaning of "reasonableness". McEachern C.J.B.C., speaking for the Court, referred to the oft-cited decision in ***Yule v. Saskatoon*** (1955), 1 D.L.R. (2d)

540 (Sask. C.A.) and to the factors set out therein, namely: the extent and character of the services rendered; the labour, time and trouble involved; the character and importance of the litigation; the amount of money and the value of the property involved; the professional skill and experience called for; the character and standing of counsel in the profession; the results achieved; and, to some extent at least, the ability of the client to pay. He observed, at pp. 183-84, para. 25, that further considerations apply in respect of contingent fees including, at least, the risk of no recovery at all and the expectation of a larger fee based upon the result than would be warranted in non-contingency cases.

2000 BCSC 971 (CanLII)

[36] However, the assessment is not produced by simply summing the results of the considerations of each factor. McEachern C.J.B.C. made that clear at p. 187, para. 47, where he said:

> All the circumstances must be considered, including the ***Yule*** factors, the risks and expectations, and the terms of the bargain which is the subject matter of the inquiry. With all this in mind, the court must then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession?

[37] Mr. Laxton's contingent fee agreement in the ***Commonwealth*** cases related to a conventional lawsuit, not to a class action. In my view, the approval of counsels' fees in class

actions involves additional considerations that are not present in the ordinary case.

[38] First, the rationale for using percentage fees in "common fund" cases in the United States is relevant. Class actions differ from conventional actions in that the beneficiaries of the action do not participate actively in it, leaving the instruction of counsel to the representative plaintiff. As was observed in ***Swedish Hosp. Corp. v. Shalala***, *supra* at p. 1265, fees in these cases must be shared by the beneficiaries of the fund in order to avoid their unjust enrichment. American courts have recognized that this approach shifts the emphasis from the fair value of the time expended by counsel, or what we would refer to as a *quantum meruit* fee, to a fair percentage of the recovery: see ***Swedish Hosp. Corp. v. Shalala***, *supra* at p. 1266.

[39] In my opinion, the equitable sharing of fees by the recipients of the award or settlement is a proper consideration in assessing the reasonableness of lawyers' fees in class actions. What is a fair fee for the work done by the lawyer is important, but equally important is that each member of the class should share in payment of a fair fee for the result achieved, as viewed from his or her perspective. This notion has been recognized as a proper consideration in the

2000 BCSC 971 (CanLII)

approval of class counsel fees in British Columbia. In ***Harrington v. Dow Corning Corp.*** (1999), 64 B.C.L.R. (3d) 332 (S.C.), at para. 18, E.R.A. Edwards J. observed that the factors that ought to be considered include "the individual claimants' contribution to the fee as a portion of their recoveries." This passage was applied by Brenner J. (as he then was) in ***Sawatzky v. Société Chirurgicale Instrumentarium Inc.*** (8 September 1999), Vancouver C954740 (B.C.S.C.) at para. 8 and by Williamson J. in ***Fischer v. Delgratia Mining Corporation*** (7 December 1999), Vancouver C974521 (B.C.S.C.) at para. 22. Accordingly, the proportion that the proposed fee bears to the recovery is prominent in the analysis.

[40] A second consideration arises from the unique nature of class proceedings. In a conventional action, the causal relationship between the lawyers' work and the result achieved is normally unquestioned. That is not necessarily so in class actions where the extent of the benefit brought about by the lawyer's work must be ascertained. This concept is illustrated in ***In Re Prudential Ins. Co. of America Sales Litigation***, *supra*, where a class action was brought on behalf of millions of policyholders alleging deceptive sales practices by a life insurer. The Court held that class counsel should not be given full credit for the result when it

2000 BCSC 971 (CanLII)

was based, in part, on a compensation scheme implemented as a result of an investigation by the New Jersey Insurance Commissioner, who recommended a remediation plan to compensate affected policyholders, to prevent future violations, and to restore public confidence in the insurance industry. In remarks that are apposite here, the Court said, at p. 337:

> While a party need not be the only catalyst in order to be considered a "material factor" and may be credited for extra-judicial benefits created, there must still be a sound basis that the party was more than an initial impetus behind the creation of the benefit. Allowing private counsel to receive fees based on the benefits created by public agencies would undermine the equitable principles which underlie the concept of the common fund, and would create an incentive for plaintiffs attorneys to "minimize the costs of failure . . . by free riding on the monitoring efforts of others."

[41] As I have already remarked, the American experience with class actions is instructive. I adopt that reasoning and conclude that it is necessary, in considering the reasonableness of the fee in relation to the results achieved, to consider the causal relationship between the efforts of class counsel and the benefits conferred on the class claimants by the resulting recovery.

[42] I turn now to a consideration of the fees proposed in these actions.

2000 BCSC 971 (CanLII)

III. ANALYSIS AND CONCLUSIONS

1. Fees in the transfused class action

[43] While an examination of the factors identified as relevant to the inquiry is necessary and will be useful, it ought not to overwhelm the recognition of the "judgment, audacity and legal skill" of counsel, to adopt a descriptive phrase used by McEachern C.J.B.C. in ***Commonwealth No. 2***, *supra* at p. 187, para. 46. In my view, Mr. Camp is one of only a few lawyers in this province with the combination of legal talent, experience, and boldness necessary to have achieved this outcome.

(a) The extent and character of the services rendered

[44] The scope of the services rendered by counsel in this case extended far beyond what is normally encountered in the practice of law. Mr. Camp and Mr. Lemer had to deal with difficult legal issues pertaining to product liability, professional negligence, and public policy in the context of public blood-banking and infectious diseases. As well, they had to become familiar with the epidemiology and natural

2000 BCSC 971 (CanLII)

history of HCV, a disease about which little was known at the outset and about which medical opinion was evolving throughout the course of their retainer. Further, they had to learn and to understand the workings of the public health care system in Canada and the interplay between federal, provincial, and territorial governments in the administration of these matters. The medical and political issues were overarching and were, to a large extent, out of their control. They had to react to these things and to accommodate their approach as matters evolved. Throughout, they were faced with disagreements between groups of infected persons and with the changing political winds as these issues were debated in the public media and as governments and government officials changed. At the same time, they had to deal with the many class members who were understandably pressing them for a resolution of the matter. In short, the gravity and difficulty of the task they faced was of the highest order.

2000 BCSC 971 (CanLII)

(b) The labour, time and trouble involved

[45] It is necessary at this point to consider the duration of the retainer of class counsel.

[46] The effective approval date for the settlement was January 22, 2000. Since that time, however, Mr. Camp and Ms. Matthews have expended considerable time, along with counsel in the other jurisdictions, in getting the settlement plan up and running to the point where benefits could be paid to class members. Much of that time was necessitated by the removal and replacement of the initial plan Administrator and, as well, considerable time was invested in preparing the many documents required for the processing of claims.

[47] The issue arises because the terms of the settlement provide for the creation of a Joint Committee, comprised of three class counsel from the transfused class actions and one class counsel from the haemophilic class actions. The terms of the settlement invest the Joint Committee with the overall supervision of the administration of the plan, including the recommending of persons for appointment by the courts as plan Administrator and the preparation of all necessary protocols. The fees of the members of the Joint Committee are to be submitted to the courts for approval from time to time throughout the life of the plan.

[48] Mr. Camp is a member of the Joint Committee and, as I understand it, Mr. Turriff's position is that the time expended by Mr. Camp and Ms. Matthews since January 22, 2000,

2000 BCSC 971 (CanLII)

should be billed as Joint Committee fees and should not be taken into consideration on the approval of class counsel fees.

[49] I cannot agree. Class counsel were retained to recover money for the class plaintiffs on account of their claims, and the work of counsel under their retainer agreements is not finished until that has happened. I understand that payments to class plaintiffs have begun this month. Accordingly, now is the appropriate time to measure the reasonableness of the proposed fees. It should be noted that Mr. Camp does not take the position that he should be entitled to charge for this work as Joint Committee work in addition to his fee as class counsel. Quite properly, in my view, he asks that his work to date be considered in relation to the reasonableness of his contingent fee.

[50] A second preliminary issue concerns the relevance of the time and effort expended by counsel in preparing for and conducting the hearing of the application to approve class counsel fees. Mr. Turriff's position is that this time was not spent for the benefit of class plaintiffs and is therefore not relevant to the reasonableness of the proposed fee. However, s. 38 of the ***Class Proceedings Act*** requires class counsel to seek court approval of their fees. This

2000 BCSC 971 (CanLII)

requirement is an integral part of the statutory scheme for class actions. Moreover, it is a term of each of the fee agreements in issue that the agreed fee will be subject to court approval. Accordingly, the obtaining of court approval of their fees is part of the work plaintiffs' counsel were required to do and the time spent by them in doing so must be considered in the assessment of the reasonableness of their fees.

2000 BCSC 971 (CanLII)

[51] In addition to their efforts in relation to the lawsuit and to the settlement, members of Mr. Camp's firm have spent a great deal of time over the past four years dealing with the questions and concerns of class claimants. As well, much time was devoted to meeting with HCV support groups across the country and with the media. As of June 12, 2000, Mr. Camp's firm has docketed approximately $3,200,000 in work in progress on this file. Mr. Camp and Ms. Matthews have devoted the majority of their time to this action since it was commenced and, as a result, they have declined many other retainers. For his part, Mr. Lemer has recorded more than $500,000 in time on this file since its inception and has spent a large proportion of his professional time on it at the expense of turning down remunerative work.

(c) The character and importance of the litigation

[52] The character of the litigation and its importance to the plaintiffs bear mentioning. As a class action, this action involved many procedural and practical difficulties not encountered in conventional litigation. As well, it was a highly complex product liability/medical negligence case attendant with great risk. The members of the plaintiff class are infected with a debilitating disease that will, in many cases, lead to a protracted and uncomfortable death. The events that precipitated this lawsuit constituted a national public-health disaster. This case was therefore of immense importance to the class plaintiffs and was important, as well, to the Canadian public for the light that it shed on the problems that gave rise to this national tragedy.

(d) The amount of money involved

[53] The total value of the settlement, in present-value terms, is in the order of $1,600,000,000. So far as I am aware, this is the largest settlement of a tort claim for damages for personal injuries in Canadian history.

2000 BCSC 971 (CanLII)

(e) The professional skills and experience called for

[54] Mr. Turriff conceded that the work done by plaintiffs' counsel required a high level of skill; that it was complex, difficult, and well-done; and that the result achieved was excellent. These points cannot be understated. To handle all of these matters and to persevere through to the settlement ultimately achieved involved a quality of representation by counsel that is uncommon. As was observed by McEachern C.J.B.C. in ***Commonwealth No. 2***, *supra* at p. 185, para.36:

> … Because of the breadth of their experience, and their special adversarial skills … senior counsel are quick learners who master the details, understand the issues, conceptualize the difficulties, and figure out how to achieve the desired result. The problems faced by Mr. Laxton were complex and formidable.

Those remarks aptly describe Mr. Camp and the difficulties he faced. This view is shared by Jack Giles, Q.C., a highly-regarded barrister of some forty years experience. In his opinion letter, which was filed in evidence, he said that the result was:

> … a truly remarkable achievement. It was obtained in the face of daunting obstacles and grave risks. It called for a high degree of experience, skill, courage and determination.

2000 BCSC 971 (CanLII)

(e) The character and standing of counsel

[55] Mr. Giles commented, as well, that Mr. Camp was uniquely fitted by his experience and standing for the role of lead counsel in this matter. The evidence supports that view. Moreover, Mr. Lemer has a wealth of experience in blood-related litigation and made good use of his knowledge and experience and, as well, of his relationships with experts in the related fields and with counsel of similar interests.

(f) The ability of the clients to pay

[56] The class plaintiffs began with doubtful claims and it is highly unlikely that any of them could have afforded to pay for individual legal representation in this case. Certainly, Ms. Endean could not have done so. The cost of lawyers and experts, and the potential costs payable to the defendants in the event of failure, were simply prohibitive. These actions were able to go forward only because they were carried by counsel pursuant to contingent fee agreements.

2000 BCSC 971 (CanLII)

(g) The results achieved

[57] The class members will recover full and generous benefits as a result of the settlement and they will do so through a simple, administrative procedure without the necessity of engaging lawyers. Moreover, their costs of claiming compensation are to be covered by the settlement fund. The results achieved can only be described as excellent.

2000 BCSC 971 (CanLII)

(h) The Risk of No Recovery

[58] The risk of no recovery at all was substantial.

[59] A demonstration of that proposition is the fact that the other two law firms consulted by the prospective class plaintiffs were unwilling to take the case on a pure contingency. One was prepared to take it only if paid hourly rates, with the plaintiffs to pay disbursements, and the other, although prepared to act for a contingent fee, insisted that the plaintiffs pay the disbursements. Of the three candidates for the action, only Messrs. Camp and Lemer were willing to undertake the action on a contingent fee at no cost to the plaintiffs.

[60] The plaintiffs' best chance of establishing liability was against the Canadian Red Cross, but those hopes were dashed when this action was stayed against that organization and it was granted protection from its creditors pursuant to the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36, leaving minimal assets available for satisfaction of any judgment. As well, the stay impeded the ability of counsel for the plaintiffs to obtain important evidence from the Canadian Red Cross through pre-trial discovery. On the other hand, the risk of failure on liability against the FPT Governments was real and significant.

[61] It was not only the risk of failure in the lawsuit that counsel had to contend with. There were also political risks. The danger existed throughout that the FPT Governments might establish a no-fault compensation scheme that would undermine these actions. This risk was heightened when the Krever Commission recommended in November 1997 that a no-fault compensation scheme be implemented by government for all those infected with HCV. Had that happened, these actions would have been for naught and plaintiffs' class counsel would have had to absorb the considerable costs they had incurred in carrying them.

2000 BCSC 971 (CanLII)

[62] There was also a significant risk that the settlement negotiations might fail. This was a matter of grave concern because the prospects of achieving comparable recovery through a trial were poor. Throughout the negotiations, counsel were frequently faced with potentially deal-breaking issues. As well, there were disputes between the class plaintiffs and other groups of infected persons that threatened to thwart a comprehensive settlement. There was, further, the risk that the courts would not approve the settlement. After that obstacle was overcome, the risk of the settlement negotiations aborting continued because of the modifications suggested by the courts. The FPT Governments initially took the position that these modifications were material, which would have allowed them to withdraw from the settlement, and it was only through further arduous bargaining that they were persuaded to accept the changes.

[63] Accordingly, the risk of no recovery was a substantial and omnipresent risk that did not diminish over the course of the retainer but continued until the FPT Governments finally accepted the court-suggested modifications to the settlement agreement.

[64] Moreover, the consequences of failure to Mr. Camp and Mr. Lemer would have been devastating. Mr. Camp correctly

2000 BCSC 971 (CanLII)

described this enterprise during his submission as "bet-your-firm-litigation."

2000 BCSC 971 (CanLII)

(i) The expectation of a larger fee than in a non-contingency case

[65] It is the nature of contingent fees that counsel and client expect that the fee, if success is achieved, will exceed what would otherwise be appropriate for the work done. Counsel shoulder the risk of failure in these cases and they and their clients legitimately expect that they will recover an enhanced fee for doing so. The evidence of Ms. Endean on this application bears this out.

(j) The contribution of counsel to the result

[66] I do not think that it can be said that counsel are seeking to take advantage of any "extra-judicial" benefit to the class plaintiffs, as was the case in ***In Re Prudential Ins. Co. of America Sales Litigation,*** *supra.* The first indication of a willingness by the FPT Governments to pay compensation was on March 27, 1998, after the transfused class actions in British Columbia and Quebec had been certified on behalf of residents of those provinces and after the action on behalf of

all other class members resident in Canada had been commenced in Ontario. Moreover, the announcement of the available $1,100,000,000 limited the potential recipients to the claimants in the class actions. In my view, the pre-eminent cause of the recovery in the context of this discussion was the effort of class counsel, and it would not be proper to give them less than full credit for the result.

2000 BCSC 971 (CanLII)

[67] As already noted, Mr. Turriff argued that I must measure the relative contribution of class counsel in each province to the pan-Canadian settlement so that there will be no chance of counsel in one province being credited in fees for value contributed by counsel in other provinces. However, it is impossible in hindsight to unravel the many factors that influenced the ultimate outcome in this case. The efforts of counsel in the other provinces undoubtedly played a large role. As well, the voices of lobby groups and others heard through the media likely entered into the deliberations of the FPT Governments. It is not necessary to identify the discrete causal contributions and to measure their respective force. It is sufficient to ascertain whether the efforts of Mr. Camp and Mr. Lemer were a material cause of the result achieved to the extent that they should receive full credit in their fees for the outcome. I have concluded that they were.

[68] In that regard, it should be noted that Mr. Camp and Mr. Lemer were the first to obtain class-action certification. Although the Quebec action had been commenced, it had not been certified at that time. The Ontario action had not yet even been commenced. The certification was no small accomplishment given the vigour with which the application was contested and the fact that the only previous Canadian attempt to obtain certification for a mass tort action involving infected blood had met with failure: see ***Sutherland v. Canadian Red Cross Society*** (1994), 17 O.R. (3d) 645 (Gen. Div.). Whether the actions in the other provinces would have gone forward otherwise or not, it appears that the certification in British Columbia was the catalyst that gave them life.

[69] The certification also energized plaintiffs' counsel nationally and Mr. Camp played a role in bringing approximately twenty of them together to form a coalition for the purpose of advancing their clients' claims. He made other significant contributions, as well. He was the chair of the coalition's first negotiating committee and, when that committee became unwieldy, he was one of three counsel delegated to negotiate for the transfused class, along with Mr. Strosberg of Ontario and Mr. Lavigne of Quebec. Mr. Camp was the first to bring representatives of the FPT Governments

2000 BCSC 971 (CanLII)

to the bargaining table when he met with Mr. Whitehall and Mr. Prowse, representing the federal and British Columbia governments respectively, on February 11, 1998. This meeting led to the further meetings that ultimately resulted in settlement. Mr. Camp and Ms. Tough, Ontario counsel for the haemophilic classes, were instrumental in bridging the differences between the transfused class members and the haemophilic class members. This accommodation resulted in their bargaining jointly with the FPT Governments, which was critical to the success of the negotiations. Mr. Camp's judgment and tactical decisions from time to time throughout the negotiations were important to their success.

[70] Mr. Lemer and Ms. Mathews made significant contributions as well. Both served on the subcommittees formed by the coalition of lawyers for the purpose of facilitating negotiations and moving the lawsuits forward. I have already commented on Mr. Lemer's depth of knowledge and his value as a resource in relation to blood-related litigation.

[71] I am satisfied that British Columbia class counsel made a substantial contribution to the result and that their efforts were at least as valuable as those of class counsel in the other provinces. It would not be proper in the circumstances

2000 BCSC 971 (CanLII)

to give them less than full credit for the result in the assessment of the reasonableness of their proposed fees.

2000 BCSC 971 (CanLII)

(k) The integrity of the legal profession

[72] Next, Mr. Turriff submitted that the fee proposed here is "simply too much". He suggested that a fee of this magnitude would "impair the integrity of the legal profession". That phrase appears in the remarks of McEachern C.J.B.C. in ***Commonwealth No. 2***, *supra*, where, at p. 187, para. 47, in a passage that I have already quoted, he said:

> . . . With all this in mind, the court must then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession? . . .

[73] Esson C.J. (as he then was) commented on this concept in ***Richardson (Guardian ad litem of) v. Low*** (1996), 23 B.C.L.R. (3d) 268 (S.C.) at paras. 29-30. I think that what he envisaged in using the phrase "integrity of the profession" was the decency, honour, and high-mindedness of the profession, both in substance and in public perception. He referred, for example, to the willingness of lawyers to readily reduce the amount payable under a contingent fee

agreement when circumstances are such that the agreed fee would be disproportionate to the amount of effort, risk, and cost involved; that the lawyer will be able to fill with other remunerative work the time set aside to try a case that was settled; and that the client needs the funds and cannot really afford to pay them to the lawyer despite the agreement.

[74] Here, the fees proposed are very large. The total value of the time docketed by all plaintiffs' counsel for the transfused class, including those who acted for individual plaintiffs and who will be paid their fees by Mr. Camp, amounts to approximately $4,000,000. Accordingly, the proposed fee is roughly 3.75 times the value that they have ascribed to their work. However, that is not necessarily a reliable measure, as I have already noted. Moreover, it must be remembered that good counsel can often achieve with a minimal effort what it might take less skillful counsel a great deal of time to achieve, as was seen in ***Commonwealth No. 1*** and ***Commonwealth No. 2***. Good counsel should not be penalized for their acuity and efficiency by basing their fees only on the amount of time that it took them to accomplish their clients' objectives.

[75] Mr. Camp and Mr. Lemer do not seek approval of a percentage fee in this case. However, percentage contingent

2000 BCSC 971 (CanLII)

fees have long been common in British Columbia and have been approved in class proceedings in this province: see ***Harrington v. Dow Corning Corp.***, *supra*, ***Campbell v. Flexwatt Corp.*** (22 February 1996), Victoria 2895/95 (B.C.S.C.), and ***Fischer v. Delgratia Mining Corporation***, *supra*. A comparison between the proposed fees as a percentage of the settlement amount and percentage fees approved in previous class actions will therefore be informative, although I must not lose sight of the principle identified by Esson C.J. (as he then was) in ***Richardson (Guardian ad litem of) v. Low***, *supra* at para. 35:

> The question "what is the reasonable fee?" must be answered, not as a percentage, but in dollars.

[76] There is evidence that British Columbia has approximately 22% of the transfused HCV-infected cohort. On that basis, for purposes of rough estimation, approximately $352,000,000 of the $1,600,000,000 settlement can be notionally credited to the clients represented by Mr. Camp and Mr. Lemer, and their proposed fee of $15,000,000 is 4.26% of the recovery.

[77] A contingent percentage fee of that magnitude in an action for damages for personal injuries is virtually unheard of in British Columbia. Rule 8-4(2) of the ***Law Society Rules*** permits a maximum percentage of 40% in cases such as this. The vast majority of percentage contingent fees in British

2000 BCSC 971 (CanLII)

Columbia range between 15% and 33 1/3%. In ***Harrington v. Dow Corning Corp.***, *supra* E.R.A. Edwards J. observed that class counsel fees in the United States commonly range between 15% and 50%, and that a "presumptively reasonable rate" is 30%. He approved a contingent fee of 15%, which produced a fee in the order of $6,000,000 for plaintiffs' class counsel. In ***Sawatzky***, *supra* a contingent fee of 20% amounting to $760,000 was approved. In ***Fischer***, *supra* a fee of 30% of shares in a public company issued in settlement was approved, although the value of the fee in monetary terms is not apparent.

2000 BCSC 971 (CanLII)

[78] The fee proposed here compares favourably in percentage terms with contingent fees approved in Ontario and Quebec, as well. In ***Nantais***, *supra* Brockenshire J. approved a percentage fee of 30%, which yielded a fee of approximately $6,000,000. In ***Doyer v. Dow Corning Corp.*** (1 September 1999), Montreal 500-06-000013-934 (Q.S.C.) a percentage of 20% was approved yielding a fee of $10,400,000. In ***Pelletier v. Baxter Health Care Corp.***, [1999] Q.J. No. 3038 (Q.L.) (S.C.), a percentage of 16.9% yielding $3,648,000 in fees was approved.

[79] I note, as well, the observation of McEachern C.J.B.C., speaking for the Court in ***Commonwealth No. 2***, *supra* at p. 188, para. 49, that he saw nothing unreasonable or threatening to the integrity of the profession in a fee of 25% "for the

skillful recovery of $6.5 million." Further, Mr. Giles, who is an experienced Vancouver barrister, as I have already noted, does not appear to consider that Mr. Camp's proposed fee is unseemly: he expressed the opinion that it is reasonable in all the circumstances.

[80] I accept that a percentage fee should generally be lower where the recovery is higher. However, 4.26% is modest by any standard.

[81] Another important factor in this connection is that the fees are not to be deducted from the compensation payable to the individual plaintiffs, as the settlement agreement provided for an allocation of $52,500,000 for legal fees in addition to that compensation. It could be said that this observation is illusory, as the $52,500,000 could have been allocated in part to plaintiffs' claims. However, two facts cannot be overlooked. First, the individual compensation awards provided for in the fund are full and generous and are available to the class members without further legal proceedings. Secondly, the FPT Governments tacitly agreed to fees up to this amount when they agreed upon the structure of the settlement fund.

[82] Another perspective can be gained by considering the fee from the point of view of each member of the class. It

2000 BCSC 971 (CanLII)

appears that there are approximately 22,000 class members in British Columbia and the fee therefore works out to about $682 each. This is a modest fee for individual awards ranging from a minimum of $10,000 in non-pecuniary compensation to a maximum of $225,000 for non-pecuniary compensation plus loss of income, cost of care and home services, and other expenses, particularly when the fee is not deducted from the award.

2000 BCSC 971 (CanLII)

[83] It is also important to note that the representative plaintiff, Ms. Endean, considers the fee to be reasonable and urges the court to approve it.

[84] While public perception is difficult to gauge, there is some interesting anecdotal evidence here. On July 11, 1999, Mr. Camp appeared on a "hot line" radio show in Vancouver, on a station that has coverage throughout the province, to discuss the $52,500,000 allocated for plaintiffs' lawyers' fees in this case. After Mr. Camp explained his justification of that amount, the host took several calls from listeners. The majority of callers supported Mr. Camp's position and, of those who were not supportive, none were overly critical. I do not give this evidence any weight as a measure of public opinion on this matter, but it does suggest that at least some members of the public would not think less of the profession if the fee proposed in this case should be approved.

[85] In my opinion, to say that the fee is "simply too much" invites a completely arbitrary assessment, one that depends upon the subjective opinions and whims of the particular judge hearing the application. If the proposed fees are to be reduced on the ground that they impair the integrity of the profession, some principled basis must be suggested for doing so. None has been suggested and I cannot agree that the proposed fee should be reduced by an arbitrary amount ostensibly to protect the integrity of the profession.

2000 BCSC 971 (CanLII)

(1) Public policy

[86] Mr. Turriff also advanced a public policy argument. He said that his clients want this Court to establish an upper limit for fees in class actions generally. One of his clients, the Province of British Columbia, enacted the ***Class Proceedings Act*** just a few years ago, in 1995, but did not impose any upper limit on fees at that time. Under our system of government, the introduction of a public policy of this nature is a matter for our elected representatives, not for this Court, and I decline Mr. Turriff's invitation to judicially legislate an upper limit.

[87] There is, however, an aspect of public policy that is relevant. It was captured by Professor Garry D. Watson Q.C. in a paper entitled ***Class Actions: Uncharted Procedural Issues***. In discussing the issue of compensation for plaintiffs' class counsel in the context of the Ontario statute, he said this:

> This is a vitally important subject, not just because it determines what will go into class counsel's pocket but because it will determine whether or not the legislation is successful. In the final analysis whether or not the ***Class Proceedings Act*** will achieve its noble objectives will largely depend upon whether or not there are plaintiff class lawyers who are prepared to act for the class and hence bring the actions. This in turn depends on two factors (a) the level of monetary reward given to class counsel, and (b) the predictability and reliability of the award. In the final analysis, both of these aspects are crucial. Class actions will simply not be brought if class counsel are not adequately remunerated for the time, effort and skill put into the litigation and the risk they assume (under contingency fee arrangements) of receiving nothing. Equally important is that such remuneration be reasonably predictable, i.e., that class counsel can take on class actions with a reasonable expectation that in the event of success they will receive reasonable remuneration. It is vital to the viability of class actions that class counsel not be met on "judgment day" with judicial pronouncements (issued with the "benefit" of hindsight) that class counsel "spent too much time, had hourly rates that were too high and in any event were conducting a case which was not really risky at all" and awarded a low base fee and a niggardly multiplier — except in very clear cases.

2000 BCSC 971 (CanLII)

[88] These comments flow from the objectives of the class action legislation, which include the improvement of access to the courts for those whose actions might have merit but who would not otherwise pursue them because the legal costs of proceeding are disproportionate to the amount of the individual claims: see ***Endean No. 1***, *supra* at para. 23. Given that objective, the courts must ensure, first, that plaintiffs' lawyers who take on risky class actions on a contingent basis are adequately rewarded for their efforts and, second, that hindsight is not used unfairly in the assessment of the reasonableness of their fees.

[89] On a consideration of all of the circumstances in this case, I am satisfied that the contingent fee contract was fair at the time it was made and that the fee of $15,000,000 proposed by Mr. Camp and Mr. Lemer is reasonable.

2. Fees in the haemophilic class action

[90] I turn now to the fee proposed by Mr. Storrow in the haemophilic class action.

[91] Actions were commenced on behalf of the haemophilic claimants in Ontario, Quebec, and British Columbia in 1998. The Ontario action was commenced by Ms. Tough, then of the

2000 BCSC 971 (CanLII)

firm of Blake, Cassels & Graydon, who coordinated and supervised the actions in Quebec and British Columbia as well. On May 1, 1998, the Vancouver office of that firm commenced the Mitchell action in this Court. The nature and extent of the work done in the Vancouver office of the firm is described in the following extract taken from Mr. Neaves' affidavit:

> 4. Blakes Vancouver delegated to Ms. Tough the responsibility of acting as national lead counsel on behalf of each plaintiffs' class in the British Columbia, Ontario and Quebec Hemophiliac Class Actions. However, I spent a considerable amount of time preparing for and participating in negotiation sessions with the FPT governments on behalf of the Representative Plaintiff in this action and in support of Ms. Tough's efforts. As a member of the Blakes Vancouver team, I provided advice to senior personnel in the Canadian Hemophilia Society and to members of the steering committee [of plaintiffs' class counsel]. I frequently consulted with and took instructions from the Representative Plaintiff. Mr. Gruber spent a considerable amount of time preparing for the hearing to approve the settlement that was ultimately reached and dealing with subsequent matters. Throughout our involvement, Mr. Storrow provided the Blakes Vancouver team with direction and advice and supported Ms. Tough in her national efforts.

[92] Counsel for the haemophilic classes agreed to seek a collective fee of $7,500,000 and to share it in proportion to the amount of work done in each province. According to Mr. Neaves, the $7,500,000 "primarily represents the work of Ms. Tough". In Mr. Neaves' words, the Vancouver office did "the least amount of work on its own." As lawyers in the Vancouver

2000 BCSC 971 (CanLII)

office spent most of their time assisting Ms. Tough, they agreed to seek $500,000 for their fees and Mr. Mitchell executed a contingent fee contract with Blake, Cassels & Graydon in that amount on June 2, 1999.

[93] Counsel for this group ran similar risks to counsel for the transfused group, including the risks that for political reasons the FPT Governments would institute a no-fault compensation scheme and that negotiations would fail. These risks had heightened consequences for counsel for the haemophilic classes because of the greater litigation risk arising out of the grave difficulties they would necessarily encounter in attempting to prove causation. In the case of the transfused plaintiffs, it would be possible to identify a discrete transfusion as the source of the infection. However, haemophilic plaintiffs have been receiving blood and blood products regularly, many since before 1986, and the blood products were manufactured from pooled blood donations, making proof of causation at a trial very difficult if not impossible. The settlement was therefore particularly valuable for this group.

[94] The compensation plan for these claimants is very similar to that agreed upon for the transfused class. However, haemophilic plaintiffs have a better result than transfused

2000 BCSC 971 (CanLII)

plaintiffs in some respects. First, haemophilic plaintiffs will not have to establish that their infection occurred within the class period. This is a critical provision because of the inability of most haemophiliacs to identify the source of their infection. Second, haemophiliacs will not be required to submit to liver biopsies for the purpose of identifying the relevant stage of their illness for compensation purposes. This is important because of the danger of uncontrollable bleeding from such an invasive procedure. Next, estates and family members of haemophiliacs who died prior to January 1, 1999, and who were infected with both HIV and HCV at the time of death may elect to receive a payment of $72,000 without proof that HCV was the cause of death. Finally, haemophilic plaintiffs infected with both HIV and HCV may avoid the stress and anxiety of participating in the long-term compensation program by electing to take a lump sum payment of $50,000.

[95] It is apparent that, in comparison to Mr. Camp and his colleagues, British Columbia counsel for the hemophilic class made a smaller contribution to the outcome. The weight of the following factors accrues largely to Ms. Tough: the extent and character of the services rendered, the professional skills and experience called for, the character and standing of

2000 BCSC 971 (CanLII)

counsel, the results achieved, and the contribution of counsel to the result. On the other hand, although Ms. Tough deserves the lion's share of credit for the result, there is no doubt that the efforts of British Columbia counsel assisted her significantly in her efforts.

[96] Other factors involved in the assessment of reasonableness are directly applicable to the claim by British Columbia counsel. The risks of failure of the action and of the negotiations were assumed by Mr. Storrow and his colleagues, though the consequences of failure were of a much lesser order of magnitude to them than to Mr. Camp and Mr. Lemer. As well, it must be remembered that the risk of failure in the litigation was far higher for this class than for the transfused class. The litigation was profoundly important to the haemophilic class members, the amount recovered is generous, and the plaintiffs would not have been able to achieve the settlement without the assistance of class counsel acting on a contingent fee agreement. Moreover, the character and standing in the profession of Mr. Storrow and his colleagues is undisputed.

[97] It must be noted that the Vancouver office of Blakes docketed no time on this matter until March 28, 1998, the day following the announcement on behalf of the FPT Governments

2000 BCSC 971 (CanLII)

that they would make $1,100,000,000 available to settle the actions. In pointing this out, Mr. Turriff suggested that there was no significant risk run by British Columbia counsel. There is an initial appeal to this assertion, but it does not tell the whole story. As I have already observed elsewhere in these reasons, the risk that negotiations might founder was a real and present risk until well after the judgments granting conditional approval of the settlement. Thus, the time invested by British Columbia counsel was at risk of being valueless. As well, the Toronto arm of the firm had invested substantial time and effort, through Ms. Tough, on behalf of haemophiliacs in the preceding years. The thoroughness and quality of Ms. Tough's work stands out clearly on the evidence. While her agreement to a fee of $500,000 for her Vancouver colleagues may seem generous, it is undoubtedly an expression of her view of the value of their work to the overall result and of the extent of the risk that they ran. As such, I consider it to be evidence supporting the reasonableness of the proposed fee.

[98] Of the total amount of the settlement, it is estimated that approximately $150,300,000 should be allocated notionally to the haemophilic classes. Of the approximately 1,650 haemophilic plaintiffs nationally, approximately 180 are

2000 BCSC 971 (CanLII)

residents of British Columbia, or roughly 11%. If it is assumed that the total recovery for British Columbia haemophilic plaintiffs is 11% of the $150,300,000, that is, $16,533,000, the $500,000 share of the fee allocated to British Columbia counsel is 3% of the recovery. That is a manifestly reasonable percentage.

[99] Assuming a cohort of 180 plaintiffs resident in British Columbia, the fee represents a charge of approximately $2,800 per plaintiff. While these are rough estimations, that is a reasonable amount for each claimant to pay in relation to the benefits recovered for them.

[100] If the matter is examined from the base fee/multiplier approach, the proposed fee does not fare as well. A rough estimate of the value attributed to the time docketed by the Vancouver office of Blakes is $90,000. The proposed fee therefore represents a multiplier of 5.5, which is at the high end of the range of permissible multipliers using this approach.

[101] The sorts of checks on reasonableness that I have just performed are useful as guides but, at bottom, the question is whether the proposed fee is reasonable having regard to all of the relevant circumstances. Having

2000 BCSC 971 (CanLII)

considered the circumstances, I conclude that this proposed fee of $500,000 meets the test for reasonableness.

3. Disbursements

[102] As I understand it, Mr. Camp claims disbursements in the amount of $75,376 and Mr. Turriff, having scrutinized the items comprising that total, agrees that the amount claimed is reasonable and that the disbursements involved are properly payable. Accordingly, the claim for disbursements totalling that amount is approved.

[103] Mr. Storrow advised during his submission that the disbursements for which he claims reimbursement total approximately $35,000. Mr. Turriff indicated that he wished to have some time to review the disbursements claimed and to make a written submission if he should think it necessary. I have not received anything further from counsel in this regard. Accordingly, if counsel can agree on the disbursements, they may insert the agreed amount in the order to be drawn up consequent on these reasons. There will be liberty to apply in the event that there are disbursement items requiring adjudication.

"K.J. Smith, J."
The Honourable Mr. Justice K.J. Smith

2000 BCSC 971 (CanLII)

June 23, 2000 -- Memorandum issued to the Law Publishers as directed by Mr. Justice Smith advising that on Page Two of his Reasons for Judgment, the title for one of the Defendants should read as follows:

> "Counsel for the Defendant, The Attorney General of Canada, and the Third Party, Her Majesty the Queen in Right of Canada"

2000 BCSC 971 (CanLII)

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Fontaine et al.* v. *Canada et al.*,
2006 YKSC 63

Date: 20061215
Docket No.: S.C. No. 05-A0140
Registry: Whitehorse

2006 YKSC 63 (CanLII)

Between:

LARRY PHILIP FONTAINE in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased, MICHELLINE AMMAQ, PERCY ARCHIE, CHARLES BAXTER SR., ELIJAH BAXTER, EVELYN BAXTER, DONALD BELCOURT, NORA BERNARD JOHN BOSUM, JANET BREWSTER, RHONDA BUFFALO, ERNESTINE CAIBAIOSAI-GIDMARK, MICHAEL CARPAN, BRENDA CYR, DEANNA CYR, MALCOLM DAWSON, ANNE DENE, JAMES FONTAINE in his personal capacity and in his capacity as Executor of the Estate of Agnes Mary Fontaine, deceased, VINCENT BRADLEY FONTAINE, DANA EVA MARIE FRANCEY, PEGGY GOOD, FRED KELLY, ROSEMARIE KUPTANA, ELIZABETH KUSIAK, THERESA LAROCQUE, JANE McCULLUM, CORNELIUS McCOMBER, VERONICA MARTEN, STANLEY THOMAS NEPETAYPO, FLORA NORTHWEST, NORMAN PAUCHEY, CAMBLE QUATELL, ALVIN BARNEY SAULTEAUX, CHRISTINE SEMPLE, DENNIS SMOKEDAY, KENNETH SPARVIER, EDWARD TAPIATIC, HELEN WINDERMAN and ADRIAN YELLOWKNEE

Plaintiffs

And

THE ATTORNEY GENERAL OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS IN THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH, THE BAPTIST CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN BAY, THE CANADA IMPACT NORTH MINISTRIES, THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE DIOCESE OF SASKATCHEWAN, THE DIOCESE OF THE SYNOD OF CARIBOO, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE METHODIST MISSIONARY SOCIETY OF CANADA), THE INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE ANGLICAN CHURCH OF THE DIOCESE OF QUEBEC, THE SYNOD OF THE DIOCESE OF ATHBASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE ANGLICAN SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE SYNOD OF THE DIOCESE OF NEW WESTMINSTER, THE SYNOD OF THE DIOCESE OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE BOARD OF HOME MISSIONS AND SOCIAL SERVICE OF THE PRESBYTERIAN CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, SISTERS OF CHARITY, A BODY CORPORATE ALSO KNOWN AS SISTERS OF CHARITY OF ST. VINCENT DE PAUL,

HALIFAX, ALSO KNOWN AS SISTERS OF CHARITY HALIFAX, ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, LES SOEURS DE NOTRE DAME – AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, INSTITUT DES SOEURS DU BON CONSEIL, LES SOEURS DE SAINT-JOSEPH DE SAINT-HYACINTHE AND INSTITUT DES SOEURS DE SAINT-JOSEPH DE ST-HYACINTHE, LES SOEURS DE JESUS-MARIE, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE, LES SOEURS DE L'ASSOMPTION DE LA SAINT VIERGE DE L'ALBERTA, LES SOEURS DE LA CHARITE DE ST.-HYACINTHE, LES OEUVRES OBLATES DE L'ONTARIO, LES RESIDENCES OBLATES DU QUEBEC, LA COPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE JAMES (THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY), THE CATHOLIC DIOCESE OF MOOSONEE, SOEURS GRISES DE MONTRÉAL/GREY NUNS OF MONTREAL, SISTERS OF CHARITY (GREY NUNS) OF ALBERTA, LES SOEURS DE LA CHARITÉ DES T.N.O. HOTEL-DIEU DE NICOLET, THE GREY NUNS OF MANITOBA INC. – LES SOEURS GRISES DU MANITOBA INC., LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE D'HUDSON – THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, MISSIONARY OBLATES – GRANDIN, LES OBLATES DE MARIE IMMACULEE DU MANITOBA, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE SISTERS OF THE PRESENTATION, THE SISTERS OF ST. JOSEPH OF SAULT ST. MARIE, SISTERS OF CHARITY OF OTTAWA, OBLATES OF MARY IMMACULATE – ST. PETER'S PROVINCE, THE SISTERS OF SAINT ANN, SISTERS OF INSTRUCTION OF THE CHILD JESUS, THE BENEDICTINE SISTERS OF MT. ANGEL OREGON, LES PERES MONTFORTAINS, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE, THE BISHOP OF VICTORIA, CORPORATION SOLE, THE ROMAN CATHOLIC BISHOP OF NELSON CORPORATION SOLE, ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD , ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, LA CORPORATION ARCHIÉPISCOPALE CATHOLIQUE ROMAINE DE ST. BONIFACE, LES MISSIONAIRES OBLATES SISTERS DE ST. BONIFACE – THE MISSIONARY OBLATES SISTERS OF ST. BONIFACE, ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC BISHOP OF THUNDER BAY, IMMACULATE HEART COMMUNITY OF LOS ANGELES CA, ARCHDIOCESE OF VANCOUVER – THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, ROMAN CATHOLIC DIOCESE OF WHITEHORSE, THE CATHOLIC EPISCOPALE CORPORATION OF MACKENZIE – FORT SMITH, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, EPISCOPAL CORPORATION OF SASKATOON, OMI LACOMBE CANADA INC.

Defendants

Before: Mr. Justice R.S. Veale

Appearances:

Kirk Baert	Counsel for the Plaintiffs (National Certification Committee)
Laura Cabott and Dan Shier	Independent Counsel for the Plaintiffs
Debra Fendrick	Independent Counsel
John Phillips	Counsel for the Assembly of First Nations
Janice Payne	Counsel for the Inuit Organizations
Catherine Coughlan	Counsel for Canada

2006 YKSC 63 (CanLII)

Alex Pettingill — Counsel for the Protestant Church Entities
Pierre Baribeau — Counsel for the Catholic Church Entities

REASONS FOR JUDGMENT

INTRODUCTION

2006 YKSC 63 (CanLII)

[1] The Indian Residential School system has been a dark period of Canadian history. The purpose of the system was to destroy the language and culture of the aboriginal people of Canada. The government of Canada and certain churches separated aboriginal children from their families and placed them in inadequately funded institutions where they were prohibited from speaking their languages and practising their cultures. There are an estimated 79,000 Indian Residential School survivors alive today, down from an estimated 83,000 in 2001. Approximately 15,000 are pursuing individual tort claims against Canada and the churches. It is estimated that Indian Residential School survivors are dying at a rate of approximately 1,000 to 1,300 per year.

[2] Our court system is unable to accommodate such a large number of claims in a timely manner. The current number and location of court claims are as follows:

Active Litigation and Plaintiffs	Statement of Claims	Plaintiffs
Alberta	1,432	3,950
British Columbia	313	830
Manitoba	289	1,157
New Brunswick	1	1
NWT	20	29
Nova Scotia	1	582
Nunavut	6	191
Ontario	101	657
Quebec	16	89
Saskatchewan	2,112	2,949
Yukon	46	103
Total Active	4,337	10,538

[3] Canada entered into a Political Agreement with the Assembly of First Nations on May 30, 2005, committing to work together to achieve "a just and fair resolution of the Indian Residential School legacy".

[4] Canada appointed former Supreme Court of Canada Justice Frank Iaccobucci to negotiate a Canada wide settlement with representatives of the survivors and their families, representatives of aboriginal organizations, including the Assembly of First Nations and Inuit groups, and church groups. The negotiations were prolonged and difficult but resulted in an Agreement in Principle signed on November 20, 2005, and a final Settlement Agreement signed by June 2006.

[5] The lawyers for all parties now appear in nine separate jurisdictions (Alberta, British Columbia, Manitoba, Northwest Territories, Nunavut, Ontario, Quebec, Saskatchewan and Yukon) seeking the certification of the class action and approval of the settlement. If the court approves, there are two alternatives. It can approve the settlement unconditionally and provide supervision to ensure that timelines and payments are met. Or, it can approve conditionally in an attempt to improve the settlement and send the parties back to the negotiating table. I have decided to certify the class action and approve the settlement unconditionally, retaining supervisory jurisdiction so the parties may return to court for directions or remedies. The only certainty in sending the parties back to the negotiating table, in the best case scenario, is further delay. Delay has a serious impact on Indian Residential School survivors who are dying at a rate of 25 a week.

Have You Ever Heard a Whole Village Cry?

[6] This question was asked by a First Nation woman who spoke in court. It captures in one sentence the horror and pain experienced by the parents and children in

2006 YKSC 63 (CanLII)

aboriginal communities when government and church representatives appeared in cars, trucks, vans and planes, to take the children away to institutions. It is not possible to do justice to the stories of 79,000 aboriginal people in this judgment. Suffice it to say that although there were some benefits, the majority of the survivors found it to be a devastating experience. It was all the more so for those who suffered physical assaults, sexual assaults and psychological harm.

[7] The Royal Commission of Aboriginal Peoples concluded that the Residential School system was a blatant attempt to re-socialize aboriginal children with the values of European culture and obliterate aboriginal languages, traditions and beliefs. The inferior education, mistreatment, neglect and abuse that resulted are a concern to all Canadians. The Assembly of First Nations and National Chief Phil Fontaine have pursued a Canada wide settlement since 1990.

2006 YKSC 63 (CanLII)

THE SETTLEMENT

[8] The settlement provides compensation for individual survivors as well as healing programs and benefits for their families and communities. It is a compensation package that is beyond the jurisdiction of any court to create. It is much more than the settlement of a tort-based class action; it is a Political Agreement. The Settlement Agreement itself, without schedules, is 78 pages in length. It is signed by Canada, the Assembly of First Nations and Inuit organizations as well as church entities and the numerous lawyers involved in the negotiation. It consists, among other things, of:

1. <u>The Common Experience Payment</u>

[9] Each survivor will be eligible to receive $10,000 for their first year of attendance at an Indian Residential School and $3,000 for each subsequent year. Canada will set aside a fund of $1.9 billion in order to compensate each student living at May 30, 2005.

If there is a surplus of funds in excess of $40 million, former students will receive an additional sum of up to $3,000 each. Any surplus under $40 million will go to aboriginal organizations for healing and education initiatives. The $40 million threshold was arrived at by taking into account the administrative costs of a payout to individual survivors. If $1.9 billion proves insufficient, Canada will supplement the funding. An applicant who is denied may appeal to the National Administration Committee, and if denied at that level, to the appropriate court. I will address the National Administration Committee below.

2006 YKSC 63 (CanLII)

2. The Independent Assessment Process

[10] This part of the Settlement Agreement requires the greatest scrutiny as it requires claimants to release their court actions against the government and churches in exchange for the claims permitted under the Independent Assessment Process.

[11] The Independent Assessment Process is intended to replace and improve the Alternative Dispute Resolution process which began in 2003 and has resolved 1,000 of the approximately 5,000 outstanding claims in that process.

[12] The Alternative Dispute Resolution process uses a team of carefully selected adjudicators to, in effect, act as judges to hear and decide claims. Although it is an improvement over the court litigation process, it was estimated in 2004 that it would take 53 years to conclude the process. To address this in the Independent Assessment Process, Canada has agreed to increase the number of adjudicators from 48 to 86 and hold 2,500 hearings per year. Canada has agreed to settle all these claims within 6 years of the implementation date of the Settlement Agreement.

[13] The Alternative Dispute Resolution has many draw backs identified by claimants and the Assembly of First Nations. It is limited to sexual assaults and serious physical assaults. The Catholic Church was not part of the process so some claimants only

received 70% of their award. The Alternative Dispute Resolution process is completely controlled by Canada and can be changed unilaterally.

[14] The Independent Assessment Process has certain enhancements over the Alternative Dispute Resolution process. It provides greater certainty as it would be part of a court order. It will address claims for sexual assaults, serious physical assaults and serious psychological harm. It has increased the overall compensation from a former limit of $245,000 to $275,000 and all individuals will receive 100% of their award. The list of Indian Residential Schools has been expanded to include boarding facilities. Sexual abuse by other students is included and liability for sexual and physical abuse extends to all adult persons lawfully on the school premises. Actual income loss, which was not compensable previously, has been added with awards up to $250,000. In very serious cases, the adjudicator can refer the income issue to court where there is no compensation ceiling. Provision has also been made for settlement of claims without a hearing.

[15] The Independent Assessment Process is set out in a 67-page document attached as a schedule to the Settlement Agreement. The purpose of such a document is to ensure uniformity in the processing of claims by the adjudicators. There is a review process that permits a claimant to ask the Chief Adjudicator or designate to review an adjudicator's decision to determine if it contains a palpable and overriding error.

[16] Two classes of admittedly weaker claims are not included in the Independent Assessment Process. They are family class members who are related to survivors and deceased class members who resided at Indian Residential Schools between 1920 and 1997, but died before May 30, 2005. However, these classes may opt out and go to

2006 YKSC 63 (CanLII)

court. They are also eligible to participate in the healing and reconciliation components of the settlement set out below.

3. The Truth and Reconciliation Commission and Commemoration

[17] The Settlement Agreement allocates $60 million to create a Truth and Reconciliation Commission. The purpose of the Commission is to allow survivors, their families and communities, churches and government, to participate in a collective process to facilitate reconciliation as well as create a permanent record. The Church groups will co-operate with the Commission. The Commission will receive approximately $20 million to allocate to communities for memorials or ceremonies.

4. Healing

[18] Canada will pay $125 million to the Aboriginal Healing Foundation to fund culturally appropriate healing programs. Canada also agrees to continue to provide "existing mental health and emotional support services" to survivors in the Independent Assessment Process, Common Experience Payment recipients, and those participating in truth and reconciliation or commemorative initiatives.

5. Legal Fees

[19] Canada will pay the legal fees to three groups of lawyers involved in the various class actions and Settlement Agreement no later than 60 days after the Implementation Date, which will be well before survivors will receive their Common Experience Payments. The National Consortium will receive $40 million, the Merchant Law Group up to $40 million and $20 million will go to the Independent Counsel. These fees relate to the various class actions across the country but not the fees to be charged to individuals involved in the Independent Assessment Process. The total potential legal

2006 YKSC 63 (CanLII)

fee of $100 million represents a recovery in the order of 5% in exchange for the release of individual retainer agreements in the order of 30%.

[20] The legal work of the three national groups goes back to the mid-1990's and involves substantial hours in pursuing class actions as well as the advocacy and negotiations with the federal government. Canada was not very receptive to the concept of a financial benefit for each residential school survivor until the Political Agreement was signed on May 30, 2005.

[21] The National Consortium, which represents approximately 5,500 individual survivors, has already proceeded through a verification process with The Honourable Frank Iaccobucci who has approved their compensation.

[22] The Merchant Law Group fees have yet to be verified but the group has agreed to a verification procedure.

[23] The Independent Counsel represents approximately 4,000 individual survivors and they have worked diligently on individual cases which broke new ground with common law precedents or Alternative Dispute Resolution processes which assisted in the overall national settlement objective.

[24] The fees for the three national groups are designed to avoid any fees to their clients in recovering the Common Experience Payment. For those survivors without counsel, the application for the Common Experience Payment is designed to permit individuals to apply on their own behalf. First Nations and Canada will provide assistance to individuals to complete and file their applications for the Common Experience Payment.

[25] Legal fees for the Independent Assessment Process are treated differently as that is a separate claim process. Canada will pay 15% of awards as a contribution to

2006 YKSC 63 (CanLII)

legal fees. Independent Counsel have agreed to cap their fees at 30%. Any individual survivor can utilize the normal court procedure to challenge the fees charged by their lawyer.

Administration of the Settlement Agreement

[26] Under this heading, I am going to address the actual administration of the Common Experience Payment and the Independent Assessment Process. The administration is clearly not independent but rather funded by Canada and administered by Canada with input from the National Administration Committee. The National Administration Committee is composed of one representative from each of Canada, church organizations, Assembly of First Nations, the National Consortium, Merchant Law Group, Inuit representatives and Independent Counsel. The members will be compensated at their hourly rates.

[27] Canada will pay the initial $1.9 billion to a Trustee who is, in effect, two federal Cabinet Ministers. The purpose of the trust is to pay survivors the Common Experience Payment according to the Settlement Agreement. The trust can earn interest. The trust terminates when all obligations have been paid under the Settlement Agreement but no later than January 1, 2015. All administrative expenses are paid by Canada, but not out of the $1.9 billion. The Trustee decides which claimants will be paid, subject to the right of the claimant to apply to the National Administration Committee, and eventually to court, if a claim is denied in whole or in part. The Settlement Agreement provides that the Trustee is subject to other duties and responsibilities as the courts may order.

[28] The mandate of the National Administration Committee is a broad one including among others the interpretation and implementation of court orders, hearing appeals for Common Experience Payments and bringing certain issues to court. A simple majority

2006 YKSC 63 (CanLII)

of 4 members may refer disputes to the appropriate court where the dispute arose but ss. 4.11(10) and (11) prohibit a reference to court where a vote of the National Administration Committee "would increase the costs of Approval Orders whether for compensation or procedural matters" unless the Canada representative approves. This is referred to as the Canada veto. Canada will pay all costs of administration for the Common Experience Payment and the Independent Assessment Process. However, the Canada veto limits the ability of the National Administration Committee to remedy problems in the process that may increase the costs of administration.

2006 YKSC 63 (CanLII)

[29] The Canada veto does not apply to Canada's commitment to process 2,500 claims annually in the Independent Assessment Process, and the right of the National Administration Committee to apply to the courts to supervise and enforce the commitment.

[30] The Canada veto only applies to the National Administration Committee. It does not apply to court applications by Indian Residential School survivors or the court's general supervision of all aspects of the operation and implementation of the Settlement Agreement.

ANALYSIS

Should the Class Action be Certified?

[31] The Yukon, like many other jurisdictions, does not have comprehensive class action legislation. Rule 5(11) of the *Rules of Court* sets out the terms for representative proceedings, another word for class proceedings:

> Where numerous persons have the same interest in a proceeding, other than a proceeding referred to in subrule (17), the proceeding may be commenced and, unless the court otherwise orders, continued by or against

> one or more of them as representing all or as representing one or more of them.

[32] In *Western Canadian Shopping Centres Inc.* v. *Dutton,* 2001 SCC 46 at para. 34, McLachlin C.J. stated that "Absent comprehensive legislation, the court must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them." This power is extremely useful in this residential school class action to ensure that the procedures available to survivors in northern Canada are no less than those available to survivors in those provinces which operate under comprehensive class action legislation. In the same way that statute law draws upon the principles of common law, the inherent power of the courts can be used to ensure similar treatment to class members in all nine jurisdictions.

2006 YKSC 63 (CanLII)

[33] *Dutton*, at para. 38, set out the four conditions that must be met for the approval of a class action in the absence of legislation. I will address each one and relate it to this proceeding.

1. The class action must be capable of clear definition. This is necessary to ensure that the class members receive notice of the terms and are bound by the judgment. It is not necessary that every member be named or known. In this case, the class is defined as all persons in Canada who resided at an Indian Residential School from 1920 forward, living or dead, and their family members.

The class is divided into 3 groups which I will define generally:

i.) Survivor Class means all persons who resided at an Indian Residential School between January 1, 1920 and December 31, 1997 (when the last school closed) who are living, or were living as of May 30, 2005, and residing in one of the jurisdictions;

ii.) Family Class means, among other things, the spouse, child, grandchild, parent, grandparent or sibling of a Survivor Class member who resided in one of the jurisdictions;

iii.) Deceased Class means all persons who resided at an Indian Residential School between 1920 and 1997, who died before May 30, 2005, and who, at the date of their death resided in one of the jurisdictions.

2006 YKSC 63 (CanLII)

The proposed class definition provides clear criteria to identify those who have a potential claim, those who will be bound by the result, and thus those to whom notice must be given.

2. There must be issues of fact or law common to all class members.

Counsel have proposed the following common issues:

(a) By their operation or management of Indian Residential Schools during the Class Period (1920 to 1996), did the Defendants breach a duty of care they owed the Survivor Class and the Deceased Class to protect them from actionable physical or mental harm?

(b) By their purpose, operation or management of Indian Residential Schools during the Class Period, did the Defendants breach a fiduciary duty they owed to the Survivor Class and the Deceased Class or the Aboriginal or treaty rights of the Survivor Class and the Deceased Class to protect them from actionable physical or mental harm?

(c) By their purpose, operation or management of Indian Residential Schools during the Class Period, did the Defendants breach a fiduciary duty they owed to the Family Class?

(d) If the answer to any of these common issues is yes, can the court make an aggregate assessment of the damages suffered by all Class members of each class as part of the common trial?

These common issues exist for all members of the class as demonstrated by the considerable body of case law in British Columbia, Alberta and Saskatchewan. All class members share a common ingredient that can best proceed by way of class action.

3. With regard to the common issues, success for one class member must mean success for all. All the class members will benefit from the successful prosecution of the action but not necessarily to the same extent. This will certainly be the case in this class action as proposed in the settlement.

4. The class representative must adequately represent the class. The two proposed representatives in this jurisdiction are willing to represent the class. Their work will be partially completed if the class action is certified and the settlement approved. The settlement includes a litigation plan in the form of the Independent Assessment Process and most, if not all survivors who are proceeding with claims have counsel to assist them. Nevertheless, the class representatives must be vigilant in instructing counsel where problems occur in implementing the settlement.

The common law test for class certification does not include the "preferable procedure test" found in some class proceedings legislation. The test requires that the court be satisfied that the class proceeding would be a fair, efficient and manageable method of advancing the class and preferable to other procedures. However, *Dutton*, at para. 51, states that the court has the ultimate discretion, to be applied in a flexible and liberal manner, to seek a balance between efficiency and fairness in the final determination of whether the class action should proceed. I find these tests to be similar to some extent. I conclude that this class proceeding should

2006 YKSC 63 (CanLII)

be certified as it offers a reasonably fair and timely resolution of a longstanding tragedy.

Jurisdiction of the Court

[34] As *Dutton* clearly sets out at para. 34, the courts must fill a legislative void under their inherent power to settle the rules of practice and procedure in class proceedings.

[35] It is also important in this particular class action that the parties and class members have similar rights to those jurisdictions that have comprehensive class proceeding statutes.

[36] By way of example, the Province of British Columbia has a *Class Proceedings Act* R.S.B.C. 1996, chapter 50. I will refer to the British Columbia *Class Proceedings Act,* as it is similar to the other jurisdictions involved.

[37] The role of the court is set out in s. 12 of the *Class Proceedings Act* as follows:

> 12 The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

[38] In my view, this is the same jurisdiction that this Court has under *Dutton*, and it is expressly stated in the draft orders proposed by counsel.

[39] Pursuant to the inherent jurisdiction of this Court, the following rules apply in addition to the rights granted to survivors under the Settlement Agreement:

1. In the usual class certification, it would be appropriate to provide an appeal process from the Common Experience Payment procedure. In this case, the claimant is provided with an appeal to the National Certification Committee which has a majority of claimant representatives. The claimant, where the National

2006 YKSC 63 (CanLII)

Certification Committee denies a Common Experience Payment claim, in whole or in part, may appeal to the appropriate court. I would add that an order for interim costs may be appropriate as the amount of such claim will necessarily be somewhat modest compared to the legal fees required to pursue the claim.

2. The survivors claiming in the Independent Assessment Process have a right of review of the decision of an adjudicator by the Chief Adjudicator or designate on the basis of whether the decision contains "a palpable and overriding error". To be consistent with the jurisdictions with class proceedings statutes, the claimants in the Independent Assessment Process shall have a right of appeal to this Court. Once again, an order for interim costs may be appropriate.

2006 YKSC 63 (CanLII)

Should the Settlement be Approved?

[40] Class action settlements must be approved by the court to be binding. This is a common feature of all class proceeding statutes and should be an essential requirement of the common law. The test for settlement approval is whether the settlement is fair, reasonable and in the best interests of the class as a whole. Conversely, the court should not reject a settlement unless it is inadequate, unfair or unreasonable.

[41] In *Dabbs* v. *Sun Life, Assurance Company of Canada*, [1998] O.J. No. 1598 (Gen. Div.), Sharpe J. as he then was, provided the following list of considerations for the approval of proposed settlements:

1. Likelihood of recovery, or likelihood of success.
2. Amount and nature of discovery evidence.
3. Settlement terms and conditions.
4. Recommendation and experience of counsel.
5. Future expense and likely duration of litigation.

6. Recommendation of neutral parties if any.
7. Number of objectors and nature of objections.
8. The presence of good faith and the absence of collusion.

This list has been added to in subsequent cases as in *Parsons* v. *Canadian Red Cross Society*, [1999] O.J. No. 3572 (Sup. Ct. Just.) at paragraph 72:

9. The degree and nature of communications by counsel and the representative plaintiff.
10. Information conveying to the court the dynamics of, and the positions taken by the parties during the negotiations.

and in *Reid* v. *Ford Motor Co.*, 2006 BCSC 1454:

11. If counsel fees were negotiated in the settlement, how big a factor are they?
12. Have the absent class members received adequate notice of the proposed settlement?

[42] I would add two further considerations:

1. The extent to which the class ultimately determines the acceptance or rejection of the settlement.
2. The extent to which the settlement represents a political accord.

I add these considerations because of the unique nature of this Settlement Agreement. It has been negotiated not only by legal counsel representing the 79,000 Indian Residential School survivors but by their national political representatives.

[43] Sharpe J. also approved the judgment of Callaghan A.C.J.H.C. in *Sparling* v. *Southam Inc. et al* (1988), 66 O.R. (2d) 225 (H.C.J.), at page 230, where he stated that

2006 YKSC 63 (CanLII)

"courts consistently favour the settlement of lawsuits in general". Callaghan A.C.J.H.C. went on to say:

> In cases such as this, it is not the court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court's function to litigate the merits of the action. I would also state that it is not the function of the court to simply rubber-stamp the proposal.

[44] In *Gariepy* v. *Shell Oil Co.*, [2002] O.J. No. 4022 (Sup Ct. Just.), Nordheimer J., after referring to the remarks cited above, stated at paragraph 44:

> It is not the function of the court in reviewing a settlement to reopen the settlement or to attempt to re-negotiate it in the hope of improving its terms. Simply put, the court must decide either to approve the settlement or to reject it. Similarly, in deciding whether to approve the settlement, the court must be wary of second-guessing the parties in terms of the settlement that they have reached. Just because the court might have approached the resolution from a different perspective, or might have reached a resolution on a different basis, is not a reason to reject the proposed settlement unless the court is of the view that the settlement is inadequate or unfair or unreasonable.

[45] I am going to divide my analysis into two parts. The first will consider the global terms of the settlement. The second part will consider the administration of the settlement.

The Global Settlement

[46] The superior courts of this country have been dealing with Indian Residential School claims for about ten years depending on the specific jurisdiction in question. During that time, a great deal of case law has been developed which has permitted the claims to advance. However, the number of cases that have actually proceeded to trial is not significant. There are a variety of reasons for that. The document discovery in these cases is massive and time-consuming. In many cases, the delay is for months

2006 YKSC 63 (CanLII)

and years as the government and churches review ancient files and records in a large number of departments and locations across the country.

[47] In the Court of Queen's Bench of Alberta, which has the largest number of claims, all the cases have been under global case management so that certain test cases could proceed. Those test cases have been delayed pending this settlement application. Simply put, our court system is not designed to accommodate such a large number of claims in a timely manner. From this perspective, it is likely that most courts will welcome this application to certify a class action and approve the Settlement Agreement.

[48] From a common law point of view, the Common Experience Payment is an extraordinary resolution to a complex political and cultural dispute. It is inconceivable that a court would provide a remedy that compensates all Indian Residential School survivors with a financial benefit without proof of loss, by simply proving that a survivor attended an Indian Residential School. That is not to say that survivors did not suffer loss of language and culture, but simply to acknowledge the unique aspect of the remedy which could only be granted in a political forum.

[49] Another positive aspect of the Settlement Agreement is the fact that the Common Experience Payment has no global cap and the expenses to administer the payments are covered by Canada, also without a cap. The same applies to the Independent Assessment Process. There is no necessity for the courts to monitor the global costs incurred by Canada. The courts can focus on the delivery of benefits and the assessment of claims under its general supervisory jurisdiction.

2006 YKSC 63 (CanLII)

[50] The Independent Assessment Process is an improvement on the former Alternative Dispute Resolution process in terms of the increased cap for individual awards and the additional coverage for serious psychological harm and actual income loss. Despite all the drawbacks of the Alternative Dispute Resolution process, it has taken in 5,000 claimants and concluded 1,000 in three years. This process has already reduced the burden on the courts. However, the process has been slow and the commitment to process 2,500 claims a year is a considerable improvement. Again, there is no global cap on the amount or number of awards in the Independent Assessment Process or the costs of administration. The advantage of building and improving on the Alternative Dispute Resolution process is that there is no requirement to reinvent the wheel. The system is working now and, in my view and certainly the view of the parties, will get better. I note that the three Yukon counsel, with experience in the Alternative Dispute Resolution process, and carrying the bulk of the Yukon survivor claims, endorse the Independent Assessment process. There is no evidence before me that requires the introduction of changes at this stage.

[51] I am not going to repeat the benefits of the Settlement Agreement previously set out. However, there is one very significant commitment that does not often get coverage. I am referring to the agreement of Canada to continue to provide existing mental health and emotional support services to those survivors proceeding through the Independent Assessment Process, Common Experience Payment recipients, and those participating in truth and reconciliation or commemorative initiatives. This is an enormous benefit for Indian Residential School survivors because one of the most consistent concerns raised by survivors themselves in this Court is the apparent lack of such support services. While the word "existing" may be a limiting factor, the

2006 YKSC 63 (CanLII)

commitment of Canada is clear and has undoubtedly created expectations that must be fulfilled. If closure is the goal for Indian Residential School survivors, this is a means to achieve that end. In addition to the terms of section 8.02 of the Settlement Agreement, Canada has made the following commitment:

> Health Canada will expand its current Indian Residential Schools Mental Health Support Program to be available to individuals who are eligible to receive compensation through the Independent Assessment Process, as well as to Common Experience Payment Recipients, and to those participating in Truth and Reconciliation and Commemoration activities. It will offer mental health counselling, transportation to access counselling and/or Elder/Traditional Healer services and emotional support services, which include Elder support. Health Canada will offer these services through its regional offices, including the Northern Secretariat which has an office located in Whitehorse, Yukon.

[52] There is a further aspect to this Settlement Agreement that bears comment. The Assembly of First Nations and Inuit organizations have played a central role in negotiating and reaching this agreement. These organizations have appeared in court with the counsel for the survivors supporting the Settlement Agreement. It is therefore more than a settlement of a tort-based court action. It is a political accord to bring closure to an historic and ongoing grievance. Their affirmation of this Settlement Agreement is a significant factor. Courts must be wary of second-guessing this political accord.

[53] It is also significant that court approval of the Settlement Agreement is subject to the approval of Indian Residential School survivors individually. Those that prefer the court process may opt out of the Settlement Agreement, hopefully after careful consideration and legal advice. If more than 5,000 survivors do opt out, the Settlement

2006 YKSC 63 (CanLII)

Agreement is void unless Canada agrees to waive its right to treat the Settlement Agreement as void. Obviously, there is little advantage to continuing large numbers of court actions and the Settlement Agreement at the same time. The ultimate acceptance or rejection of the Settlement Agreement is, appropriately, for the survivors themselves to decide.

2006 YKSC 63 (CanLII)

ADMINISTRATION OF THE SETTLEMENT AGREEMENT

[54] The Settlement Agreement is not perfect as every counsel pointed out. I am going to address some of the shortfalls. On balance, I do not find that any of them, individually or collectively, cause me to reject the Settlement Agreement or approve it conditionally and send the parties back to the negotiating table. The main concerns arise in the administration of the Independent Assessment Process. However, those concerns or "deficiencies" as some courts describe them can be remedied, if necessary, under the court's supervisory jurisdiction. They should not hold up the benefits of the Settlement Agreement available to the majority of the Indian Residential School survivors who do not have a claim under the Independent Assessment Process.

The Canada Veto

[55] The Canada veto refers to paragraphs 14.11(9), (10) and (11) of the Settlement Agreement. Decisions of the National Administration Committee to refer disputes from the Committee to court that "would increase the costs of approval orders, whether for compensation or procedural matters", may be vetoed by Canada. The courts are not permitted to review Canada's veto. This veto, while problematic, must be placed in context. The only other reference to the Canada veto is under paragraph 6.03(3) which states that the Canada veto does not apply to an application by the National

Administration Committee for court enforcement of the commitment to process 2,500 Independent Assessment Process claims a year. I interpret the Canada veto to apply only to decisions of the National Administration Committee to refer their disputes to court. It does not apply to the rest of the Settlement Agreement which is under the general supervisory jurisdiction of the courts. It does not prohibit any party or individual survivor from accessing the courts if they feel Canada is not living up to its obligations. On the other hand, it does allow Canada, on behalf of the taxpayer, to have some ultimate cost control over decisions of the National Administration Committee, which is under the voting control of plaintiff representatives.

2006 YKSC 63 (CanLII)

[56] But the Canada veto does mean that the administration of the process for resolving claims is not independent, a characteristic that is usually desirable for the process to resolve claims in a class action. However, counsel for the plaintiffs and counsel for the Assembly of First Nations and the Inuit organizations are prepared to live with the Canada veto because the financial burden on Canada is open-ended. There are no global caps on the financial obligation to conclude this Settlement Agreement. In a very real sense, this is a challenge for Canada. Canada created the problem and it must now implement the Settlement Agreement in a fair and reasonable manner under the direction and supervision of the courts.

Legal Fees

[57] I find the legal fees problematic, not in the global amount, but in the early payment for achieving what is undoubtedly an outstanding political agreement. My concern is that once the lawyers are paid out, they will have little interest in assisting the survivors who may have continuing issues over relatively small amounts of the Common

Experience Payment and Independent Assessment Process claims that remain unresolved. There is no simple resolution of this problem, although counsel that brings such issues to court may apply for interim costs and be awarded those costs in appropriate cases.

[58] Plaintiffs' counsel had various explanations with respect to the Common Experience Payment. Some said the legal fee was a pre-payment for work to be done and that counsel had undertaken to work on the Common Experience Payment problems. The unresolved Common Experience Payment problems still present a concern.

[59] Similarly, once an award is granted under the Independent Assessment Process, further reviews or appeals to court will not necessarily be covered by retainer agreements.

[60] The other aspect of the legal fees issue is that under the Independent Assessment Process, Canada only pays an additional 15% of the award for legal fees which will typically be 30%. Several survivors raised this issue in Court. The balance of the lawyers' fees will inevitably come off the award.

[61] In Yukon, it would not be unusual for 100% of legal fees to come off the award with the defendant paying court costs which are usually less than a lawyer's contingency fee. So in that sense, Canada's contribution of 15% is a distinct improvement over the court process where the full extent of disputed liability remains. Moreover, the 15% paid by Canada is a far sight better than the uncertainty of a trial where success is not guaranteed.

2006 YKSC 63 (CanLII)

[62] In my view, it will be important for Canada to report to the courts on those claims for the Common Experience Payments and the Independent Assessment Process that are refused, as well as the grounds for doing so, on an annual basis.

DECISION

[63] To summarize, I certify the class action and approve this Settlement Agreement as fair, reasonable and in the best interests of the class as a whole. I have expressed concerns about some aspects of the administration of the Settlement Agreement and legal fees. However, it is a political and legal compromise that rewards all survivors to some degree and pays reasonable compensation to those with claims of sexual assault, serious physical assault and serious psychological harm. It provides a path forward to resolve claims that have overwhelmed the court system. It provides a timely resolution in circumstances where the survivors are dying at a rate of 1,000 to 1,300 or more a year. It is time to move on for Indian Residential School survivors who want to bring closure to a very dark chapter in the ongoing relationship between Canada and its aboriginal people.

VEALE J.

2006 YKSC 63 (CanLII)

ᓄᓇᕗᑦ ᐃᓕᓴᕐᓂᐊᕐᓇᖅᑐᑦ
nunavuumi iqkaqtuijikkut
NUNAVUT COURT OF JUSTICE
La Cour de justice du Nunavut

2006 NUCJ 24 (CanLII)

Citation:	***Fontaine v. Canada (Attorney General)*, 2006 NUCJ 24**
Date of Judgment (YMD):	2006-12-19
File Number:	08-05-401 CVC
Registry:	Iqaluit
Plaintiffs:	**Larry Philip Fontaine, et al.**
	-and-
Defendant:	**The Attorney General of Canada, et al.**

Before:	The Honourable Mr. Justice R. Kilpatrick
Counsel (Plaintiffs):	Janice B. Payne and Lori A. O'Neill
Counsel (NTI):	Steven Foulds
Counsel (Defendant):	Michele Annich and Jaxine Oltean
Counsel (Prospective Plaintiffs):	Steven Cooper
Counsel (Assembly of First Nations):	Richard J. Finn
Counsel (Church Entities):	Michel Thibault
Location Heard:	Iqaluit, Nunavut
Date Heard:	October 10-11, 2006
Matters:	*Nunavut Rules of Court,* R.N.W.T. R-010-96, as duplicated for Nunavut by s.29 of the *Nunavut Act,* S.C. 1993, c. 28, Rules 62, 657-661

REASONS FOR JUDGEMENT

(NOTE: This document may have been edited for publication)

Amended Decision: An amended decision was issued on October 22, 2015; the corrections have been made to the text and the amendment is appended to this judgment.

2006 NUCJ 24 (CanLII)

I. INTRODUCTION

[1] There is a brooding resentment for a life that is damaged. There is anger for a childhood that is lost. There is profound emptiness and a sadness that comes from the loss of an opportunity to be raised in a nurturing family environment. There is only a memory of survival; a memory scarred by pain, anxiety and humiliation. Then there is the loneliness, a solitude caused by years of isolation from language, culture, and extended family. Michelline Ammaq is left with a great yearning to know a life that has never been lived. These feelings are the unfortunate legacies, the bitter byproducts, of a residential school experience.

[2] These feelings are shared by many who passed through Canada's 'Indian' residential school system. Michelline Ammaq is joined by other former students in bringing a legal action against the authorities responsible for the creation and implementation of this 'Indian' residential school system in Canada. In human terms, the objectives underlying this litigation are varied. Some seek redress in the form of financial compensation for what has been lost. Some seek public recognition, and an apology for the suffering inflicted and the harm sustained. Some seek an opportunity to rebuild damaged lives through access to remedial programs. Almost all litigants struggle to understand their residential school experiences. There is a need for reconciliation so that a healing journey can be completed. For many who attended the residential schools, it is already too late - Death has intervened.

2006 NUCJ 24 (CanLII)

[3] The applicants seek an order certifying their litigation as a class proceeding within the meaning of Rule 62 of the *Nunavut Rules of Court,* R.N.W.T. R-010-96, as duplicated for Nunavut by s.29 of the *Nunavut Act,* S.C. 1993, c. 28 (*Rules*). With the consent of all the litigants, approval is also sought for the terms of a negotiated settlement. The consent of the Defendants to the certification motion is conditional upon this Court approving the proposed settlement. The Defendants' consent to these two applications also turns upon parallel applications being successful in eight other jurisdictions in this country. If approval of this settlement is not given, the litigation now pending before this Court would continue. In Nunavut, there are presently six statements of claim filed on behalf of 191 claimants.

2006 NUCJ 24 (CanLII)

II. APPLICATION FOR CERTIFICATION

[4] Nunavut does not have class action legislation. It is left to the common law and this Court's inherent jurisdiction to regulate any proposed class action. The *Rules* provide as follows:

> *"62. Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all."*

[5] Four criteria are necessary for approval of a common law class action. They are as follows:

1. The members comprising the proposed 'class' must be clearly defined;

2. There must be issues of fact or law that are common to all class members;

3. With respect to these common issues, success for one class member must mean success for all, though not necessarily to the same extent; and

4. The proposed class representatives must adequately represent the proposed class.

[6] The proposed class in this action is comprised of three categories of potential claimants. The 'survivor' class is defined as all persons in Canada who resided at an "Indian Residential School" between January 1, 1920 and December 31, 1997, who were living as of May 30, 2005, in one of the identified jurisdictions. The 'family' class includes a spouse, child, parent, grandparent or grandchild of a 'survivor'. The 'deceased' class covers all persons who attended an Indian residential school between 1920 and 1997 who died before May 30, 2005. I am satisfied that these definitions provide sufficient objectively verifiable criteria to identify those with a potential claim under the proposed class action. The first criterion is satisfied.

[7] I am also satisfied that there are at least four legal issues that are shared in common by the proposed class members. These issues are identified by the litigants as follows:

> 1. By their operation or management of Indian Residential Schools during the class period (1920 to 1997), did the Defendants breach a duty of care they owed the survivor class and the deceased class to protect them from actionable physical or mental harm?
>
> 2. By their purpose, operation or management of Indian Residential Schools during the class period, did the Defendants breach a fiduciary duty they owed to the survivor class and the deceased class or the aboriginal or treaty rights of the survivor class and the deceased class to protect them from actionable physical or mental harm?
>
> 3. By their purpose, operation or management of Indian Residential Schools during the class period, did the Defendants breach a fiduciary duty that they owed to the family class?
>
> 4. If the answer to any of these common issues is yes, can the Court make an aggregate assessment of the damages suffered by all class members of each class as part of the common trial ?

2006 NUCJ 24 (CanLII)

[8] These class members as defined would all be bound by the result of any legal determination of these four issues in the context of this proposed class action. The third criterion is therefore met.

[9] The individual characteristics of the proposed class of Plaintiffs are set out in the affidavit materials filed by the applicants. I am satisfied that the proposed representative Plaintiffs reflect a broad cross-section of potential claimants from all three classes as defined by the proposed class action. These Plaintiffs collectively provide a fair and adequate representation for the survivor, family and deceased classes. The affidavit material filed on behalf of these proposed representative plaintiffs deposes that these plaintiffs or their representatives are both willing and able to effectively represent the class of which they are a part and so advocate their respective class interests. The fourth and final criterion for certification is therefore also met.

[10] There are significant advantages accruing to both the Court and the litigants associated with this matter proceeding as a class action.

[11] Much judicial economy is achieved by avoiding unnecessary duplication of fact finding and legal analysis. The residential school litigation in its present form is likely to consume a significant quantity of judicial resources. In this jurisdiction, the Nunavut Court of Justice would be hard pressed to accommodate the demands associated with extensive litigation on the common issues of fact and law raised by the pleadings. The class action would result in a more effective use of these scarce judicial resources. Claims that are pursued individually could potentially wait years for resolution in a court that is already strained to capacity.

[12] The substantial costs associated with this type of litigation in Nunavut are likely to be reduced through cost sharing arrangements made between individual plaintiffs. This would enhance the impecunious litigant's access to justice. Many citizens in Nunavut might not otherwise have the financial resources needed to litigate. If pursued as individual claims, the substantial costs associated with litigation in Nunavut might eat up most, if not all of any anticipated recovery in damages in many cases.

2006 NUCJ 24 (CanLII)

[13] The Defendants can also achieve greater economy by pooling resources and sharing costs. They would be required to defend only once.

[14] There are strategic and tactical disadvantages to individual litigants posed by certification as a class action. A defendant may wish to raise different defenses with different groups of Plaintiffs. Individual class members of Plaintiffs may also wish to raise issues that are not necessarily shared by all members of their class. This becomes very difficult to do in the context of class action litigation. While the potential always exists for these disadvantages to arise after certification, none of the parties to this motion and none of the citizens appearing to speak to this motion identified specific areas of concern.

[15] On balance, I conclude that in this jurisdiction both efficiency and fairness favors approval of the motion for certification as a class action.

III. TERMS OF THE PROPOSED SETTLEMENT

[16] There are four key elements of the proposed *Indian Residential Schools Settlement Agreement*[1] (*Settlement*) before the Court. These are:

1. The Common Experience Payment;

2. The Independent Assessment Process;

3. Truth and Reconciliation, Commemoration and Healing; and

4. In Kind Services Provided by Church Organizations and Canada

[1] *Settlement Agreement*, online: Indian Residential Schools Class Action Settlement - Official Court Website: http://www.residentialschoolsettlement.ca/settlement.html

2006 NUCJ 24 (CanLII)

A. The Common Experience Payment (CEP)

[17] All members of the survivor class will receive a cash payment. The amount of this payment will vary with the length of time actually spent in the residential school. Each survivor is to receive $10,000 for the first year of attendance and $3000 for each year or part of a year thereafter. There are estimated to be approximately 79,000 eligible claimants under this class.

[18] This payment is intended to compensate all survivors for the hardships associated with their 'common experience'. It is not intended to provide compensation for physical or sexual abuse or other acts of willful misconduct committed by school authorities or agents. This is to be the subject of a second head of compensation outlined under the independent assessment process.

[19] The Defendant Canada has budgeted 1.9 billion dollars for the common experience payments and is committed to increase this amount if needed.

[20] Payout of this type of claim is to be made upon proof of attendance at a designated residential school. An aggrieved claimant has a right of appeal in the first instance, to the National Administration Committee, and then to a court of competent jurisdiction.

B. The Independent Assessment Process (IAP)

[21] Claimants may seek additional compensation for acts of physical or sexual abuse or other wrongful acts as defined by the *Settlement*. Compensation from $5000 to a maximum of $275,000 is available under this head, with an additional sum of up to $250,000 available on proof of actual income loss.

2006 NUCJ 24 (CanLII)

[22] Proof of the wrongful act and consequential harm must be established. Canada is to provide an independent review process to adjudicate these claims and is committed to processing a minimum of 2500 such claims per year. It is estimated that there may be as many as 15,000 claimants under this head of compensation.

[23] Canada has agreed to settle all of these claims within six years and to ensure that sufficient resources are in place to meet this objective. Canada is further committed to ensure that a claimant is given a hearing date within nine months of the claim being filed.

[24] In the event that Canada fails to meet its commitment to adequately resource the IAP, the committee charged with overall administration of this program, the National Administration Committee (NAC) may apply to the Court for an order to address this issue.

[25] The administrative costs associated with this review process are to be paid for separately by Canada and will not impact upon the amount of funds available for payment of compensation to survivors. There is no cost estimate provided for the administration of the IAP.

[26] It is anticipated that many or most of these claims will be resolved using an informal inquisitorial method presided over by an adjudicator. However, the *Settlement* does provide that an adjudicator may refer a matter to court for resolution:

> (a) where the evidence suggests that the claim for actual income loss or consequential loss of opportunity may exceed the maximum compensation available under the IAP;
>
> (b) where the evidence indicates that the claimant suffered catastrophic physical harm for which greater compensation may be available from the Court than the IAP;
>
> (c) in any case where the complexity and extent of evidence required to address the alleged harms makes recourse to the courts more appropriate.

2006 NUCJ 24 (CanLII)

[27] Where an adjudicator refers an IAP claim to the Court for resolution, the defendant Canada is obligated under the proposed settlement to waive any applicable defenses arising from a Statute of Limitations.

[28] The *Settlement* provides for a right of appeal from any decision of an adjudicator to the Chief Adjudicator. Beyond this, there is no additional right of appeal to the Courts.

C. Truth and Reconciliation, Commemoration and Healing

[29] In addition to the monetary compensation provided by the CEP and IAP, the *Settlement* provides three additional benefits.

[30] Sixty million dollars is committed to establish a Truth and Reconciliation process through the establishment of a Commission with a five-year mandate to:

> (a) acknowledge residential school experiences, impacts and consequences;
>
> (b) provide an appropriate and safe setting for individuals to speak of their experiences;
>
> (c) witness, promote, and facilitate truth and reconciliation events at both national and community levels;
>
> (d) educate the Canadian public about the residential school system and its impacts;
>
> (e) create an historical record of the 'Indian residential school system' for future study and use;
>
> (f) produce a report on the 'Indian residential school system', its effects and ongoing legacy.

2006 NUCJ 24 (CanLII)

[31] A further twenty million dollars is committed to fund commemorative events at both a national and local level. Control of this budget is given to the Truth and Reconciliation Commission who will administer any applications made to fund commemorative events.

[32] One hundred twenty five million dollars is committed to fund healing programs through the Aboriginal Healing Foundation.

[33] All three classes and their families, as defined by the agreement, are able to benefit from these settlement provisions and any programs or services created under this head.

2006 NUCJ 24 (CanLII)

D. In Kind Services Provided by Church Organizations and Canada

[34] The various church organizations are collectively committed to provide both cash and in kind services to a maximum of $102.8 million dollars to develop new programs for class members and their families. Canada is required to continue any existing mental health and emotional support services to survivors participating in the various settlement initiatives including truth and reconciliation events.

IV. CRITERIA FOR APPROVAL OF A CLASS ACTION SETTLEMENT AGREEMENT

[35] Many stand to be affected by the proposed resolution. The Court has an obligation to scrutinize the proposed settlement to ensure that it fairly meets the interests of all who stand to be affected by it, including those who are not presently represented by counsel.

[36] It is for this reason that the Court has an overriding responsibility to ensure that any proposed settlement is fair and reasonable before approving its terms. The proposed settlement must be in the best interests of the class as a whole.

[37] The settlement agreement that is presented for approval was the product of extensive negotiation conducted over a significant period of time. Some of the best legal minds in Canada were engaged in this process. The proposed agreement has the support of many of this country's leading aboriginal organizations. In this jurisdiction, it has the support of Nunavut Tunngavik Incorporated. It has the support of the Honourable Frank Iacobucci, former justice of the Supreme Court of Canada, who was instrumental in mediating the settlement discussions that ultimately resulted in this agreement being created. It has the support of all of the parties, both plaintiffs and defendants, who appeared on this motion.

[38] As in the case of any negotiated agreement there has been both 'give' and 'take' by all of the parties over a broad range of issues covered by the negotiations. Compromises are inevitably made in the course of reaching such an agreement. For this reason, it is inappropriate to apply a standard of perfection to the end product. Considerable deference must be shown to the process underlying the negotiated settlement.

[39] The decision to approve the proposed settlement agreement must be based upon an objective standard of reasonableness; a standard that takes into account the needs and interests of the class as a whole. Subjective considerations related to individual litigants do not determine whether the settlement receives court approval. It is only where these subjective concerns are of such number or magnitude that the settlement is rendered unfair, inadequate or unreasonable to the class as a whole, that court approval should be withheld. This is so because what is 'best' for an individual litigant may not be achievable or fair for the larger class of which the litigant is only a part.

[40] In applying this objective standard to this settlement proposal a number of criteria stand out in importance.

2006 NUCJ 24 (CanLII)

A. Likelihood of Success – Risk of Loss

[41] There are risks associated with any litigation. As the potential risk of loss increases, the advantages associated with the certainty of a negotiated settlement become an increasingly important factor in a court's decision to approve any proposed resolution. In assessing the weight to be attached to this criterion, the Court is not called upon to decide the merits of the litigation. It looks only to an assessment of the risks associated ith the claim being advanced when balanced against prospective defenses to liability or recovery raised by the pleadings.

[42] In this case, the Plaintiffs face a significant risk of loss on an issue of liability. Limitation defenses are raised against all three classes of Plaintiffs. A claim of statutory immunity is raised by Canada in relation to alleged intentional torts arising before 1953. Canada's exposure is limited by law to vicarious liability only by virtue of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c.C-50.

[43] The Defendants collectively raise a 'standard of the day' defense, by arguing that the schools were operated in accordance with the standards of the time, thus occasioning no breach of either duty or of the applicable standard of care. The Defendants are only accountable if their conduct fell below the standards prevailing when the cause of action arose.

[44] The Defendant Canada argues that it is not open to any court to review the government policy behind the creation of the 'Indian' residential school system. It is argued that government policy is not a 'justiciable' issue. This is said to offend the common law doctrine of Parliamentary supremacy. It is argued that any cause of action based upon an attack of this government policy must fail for this reason.

[45] It is argued that the common law to this point has not recognized loss of culture or language as giving rise to a legal claim of any kind.

2006 NUCJ 24 (CanLII)

[46] In addition to these potential defenses, claims made by the family class are attacked on the basis that these claims are either not recognized by statute or common law, or that they fail to meet the rigourous common law standards necessary to perfect such claims.

[47] The deceased class has additional problems associated with having to establish a claim in the absence of the deceased. The deceased was obviously in the best position to give evidence concerning his or her treatment and conditions within the school. He or she is no longer available to testify.

[48] This class must overcome legislation in many jurisdictions which prohibits or limits actions to recover damages by the estate of a deceased person.

[49] I conclude that all three classes of Plaintiffs face significant legal risks in pursing litigation through the courts. Significant advantages accrue to all three classes by favoring the certainties achieved by negotiation over the uncertainties posed by pursuing litigation in court.

B. Time and Cost of Litigation in Nunavut

[50] The cost of litigation in Nunavut is significantly higher than anywhere else in the country. Air travel is necessary given the distance and geography of the Territory. There are no roads between communities. There are no trains or public transit systems. Witness travel costs are a very substantial component of the costs associated with litigation in Nunavut. Lawyer travel also adds to the expense of proving a complex claim in a lengthy trial process. All lawyers presently involved in this litigation are resident outside the Nunavut territory. The 'experts' likely to be retained for the purpose of prosecuting or defending these claims are also resident outside the territory.

2006 NUCJ 24 (CanLII)

[51] The extremely high cost of litigation in this jurisdiction puts this type of complex litigation out of the financial reach of most Nunavummiut. The expenses associated with proving an individual claim would likely eat up any potential recovery in many, if not most claims. The groups most likely to benefit from complex court-based litigation would be the local airlines and the legal community.

[52] Nunavut is this country's only 'unified trial court'. Its three justices are expected to provide all services ordinarily provided by provincial and superior courts in all criminal and civil matters. They also sit in an appellate capacity. All three justices are presently working to capacity. This Court's lack of judicial resources limits the Court's flexibility to accommodate a significant volume of civil litigation. Significant delays in reaching trial can be expected as a result.

[53] The proposed settlement, if accepted, provides a claims resolution process that is at least as expeditious as any that this Court could be expected to provide and at far less cost to the individual litigant in Nunavut. All of these considerations clearly weigh in favor of the proposed settlement.

C. Personal Circumstances of the Plaintiffs

[54] Time has already taken a heavy toll upon the survivor class. Many have died. This number grows larger, and is accelerating, with each passing month. Many of the potential claimants in the survivor class are elderly and in poor health. Their ability to sustain the stress associated with a lengthy trial diminishes with age. Memories are fading. Their ability to successfully prove a claim is affected by this.

2006 NUCJ 24 (CanLII)

[55] Many of the members of both the survivor and the family class need remedial programming now to address the dysfunction associated with the survivor's experiences. In many cases, the survivor's dysfunction continues to be passed on to family members long after the residential school experience has ended. The social impact of the 'Indian residential school' has become inter-generational in scope. Any delay in providing remedial programming serves only to enhance this dysfunction and delay effective recovery of the larger family unit.

[56] I conclude that the needs and interests of both the survivor and family classes are prejudiced by delay. The life circumstances of these two groups weigh heavily in favour of settlement approval and a speedy resolution of their claims.

D. Number and Nature of Objections

[57] A two-day hearing was made available to any citizens wishing to voice concerns about the terms of the proposed settlement. This hearing was publicized thoughout Nunavut in accordance with a communications plan approved by the Court. Written submissions were invited to be made by those who either lacked the means to travel to Iqaluit or who preferred to do so in writing. Those who made submissions in Nunavut did so overwhelmingly in favor of the proposed settlement.

[58] This Court has reviewed the submissions filed with the courts in the other eight jurisdictions. Some citizens complained that the CEP payment is too small, and should be increased. Some argued that the descendants of former students now deceased should be able to benefit from the CEP awarded to survivors. Some argued that the cut-off date of May 30, 1995, is arbitrary and that persons who died before the settlement was signed should be able to receive the monetary benefits through their estate. Some had insisted that monetary compensation should be accompanied by a formal apology made by the various Defendants in a public forum.

2006 NUCJ 24 (CanLII)

[59] In an agreement of this scope and complexity, there will inevitably be some dissent. Any potential claimants who are not prepared to accept the proposed settlement in full satisfaction of their claim, do not have to do so. They have the ability to opt out of the provisions of this settlement, but must do so within five months of the settlement being approved. If they do so, they must then accept all of the risks and disadvantages associated with pursuit of this litigation in the courts.

E. Access to Justice and the Inuit Healing Perspective

[60] Many Nunavummiut stand to benefit from the terms of the proposed settlement. This is so whether the benefit takes the form of direct monetary compensation or access to the programming created by it. The settlement associated with this class action provides greater access to 'justice' than that associated with a particular individual's legal victory in a courtroom.

[61] This is a settlement that is fashioned with Inuit perspectives in mind. It is holistic in its scope. It provides tangible benefits; benefits directed not only at the individual claimant, but at the larger aboriginal community of which the claimant is a part. It is forward-looking. It provides some redress in the form of monetary compensation for past misdeeds while focusing on the need to heal. It addresses the healing needs of the survivor and the larger family unit through the provision of remedial programming. It provides for community healing through a Truth and Reconciliation Commission and related commemorative events. No legal victory in a courtroom could ever hope to do this. This Court is not equipped to address the holistic healing perspectives of the individual, his or her family and the community in a way that does justice to the larger Inuit and aboriginal perspectives on life, on living and on conflict resolution. The settlement agreement proposes to do just that.

2006 NUCJ 24 (CanLII)

[62] The Inuit understand justice to be a dynamic human process. It is 'doing justice' that is important. Justice is a process that restores harmony and balance to relationships that are damaged. Success is not measured solely by the size of an individual's damage award, but by the number of survivors and their families who can be reconciled with their past. The Inuit expression of justice is multi-dimensional and encompasses the interests and needs of all who are affected by the problem at issue.

[63] No amount of monetary compensation can ever restore what has been lost by the Inuit survivors of the 'Indian' residential schools and their families. No settlement agreement has the power to undo what has been done in the past. No price can be put on the many lives that have not been lived or on the many missed opportunities for advancement of life.

[64] The proposed settlement does not try to do this. It does provide a means for moving forward. It does provide a measure of closure for individual survivors, their families and the families of the deceased class, together with their respective communities. It does provide a useful forum to understand what happened and why. It does so in a meaningful and culturally sensitive way. At a national level, it offers an opportunity for reconciliation, and an opportunity to learn from the mistakes of the past.

V. ANALYSIS

[65] There are some areas of concern that have been identified by fellow judges in companion judgments in other jurisdictions on this motion for certification and settlement approval. In some instances, the Court's approval has been given conditionally upon the parties resolving these deficiencies. These deficiencies include:

(a) the lack of sufficient financial information to enable the courts to make an informed decision about the anticipated cost of the Independent Assessment Process;

(b) the lack of an autonomous supervisor to oversee the administration of the IAP who would be accountable to the Court for the implementation of this part of the settlement; and

2006 NUCJ 24 (CanLII)

(c) the absence of any summary review mechanism for legal fees charged by lawyers who assist claimants under the IAP.

A. Certainty of Delay and Risk of Termination

[66] In a perfect world, it would be desirable to see these deficiencies remedied before the agreement is approved. I am not convinced that these deficiencies are individually or collectively serious enough to warrant sending the settlement agreement back to the parties for further negotiation. Should this Court approve the settlement 'conditionally', the identified deficiencies would have to be corrected before full approval is granted.

[67] Any 'conditional' approval will inevitably result in delay. Further delay is not in the best interests of the various class members for all of the reasons identified earlier in this judgment.

[68] There is a real risk that the settlement agreement may unravel in the course of further negotiations. The parties cannot be compelled to negotiate amendments or additions to the existing agreement. They might choose to reopen negotiations on other aspects of the agreement as a condition of doing so. The *Settlement* provides as follows:

> "16.01 This Agreement will not be effective unless and until it is approved by the Courts, and if such approvals are not granted by each of the Courts on substantially the same terms and conditions save and except for the variations in membership contemplated in Sections 4.04 and 4.07 of this Agreement, this Agreement will thereupon be terminated and none of the Parties will be liable to any of the other Parties hereunder, except that the fees and disbursements of the members of the NCC will be paid in any event."

[69] A requirement that the parties create an autonomous supervisory board to administer the IAP might be regarded as a substantial change to the structure of the existing agreement. This might result in the existing agreement being lost entirely. This is a risk that this Court is reluctant to take. Too much is at stake.

2006 NUCJ 24 (CanLII)

B. Absence of Financial Plan

[70] Evidence of a financial plan is often of crucial importance to a Court's assessment of the viability of a settlement proposal made in the private sector. The existence of financial and material resources sufficient to administer the proposed settlement cannot be assumed. These resources are often limited. The Court must be assured through evidence that the resources necessary to fully implement the settlement plan are present or will become available. If the resources are not equal to the task proposed, the Court may well reject the proposed settlement as unrealistic or unworkable.

[71] In the context of this settlement proposal, the expenses associated with the administration of the IAP and CEP are backed by the material and financial resources of Canada's largest public government. While the financial plan for the administration of this settlement is not before the Court, Canada is committed through the agreement to provide and pay for sufficient resources to clear a minimum number of claims per year. Canada is accountable to the Court under the agreement if it fails to do so. Canada's performance in this respect is to be monitored by the NAC.

[72] This Court does not view evidence of a financial plan as being necessary to assess the viability of the proposed settlement. I am satisfied that the resources of the Federal government are equal to the task that lies ahead. If these expenses prove to be more significant than originally anticipated by Canada's representatives, the program administrators may have to answer to Treasury Board. The politicians may then have to answer to their electorate. But the job will get done. This Court will be there to ensure that Canada meets the solemn commitments undertaken in this settlement agreement.

2006 NUCJ 24 (CanLII)

C. Absence of An Independent or Neutral Supervisor of the IAP

[73] Under the terms of the settlement agreement, the IAP is to be administered by Canada. Canada is one of the party litigants. Canada will be instructing agents to pursue its interests as a litigant in the context of any hearings held under the IAP. At the same time, Canada is charged with overseeing the administration of the IAP itself. This is said to lend itself potentially to a perception of bias or partiality arising from a possible conflict of interest.

[74] Such a conflict is more apparent than real. The administrative services of the Nunavut Court of Justice are provided by government. Government is often a party litigant in disputes coming before this Court and the courts of other provinces and Territories. The Judiciary is independent of government. The Judiciary does not answer to government and, in this country, jealously defends its independence. The adjudicators under the IAP are similarly independent of government, though their administrators under this settlement agreement are not.

[75] While it may be preferable to have an independent or autonomous administrator running the IAP, I am satisfied that this is not an essential prerequisite to the impartial administration of justice under the proposed settlement agreement. A reasonable person, fully apprised of the facts, would understand that control of the administrative machinery of the IAP does not and cannot allow Canada to dictate how an adjudicator decides a particular case.

[76] The terms of this settlement agreement were negotiated and agreed to by lawyers acting for potential claimants under this proposed IAP model. It is not this Court's place to second guess the reasons for the parties agreeing to adopt this particular model.

[77] I am not convinced that the absence of an autonomous Supervisor of the IAP is of sufficient concern to block this Court's approval of the settlement proposal.

2006 NUCJ 24 (CanLII)

D. Absence of any Summary Review Procedure for Fees Charged by Counsel to Clients Engaged in the IAP

[78] Most of the claimants pursuing compensation through the IAP will likely have counsel to assist them through this process. Most of these lawyers will likely be compensated on the basis of contingency fee arrangements entered into with their clients. Many of the IAP claimants entered into these fee arrangements prior to the settlement agreement being reached.

[79] Under the *Settlement*, Canada is only obligated to pay counsel 15 per cent of any award made to the client through the IAP. Many of the contingency fee agreements provide for payment of fees based upon percentages well in excess of this amount. Any fees exceeding the 15 per cent paid by Canada will be absorbed by the client, and will come off the top of any award in damages. There may well be situations arising where the stipulated legal fee becomes grossly disproportionate to the work done or the risk undertaken.

[80] In the absence of any specific review provision in the settlement agreement, the client is left to the common law and any prevailing statutory provisions to review or 'settle' the lawyer's account. Many jurisdictions have introduced legislation to give clients a statutory remedy to challenge a contingency fee agreement that is unfair or unreasonable. Nunavut has not done so because a speedy and inexpensive remedy for review is available through the *Rules* of the Nunavut Court of Justice.

[81] These *Rules* regulate not only the form of the contingency fee agreement (Rule 658), but require the agreement to be filed with the Court within 15 days of its execution (Rule 659). The contingency fee agreement must advise the client of his or her right to have the compensation payable under the agreement reviewed by the Clerk of the Court or a Judge. If the agreement fails to comply with the form required by the *Rules*, or has not been filed, the lawyer's compensation is limited to what would otherwise have been payable in the absence of the agreement.

2006 NUCJ 24 (CanLII)

[82] The *Rules* go on to provide that such an agreement may be reviewed at any time up to one year from the day the lawyer has been paid pursuant to the terms of the agreement (Rule 661). A judge reviewing such an agreement has all of the powers available to a clerk on a taxation of a solicitor and client bill of costs. Rule 661(4) provides that on such a review, a Judge can confirm, vary or disallow the contingency agreement entirely.

[83] While the proposed settlement agreement may not provide for a review mechanism, there is an effective remedy still available to aggrieved citizens in this jurisdiction to address any problems that may arise. When the 'flaw' is weighed against the risks associated with requiring the parties to renegotiate a summary review procedure, the balance still weighs heavily in favor of settlement approval.

VI. LEGAL FEES

[84] The *Settlement* requires that this Court approve the legal fees that are to be payable to counsel for services rendered under this agreement. This area has been the subject of considerable study and analysis in companion judgments issued in other jurisdictions on this motion. Ball J. in *Sparvier et al. v. Canada (Attorney General) et al.*, 2006 SKQB 533, provided an extensive overview and, at paragraph 45, outlined some of the common law criteria usually applied to an assessment of legal fees, which include:

(a) the time expended by counsel on the clients behalf;

(b) the legal complexity of the matters;

(c) the degree of responsibility assumed by counsel;

(d) the monetary value of the matters at issue;

(e) the results achieved and the contribution of counsel to the result; and

(f) the importance of the matter to the clients.

2006 NUCJ 24 (CanLII)

Taking into account these criteria, this Court finds that the fee structure proposed by the settlement agreement is both fair and reasonable.

VII. CONCLUSION

[85] When viewed objectively from the standpoint of the interests and needs of the larger classes involved, I conclude that the proposed settlement is both fair and reasonable. It is in the best interests of all concerned, both claimants and defendants, to put this matter behind them. The settlement agreement may not be perfect, but it does not have to be, in order to win court approval.

[86] Much additional work needs to be done to ensure that Nunavummiut receive the benefits and services contemplated by this agreement. The creation of community-based services and programs for the survivor and family classes, the hosting of commemorative events, and the participation of class members and communities in the activities of the Truth and Reconciliation Commission will require applications of various kinds to access funding. Every effort needs to be made to assist the isolated communities of Nunavut to develop funding proposals appropriate to their needs.

[87] It would be helpful if NTI remained involved in this larger process by ensuring that the expertise necessary to develop these funding proposals is available to those communities needing it.
Such expertise will be necessary if the communities are to pursue the broader healing and reconciliation objectives contemplated by this agreement. It may be useful, given the size of the Territory, to develop a strategic Territory-wide plan to implement this part of the settlement agreement.

2006 NUCJ 24 (CanLII)

[88] Funding protocols must also be developed that recognize the high costs associated with the delivery of services to the citizens of this Territory. The number of citizens in Nunavut to benefit from programs may be small when compared to the numbers living in the south. Yet the costs associated with program delivery are many times that of similar services delivered in the other provinces and territories. This is Nunavut's reality; a reality imposed by distance, climate and geography. Economies of scale are difficult, if not impossible to achieve. Any funding formula based on numbers alone would be an injustice to the citizens of this Territory.

[89] This Court approves the proposed settlement unconditionally. It does so with the expectation that the co-operative and conciliatory approach that resulted in the creation of this historic consensus will continue to characterize the parties' relationship with each other in the future.

[90] The Court extends its gratitude to the many citizens who had the courage to speak openly of their experiences and feelings on the hearing of this motion. The Court wishes them every success in the healing journey that lies ahead.

Dated at the City of Iqaluit this 19th day of December, 2006

_____

Mr. Justice R.G. Kilpatrick
Nunavut Court of Justice

2006 NUCJ 24 (CanLII)

Amendment of the Reasons for Judgment Reserved of
The Honourable Mr. Justice Kilpatrick

The neutral citation of this judgment has been changed from "*Ammaq et al. v. Canada (Attorney General), 2006 NUCJ 24*" to "Fontaine. v. Canada (Attorney General), 2006 NUCJ 24."

The style of cause on the frontispiece has been changed from "Plaintiffs: Michelline Ammaq, Blandina Tulugarjuk and Nunavut Tunngavik Incorporated and Defendant: Attorney General of Canada" to "Plaintiffs: Larry Philip Fontaine, et al and Defendant: The Attorney General of Canada, et al"

Please replace the amended pages in your hard copy of the judgment.

2006 NUCJ 24 (CanLII)

Gagne v. Silcorp Ltd., [1998] O.J. No. 4182

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

Charron, Rosenberg and Goudge JJ.A.

Heard: May 27, 1998.

Judgment: October 21, 1998.

Docket No. C28348

[1998] O.J. No. 4182 | 41 O.R. (3d) 417 | 167 D.L.R. (4th) 325 | 113 O.A.C. 299 | 39 C.C.E.L. (2d) 253 | 27 C.P.C. (4th) 114 | 83 A.C.W.S. (3d) 125 | 1998 CarswellOnt 4045

Proceeding under the Class Proceedings Act, 1992 Between Sherrie B. Gagne, (plaintiff), and Silcorp Limited, (defendant)

(14 pp.)

Case Summary

Barrister and solicitor — Compensation — Agreements, contingent fees — Review and approval — Multiplier — Calculation of — Accounts — Hourly rates — Measure of compensation — Relevant considerations — Reasonable charges, reasonably performed — Respecting successful services — Class services.

Appeal by solicitors for the plaintiff in a class action, Gagne, from the dismissal of their motion for court approval to increase their base fee by a multiple of three. Gagne brought a class action for wrongful dismissal against the defendant, Silcorp. Pursuant to a written agreement, the lawyers took her class action on a contingency basis as permitted by the Class Proceedings Act. They agreed that the base fee would be the product of the hours worked by the lawyers and their usual hourly rates. Negotiations resulted in a fairly quick settlement. Mini hearings were held to resolve individual claims. The final total gross recovery was $1,945,723. The lawyers motion for court approval to increase their base fee by a multiple of three was denied, and they were allowed only their base fee. The motions judge found that there was no material risk in accepting the retainer and that the base fee was fair compensation for the lawyers' services in obtaining the degree of success they had. They appealed to the Ontario Court of Appeal.

HELD: Appeal allowed.

A multiplier of two was to be applied to the base fee. This was fair and reasonable compensation as contemplated by the retainer, and it represented a multiplied fee that was much less than ten per cent of gross recovery. It provided a sufficient real incentive for solicitors in future similar cases. The motions judge erred by failing to give due weight to relevant risk and success considerations. Both the degree of risk assumed by the lawyers and the degree of success they achieved were relevant considerations. Here, while the risk of an adverse finding on liability was minimal, there was a material risk of non-certification. As well, there were significant elements of success in the way the solicitors conducted the proceedings. Weighed against these success factors was the fact that individual class members incurred further legal fees to finally realize on their claims after the settlement. Class members' views about whether the base fee should be increased were not to be considered.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 33, 33(2), 33(7)(b).
Employment Standards Act, R.S.O. 1990, c. E-14.

Counsel

Paul S.A. Lamek, Q.C., for the appellant solicitors. McGowan & Associates and Jeff Burtt, advocate.

The judgment of the Court was delivered by

GOUDGE J.A.

1 The Class Proceedings Act, 1992, *S.O. 1992, c. 6* (the "Act") permits a solicitor to take a class action on a contingency basis. If the action is successful the Act permits the solicitor to seek the court's approval to increase his or her base fee by applying a multiple to that fee. This appeal concerns the appropriate considerations that should inform the court's decision on such a motion.

2 The appellants are solicitors who acted on behalf of the plaintiff Sherrie Gagne in a class action against the defendant Silcorp Limited. The action was concluded successfully and the appellants, having taken the case on a contingency basis, moved to increase their base fee by a multiple of three. Southey J. denied this request, allowing the solicitors only their base fee, namely the product of their usual hourly rates and their hours worked on the matter. This is an appeal from that disposition.

THE FACTUAL BACKGROUND

3 Beginning in late 1996, the defendant Silcorp proceeded to merge the operations of the Becker's and Mac's convenience store chains which it owned. As a consequence of the merger, a number of its employees were no longer needed and were dismissed. Initially Silcorp offered those terminated only an amount that was less than the minimum termination and severance pay to which they were entitled under the Employment Standards Act, R.S.O. 1990, c. E.14.

4 On March 24, 1997 the appellant solicitors commenced a class action for wrongful dismissal on behalf of those former employees who had been terminated. Sherrie Gagne was the representative plaintiff.

5 Immediately after commencing the action, the appellants brought a motion before Southey J. seeking an injunction to compel Silcorp to comply with the Employment Standards Act. This motion was adjourned from April 3, 1997 to April 17, 1997 on the undertaking of Silcorp to immediately comply with the requirements of that Act.

6 The parties then engaged in intensive negotiations which culminated in minutes of settlement dated April 14, 1997. On April 17, 1997, that settlement was approved by Southey J. as required by s. 29 of the Act. The settlement order was very complex but its essential elements were the following:

* The action was certified as a class proceeding for the purposes of the Act.

* Sherrie Gagne was appointed the representative plaintiff on behalf of the class of former employees who had been terminated by the defendant Silcorp.
* The appellant solicitors were appointed as counsel for the class.
* The defendant was adjudged liable for compensatory damages and Employment Standards Act entitlements.
* The claims for punitive and exemplary damages were dismissed.
* Pursuant to s. 25 of the Act, a reference was directed to determine the quantum of damages for each class member.
* The terms of the reference created a mini-hearing process with a mediation stage and an arbitration stage.
* The class members were each permitted to be represented in the mini-hearing process by a personal lawyer rather than the appellant solicitors.

7 Between the date of the settlement and August 26, 1997, when the appellant solicitors prepared the material seeking to triple their base fee, thirty-five individual claims were finally resolved through the mini-hearing process. This court was further advised that by the time of this appeal, all sixty-five class members had resolved their individual claims for a total gross recovery of $1,945,723.

8 As required by the Act, the appellant solicitors executed a written agreement with the representative plaintiff respecting their fees and disbursements. It provided that the payment of any legal fees was contingent on the class action being concluded successfully as defined by the Act. It also provided that the base fee would be the product of the hours worked by the solicitors and their usual hourly rates. In addition, it set out that the solicitors could seek court approval for a multiplier to be applied to that base fee. Finally, the agreement described two examples of how this might work:

> 7. The Consortium and the Client acknowledge it is difficult to estimate what the expected fee will be. However, the following are estimates:
>
> (a) If the class action results in a quick settlement for the class, within 3 months after the date of this retainer, and at that time the Base Fee is $50,000 and if the court sets the Multiplier at 3.0, then the fee will be $50,000 x 3.0 = $150,000.
>
> (b) If the trial of the common issues occurs within 2 or 3 years and is decided in favour of the class and no appeals are taken, and at the time the Base Fee is $250,000 and if the court sets the Multiplier at 2.0, then the fee will be $250,000 x 2.0 = $500,000.
>
> These estimates do not include work for any mini-hearings or other proceedings which may be necessary to deal with individual damage claims.

9 The motion brought by the appellants sought a multiplier of 3. In denying this request Southey J. considered two factors, namely the degree of risk in accepting the retainer and the degree of success achieved by the solicitors. He set out his analysis of each of these factors clearly and concisely as follows:

> As to the first of the above elements, I am unable to see any reason why the employees who were dismissed would not be entitled to their "entitlements" under the Employment Standards Act and to compensatory damages, if any. It appears to me that there was no serious issue as to liability in this case. In these circumstances, I cannot find that there was any material risk in accepting the retainer.
>
> When I asked counsel for the Consortium to explain the risk, his reply was that the difficulty arose out of procedural complexity. In my judgment, that is not the sort of risk that should influence the multiplier. That sort of risk is adequately covered by an award of a Base Fee in the full amount of the usual charges made by the legal professionals, as I have approved in this case ...

As to the second element, what has been achieved? Former employees now have available to them a procedure for the prompt determination of their claims. For Achieving that result, the solicitors, in my opinion, are fairly compensated for their services to August 8 last by the Base Fee of $109,411.28, including GST. Any premium based on a high degree of success must depend on the recovery in each case, which was not the subject of evidence before me.

10 The appellants argue that Southey J. erred in his consideration of both the risk factors and the success factors and, further, that he failed to give weight to the views of the class members who, it is argued, appear content with a significant multiplier. No one appeared in opposition to the appellants.

ANALYSIS

11 Central to a consideration of these arguments is s. 33 of the Act. It reads as follows:

> Agreements for payment only in the event of success
>
> 33.-(1) Despite the Solicitors Act and An Act Respecting Champerty, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.
>
> Interpretation, success in a proceeding
>
> (2) For the purposes of subsection (1), success in
>
> a class proceeding includes,
>
> (a) a judgment on common issues in favour of some or all
>
> class members; and
>
> (b) a settlement that benefits one or more class
>
> members.
>
> Definitions
>
> (3) For the purposes of subsections (4) to (7), "base fee" means the result of multiplying the total number of hours worked by an hourly rate; "multiplier" means a multiple to be applied to a base fee.
>
> Agreements to increase fees by a multiplier
>
> (4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.
>
> Motion to increase fee by a multiplier
>
> (5) A motion under subsection (4) shall be heard by
>
> a judge who has,
>
> (a) given judgment on common issues in favour of some or
>
> all class members; or
>
> (b) approved a settlement that benefits any class
>
> member.
>
> Idem
>
> (6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.
>
> Idem

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

(a) shall determine the amount of the solicitor's base fee;

(b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and

(c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement.

Idem

(8) In making a determination under clause (7)(a), the court shall allow only a reasonable fee.

Idem

(9) In making a determination under (7)(b), the court may consider the manner in which the solicitor conducted the proceeding.

12 This section makes clear that the motion seeking to apply a multiplier to the base fee can be brought only after the class proceeding has been concluded successfully as defined in s. 33(2). Section 33(7)(b) gives the judge a discretion in determining whether to apply a multiplier or not. Hence, on appeal, while this court is not free to simply substitute its own exercise of discretion for that exercised at first instance, reversal of the order appealed from may be justified if the motions judge gave no weight or insufficient weight to considerations relevant to his decision. See Friends of the Old Man River Society v. Canada (Minister of Transport), *[1992] 1 S.C.R. 3* at 76-77.

13 In applying this standard of review to the decision appealed from, it is appropriate to begin with a consideration of the genesis of the Class Proceedings Act, 1992. It was enacted following much legislative study and in the wake of a detailed report of the Ontario Law Reform Commission laying out the broad rationale for such legislation. One of the objects which the Act seeks to achieve is the efficient handling of potentially complex cases of mass wrongs. See Dabbs v. Sun Life Assurance Company of Canada, a judgment of the Ontario Court of Appeal, released September 14, 1998 at p. 3.

14 Another fundamental objective is to provide enhanced access to justice to those with claims that would not otherwise be brought because to do so as individual proceedings would be prohibitively uneconomic or inefficient. The provision of contingency fees where a multiplier is applied to the base fee is an important means to achieve this objective. The opportunity to achieve a multiple of the base fee if the class action succeeds gives the lawyer the necessary economic incentive to take the case in the first place and to do it well. However, if the Act is to fulfill its promise, that opportunity must not be a false hope.

15 With that background, I turn to the judgment appealed from. As I have said, Southey J. addressed two criteria in concluding that he would not apply a multiple to the base fee: the degree of risk assumed by the solicitors and the degree of success they achieve. In my view, he was correct in focusing on these two considerations. Section 33(7)(b) makes clear the relevance of "the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success". Section 33(9) invites a consideration of the manner in which the solicitor conducted the proceedings. However, for the reasons that follow I have concluded that he erred in giving no weight to considerations relevant to each of the risk and success criteria.

Risk Factors

16 The multiplier is in part a reward to the solicitor for bearing the risks of acting in the litigation. The court must determine whether these risks were sufficient that together with the other relevant considerations a multiplier is warranted. While this determination is made after the class proceeding has concluded successfully, it is the risks when the litigation commenced and as it continued that must be assessed.

17 The only risk factor considered by Southey J. was whether the defendant might ultimately escape liability. Because there was no real doubt about that liability, he determined that there was no material risk in accepting the retainer.

18 Since this class proceeding was concluded quickly, the risk assessment was properly focussed on the risks incurred at the outset in undertaking the proceeding and did not have to extend to the risks, if any, in continuing it. Nonetheless, in my view there was from the beginning a second material risk that was a relevant consideration, namely the risk that comes with this action being brought as a class proceeding, particularly the risk of non-certification. The certification step in a class action is a significant one, often requiring extensive preparation by counsel. If certification is denied, a solicitor who has agreed to a fee contingent on success recovers nothing. Moreover, when this action was commenced, certification could not be predicted with certainty. A debate was quite possible about whether the common issues requirement would be met or whether a class proceeding was the preferable procedure given the enforcement mechanisms provided by the Employment Standards Act. This risk factor was material and ought to have been given weight.

19 It is true that this risk factor will be present in most class proceedings. This factor should be recognized so that solicitors faced with a class proceeding retainer will have the necessary economic incentive to take on the matter. They will know that if, in prosecuting the action, they can meet the success criterion there will be a real opportunity to have some multiple attached to the base fee. To accord due weight to this consideration is to serve the legislative objective of enhanced access to justice.

Success Factors

20 Section 33(9) invites the court, in determining whether a multiplier is appropriate, to consider the manner in which the solicitor conducted the proceeding. Just as the real opportunity to receive an enhanced reward for incurring the risks of the litigation serves as an incentive for the solicitor to take on the retainer, that opportunity is also designed to serve as an incentive for the solicitor to achieve the best possible results for the class, expeditiously and efficiently.

21 The only success factor considered by Southey J. was that a procedure had been provided to former employees for the prompt determination of their claims. This was insufficient, in his view, to warrant the application of any multiple to the base fee.

22 In my view, this fails to recognize that the solicitors achieved immediate, partial success in extracting a commitment from the defendant to comply forthwith with the Employment Standards Act. Second, the ultimate settlement of the common issues was achieved quickly. Third, the settlement provided for a creative and effective mini-hearing process that resulted in the complete resolution of all individual claims within little more than a year. These factors are all relevant to the degree of success with which the solicitors conducted the proceedings and all deserved to be considered in determining whether a multiplier was appropriate.

Views of Class Members

23 In reaching his decision Southey J. did not consider the views of class members about whether a multiplier should properly be applied to the base fee. In my view, he was correct in doing so. The Act does not appear to invite such a consideration. Moreover, in this case those views, which are said to constitute acceptance or even approval of a multiplier, can be gleaned only by a very tenuous process of inference. One simply cannot say with any certainty that the views of class members on this issue are as they are argued to be.

24 In summary, therefore, I have concluded that Southey J. erred in the exercise of his discretion in failing to give due weight to relevant risk and success considerations. If appropriate weight is accorded them, I think the conclusion must be that this is an appropriate case to apply a multiplier to the base fee.

25 I recognize that the selection of the precise multiplier is an art, not a science. All the relevant factors must be weighed. Here, while the risk of an adverse finding on liability was minimal, there was a material risk of non-certification. As well, as I have outlined, there were significant elements of success in the manner in which the solicitors conducted the proceedings. Weighed against these success factors is the fact that following the April 17, 1997 settlement, individual class members had to incur further legal fees to finally realize on their claims.

26 In the end, these considerations must yield a multiplier that, in the words of section 33(7)(b), results in fair and reasonable compensation to the solicitors. One yardstick by which this can be tested is the percentage of gross recovery that would be represented by the multiplied base fee. If the base fee as multiplied constitutes an excessive proportion of the total recovery, the multiplier might well be too high. A second way of testing whether the ultimate compensation is fair and reasonable is to see whether the multiplier is appropriately placed in a range that might run from slightly greater than one to three or four in the most deserving case. Thirdly, regard can be had to the retainer agreement in determining what is fair and reasonable. Finally, fair and reasonable compensation must be sufficient to provide a real economic incentive to solicitors in the future to take on this sort of case and to do it well.

27 In this case, then, taking into account all the relevant considerations I have recited, in my view the appropriate multiplier is two. This reflects the risk and success factors at play. It represents a multiplied fee that is significantly less than ten per cent of gross recovery. It reflects the fact that this case does not exemplify the greatest risk or the greatest success. It is within the range contemplated by the retainer agreement. And finally, the resulting compensation should provide a sufficient real incentive for solicitors in future similar cases.

DISPOSITION

28 I would therefore allow the appeal and provide for a multiplier of two to be applied to the base fee up to April 17, 1997, the date of the settlement order. I would vary the order below accordingly. The appellants do not seek costs of the appeal and I would order none.

GOUDGE J.A.
CHARRON J.A. -- I agree.
ROSENBERG J.A. -- I agree.

End of Document

Griffin v. Dell Canada Inc., [2011] O.J. No. 2487

Ontario Judgments

Ontario Superior Court of Justice

G.R. Strathy J.

Heard: April 26, 2011; written submissions

and case conference, May 25, 2011.

Judgment: May 31, 2011.

Court File No. 07-CV-325223

[2011] O.J. No. 2487 | 2011 ONSC 3292 | 203 A.C.W.S. (3d) 37 | 38 C.P.C. (7th) 86 | 2011 CarswellOnt 4190

RE: Thaddeus Griffin, 1339850 Ontario Limited (c.o.b. as Griffin Leasing) and Ian Andrews, Plaintiffs/Moving Parties, and Dell Canada Inc., Defendant/Respondent

(55 paras.)

Counsel

Joel Rochon and Sakie Tambakos, for the Plaintiffs/Moving Parties.

Mahmud Jamal and Jean-Marc Leclerc, for the Defendant/Respondent.

REASONS FOR SETTLEMENT APPROVAL

G.R. STRATHY J.

1 This is a motion, pursuant to s. 29 of the *Class Proceedings Act, 1992, S.O. 1992, c. 6* (the *C.P.A.)*, for the approval of a settlement between the plaintiffs and the defendant, Dell Canada Inc. ("Dell"). The plaintiffs also seek approval of class counsels fees and disbursements.

Background

2 This is a consumer class action involving five allegedly defective models of the Dell Inspiron computer, which was sold in Canada between March 2003 and May 2005. During that time, Dell sold approximately 118,629 Inspiron computers at an average price of about $2,000.

3 The plaintiffs allege that these computers were prone to overheating, power failure, an inability to "boot up" and unexpected shutdowns. They allege that the computers had an inadequate or defective cooling system, and a defective motherboard. The expert retained by class counsel expressed the opinion that the computers had improper circuit board soldering, a defect that was capable of being demonstrated on a class-wide basis.

4 Details of the allegations of the plaintiffs, and their specific experience, are set out in the decision of Lax J., certifying the proceeding as a class action: *Griffin v. Dell Canada Inc., [2009] O.J. No. 418, 72 C.P.C. (6th) 158*.

5 The action has had a lengthy procedural history. There have been numerous motions and appeals. In response to the plaintiff's motion for certification, Dell brought a cross-motion to stay the action in favour of arbitration, based on a provision in Dell's standard terms and conditions which required that disputes be arbitrated in the State of Minnesota, in the U.S.A.

6 On February 3, 2009, Lax J. dismissed Dell's motion to stay and conditionally certified the action, subject to the plaintiffs producing a workable litigation plan.

7 Dells motion for leave to appeal the certification decision was dismissed by Wilson J.: *[2009] O.J. No. 3438*.

8 Dell moved, in March 2009, before Justice Lax for an order reconsidering the stay decision. That motion was dismissed: *[2009] O.J. No. 1592*.

9 Dell's appeal from the decision of Lax J. on the stay and reconsideration motions was dismissed by the Court of Appeal: *[2010] O.J. No. 177*. An application for leave to appeal was dismissed by the Supreme Court of Canada: *[2010] S.C.C.A. No. 75*.

10 As is so often the case, there was parallel class action litigation in the United States. Two U.S. class actions were settled in 2010 on the basis that purchasers of the 1150, 5100 and 5160 Inspiron models would receive compensation, in whole or in part, for "eligible repairs" - that is, repairs to their computers that were performed by Dell or its authorized repair facilities. In the case of the Inspiron 5160 model, the compensation was "capped" at $150. There was no compensation provided to purchasers of the 1100 Inspiron model, because its repair record was better than the industry norm at the time. An earlier class action settlement had been concluded in 2006 with respect to the Inspiron 5150 model. That settlement provided reimbursement for certain out-of-pocket expenses and qualifying repairs and a new, limited warranty on the computer to cover qualifying repairs.

11 These developments encouraged the parties to discuss settlement of this proceeding and a two-day mediation was held in August 2010, with the Honourable Frank Iacobucci Q.C. as mediator. An agreement in principle was reached, and a settlement agreement was signed on January 9, 2011, subject to court approval.

The Settlement Agreement

12 Under the terms of the settlement, as in the U.S. settlements, class members (which Dell has agreed will include, for the purposes of settlement, persons who leased their computers directly from Dell) who paid for certain "reimbursable repairs" - that is, repairs of a specific kind that were made by Dell or one of Dell's authorized service providers - are entitled to receive a refund of all or a certain percentage of the repair cost. "Reimbursable repairs" include:

(a) repairs addressing clogged vents or restricted airflow, including fan repair or replacement;

(b) heat sink replacements;

(c) AC adaptor replacements;

(d) motherboard replacements addressing power failure, shutdown, failure to boot, and/or freezing situations; and

(e) battery replacements addressing failure to take a charge or to hold a charge.

13 The amount of the reimbursement depends on which model of computer is involved and how long the class member owned the computer prior to repair. In the case of the Inspiron 1150, 5100 and 5160 models, the refund will be equivalent to:

(a) 100% of the cost of repairs between 12 and 18 months of the purchase date;

(b) 75% of the cost of repairs between 18 and 24 months of the purchase date;

(c) 40% of the cost of repairs that occurred between 24 and 30 months of the purchase date; and

(d) 20% of the cost of repairs that occurred over 30 months after the purchase date and before the deadline for claims.

14 Unlike the settlement in the United States, there is no cap on eligible repairs to the Inspiron 5160 computer.

15 The payment of a different percentage of repair cost depending on the age of the computer is intended to reflect the fact that the consumer has obtained a greater use of the computer, there is greater likelihood that the need for repair is attributable to ordinary wear and tear, and the remaining working life of the computer is proportionately less.

16 Owners of the Inspiron 5150 will also receive a cash refund, on a sliding scale depending on when the repairs took place. The refund will be:

(a) 100% of the cost of repairs that occurred before September 30, 2007;

(b) 75% of the cost of repairs between October 1, 2007 and March 31, 2008;

(c) 40% of the cost of repairs that occurred between April 1, 2008 and September 30, 2008; and

(d) 20% of the cost of repairs that occurred between October 1, 2008 and the deadline for claims.

17 The following will not be covered under the settlement:

(a) as in the United States, owners of the Inspiron 1100 are not entitled to compensation under the settlement, as the failure rate for that computer was below the industry average. It was the experience of class counsel in Canada that the problems with this model were not as widespread as those affecting the other models - that said, some 70 of the 735 class members who contacted class counsel were model 1100 owners;

(b) repairs that were carried out by repairers other than Dell or its authorized repairers - if the owner found it more convenient, and perhaps less expensive, to have his or her computer repaired by a local repair shop, those costs will not qualify for reimbursement[1];

(c) computers that failed on one or more occasions, but were never repaired; and

(d) computers that were simply scrapped or replaced because they were unusable.

18 To reflect the fact that the settlement does not cover some of these claims, which in many cases would be difficult to prove and expensive to administer, Dell has agreed to contribute $200,000 worth of computers (at retail value) or, where that is not practical, to make equivalent cash donations, to various Canadian children's hospitals and other youth programs in Canada.

19 In addition, Dell will be responsible for payment of the costs of notice of the settlement to class members and the costs of administration of the settlement.

20 Dell has also agreed to pay the sum of $2 million, inclusive of taxes and disbursements, in full satisfaction of the fees of class counsel. Class members will have no obligation to make any payment towards costs.

21 As Dell has an excellent customer database, it has been able to estimate, with some precision, the number of purchasers who are likely to qualify for reimbursement under the settlement. It estimates that there are approximately 435 customers who will automatically be eligible for settlement. Over 700 people have contacted

class counsel with respect to the settlement, although a number of these may be ineligible. I was advised that the average repair cost was likely in the range of $400-$800. As noted above, only a portion of this cost will be recoverable in some cases.

Notice of Settlement and Objections

22 On January 11, 2011, I made an order giving notice of certification and of the proposed settlement. Analytics Inc. was appointed the notice and opt-out administrator. Class members were provided with an opportunity to file written objections to the settlement. There are approximately 118,000 class members and approximately 90% of those actually received direct written notice of certification and of the settlement approval motion. There was also a program for national newspaper advertisement and notice on class counsel's web site. There were six objections to the settlement. There were opt-out requests from 101 class members.

23 The primary concern of the six objectors is that the settlement only covers repairs carried out by Dell or its authorized service providers and that the compensation is confined to the reimbursement of repair costs. They complain that there is no compensation for owners who simply decided that they had had enough, and bought new computers and scrapped the old ones which were defective and had no trade-in or market value. One of the class members objected that class counsel received a large fee, whereas some class members were excluded from the settlement. I will discuss these objections below.

Discussion

24 In considering whether to approve a settlement, the court must ask whether the settlement is fair and reasonable and in the best interests of the class as a whole: *Dabbs v. Sun Life Assurance Co. of Canada (1998), 40 O.R. (3d) 429*, *[1998] O.J. No. 2811* (Gen. Div.) at paras. 30-46, aff'd *(1998), 41 O.R. (3d) 97*, *[1998] O.J. No. 3622* (C.A.), leave to appeal refused *[1998] S.C.C.A. No. 372* (*Dabbs*).

25 Consideration must be given to all the circumstances, including the factual context of the proceedings, the legal issues, the claims made and defences raised, as well as any objections to the proposed settlement. The relevant factors, which will vary from case to case, were summarized by Perell, J. in *Corless v. KPMG LLP*, *[2008] O.J. No. 3092*, *170 A.C.W.S. (3d) 464* at para. 30 (S.C.J.) at para. 38:

> When considering the approval of negotiated settlements, the court may consider, among other things: likelihood of recovery or likelihood of success; amount and nature of discovery, evidence or investigation; settlement terms and conditions; recommendation and experience of counsel; future expense and likely duration of litigation and risk; recommendation of neutral parties, if any; number of objectors and nature of objections; the presence of good faith, arms length bargaining and the absence of collusion; the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Dabbs v. Sun Life Assurance Company of Canada (1998), 40 O.R. (3d) 429* (Gen. Div.) at 440-44, aff'd *(1998), 41 O.R. (3d) 97* (C.A.), leave to appeal to S.C.C. refused Oct.22, 1998, *[1998] S.C.C.A. No. 372*; *Parsons v. The Canadian Red Cross Society*, *[1999] O.J. No. 3572* (S.C.J.) at paras. 71-72.; *Frohlinger v. Nortel Networks Corp.*, *[2007] O.J. No. 148* (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co.*, *[2005] O.J. No. 175* (S.C.J.) at paras. 12-13; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd. (2005), 74 O.R. (3d) 758* (S.C.J.) at para. 117; *Sutherland v. Boots Pharmaceutical plc*, *[2002] O.J. No. 1361* (S.C.J.) at para. 10.

26 The test is easy to state. It is more difficult to apply. It is particularly difficult to apply because the adversary process is generally absent from the settlement approval motion. Both parties support the settlement and neither party is inclined to highlight its deficiencies. The Court of Appeal has recently noted that in appropriate cases, the motion judge may appoint an *amicus* or monitor to investigate and comment on a proposed settlement: *Smith Estate v. National Money Mart Co.*, *[2011] O.J. No. 1321*, *2011 ONCA 233* at paras. 23-41.

27 Settlement approval is all the more difficult because in many cases, including this one, the risk of the settlement not being approved falls disproportionately on class counsel. If the settlement is not approved, and the case goes to trial and the plaintiff loses, the loss to each class member is a few hundred dollars, which they would not have recovered in any event without the class action. Class counsel stands to lose not only the substantial time and and disbursements invested in the file to date, but also is at risk of the considerable costs of taking the case to trial and, potentially, the risk of an adverse costs award.

28 Mr. Rochon properly acknowledges that no settlement is perfect and that this settlement is not perfect. It clearly is not perfect as far as the six objectors are concerned. Some class members are being left out of the settlement. On the other hand, as was noted in *Dabbs* at para. 30, "[A] less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation."

29 I propose to briefly summarize my conclusions with respect to the factors mentioned in *Dabbs*.

30 *Likelihood of success:* It has been my experience on settlement approval motions, particularly where the settlement reflects a significant compromise, that the parties are reluctant to make detailed submissions about the likelihood of success. This is probably because neither party wants to admit to weaknesses in its case, in the event the action does not settle. In this case, one could say that the plaintiff has a good arguable case, but the defendant has some weighty potential defences, including absence of negligence, contractual exclusions and the limited nature of the purchasers warranty. This is definitely a case in which a prudent plaintiff would accept a significant discount in order to avoid the litigation risks associated with trial.

31 *Amount and nature of discovery:* There has been no discovery, but the plaintiffs counsel has had the benefit of information gleaned from the proceedings in the United States and has also, as I have noted, retained an expert witness. I am satisfied that class counsel has a full appreciation of the strengths and weaknesses of the case.

32 *Settlement terms and conditions:* I have set out the settlement terms above. There is a rational basis for the exclusion of certain claims based on difficulties of proof.

33 *Recommendations and experience of counsel:* The settlement comes with the recommendation of experienced and highly reputable class counsel.

34 *Future expense and likely duration of litigation:* There is absolutely no question that if this action is not settled, the plaintiffs will be faced with an adversary with deep pockets, which is strongly motivated to resist any attack on its brand. Dell has shown a willingness to engage in costly litigation, using experienced, hard-nosed and well-nourished counsel, to defeat these claims. With the litigation in the United States settled, the plaintiff in Canada would have to go it alone. There is no question that taking this action to trial will be an expensive and time-consuming process. It will likely cost at least another $1 million in unbilled fees and three or more years to take this action through discovery and to trial. These are circumstances that militate strongly in favour of settlement and are factors that any fee-paying litigant would take into account in assessing the value of an immediate settlement against the possibility of a future recovery.

35 *Recommendations of neutral parties:* The mediator has not, quite properly, expressed an opinion on the settlement. He has, however, confirmed that the negotiations were adversarial, lengthy and hard fought. I am satisfied that the settlement was the product of a true adversarial process and that class counsel sought to achieve a settlement that was in the best interests of all class members.

36 *Number and nature of objections:* The objections come from six individuals who will be excluded from the settlement class. Their objections are fair, reasonable and principled. Their main complaint is that the settlement does not include purchasers who had their computers repaired by someone other than Dell or its authorized service providers or who simply scrapped their computers without having them repaired.

37 This issue was addressed in the plaintiffs motion for settlement approval and also by way of supplementary submissions, at my request. The issue was raised in the settlement negotiations and Dell took the position that any settlement in Canada would have to be modelled on the settlements in the U.S., which did not include compensation for anything other than eligible repairs. In addition to this position, which appears to have been a "deal breaker", there was a genuine concern about the ability to identify claimants for non-eligible repairs and the administrative costs of verifying their claims. Ultimately, the proposed cy-près payment was put forward, and agreed upon, as a means of making some acknowledgment of these claims.

38 As well, of course, class members not included in the settlement have the right to opt-out, and it appears that approximately 100 class members have decided to do so.

39 Having considered this issue, I have concluded that although the objectors concerns are legitimate, and the settlement can be described as less than perfect to that extent, this settlement, like all settlements, is the product of compromise. While the court might prefer a more inclusive compromise, I am not prepared to say that the compromise was not a reasonable one.

40 *Good faith and absence of collusion:* I am satisfied that the settlement is made in good faith and that there was no collusion.

41 *Communication between class counsel and class members:* Class counsel has been in communication with the class through its web site.

42 *The dynamics of the negotiations:* As described above, the negotiations were adversarial and took place over two days. It is noteworthy that class counsel was given the opportunity to participate in the settlement negotiations involving the U.S. litigation. He declined to do so, based on the assessment that an independent settlement was in the best interests of the class. The settlement in Canada is a modest improvement on the settlement achieved in the United States.

The Cy-Près Component

43 Sub-section 26(4) of the *C.P.A.* provides:

> The court may order that all or a part of an award under section 24 [an aggregate assessment of damages] that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order.

44 Subsection 26(6) provides that the court may make such an order even if the order would benefit persons who are not class members.

45 The proposed award in this case is set out above. Considering that the contribution of computers can be made in kind, and is calculated at retail value, the cost to Dell is quite modest. I assume that the contributions will also have a goodwill element that benefits Dell.

46 The cy près distribution will provide children in hospitals and in youth programs with Dell computers for their education, training and recreational use. To that extent, it can reasonably be expected to benefit certain members of the proposed class. Further, to the extent the contribution represents additional damages payable by Dell, it may be regarded as accomplishing the goal of behaviour modification, and thus advances the goals of the *C.P.A.*

Conclusion on Settlement Approval

47 For the foregoing reasons, I approve the settlement.

Class Counsel Fees

48 The settlement includes a payment of $2 million for the fees and disbursements, together with taxes, of class counsel. That fee was negotiated after agreement in principle had been reached on the main terms and structure of the settlement with class members.

49 The fee component is approximately $1.7 million which represents a multiple of approximately 1.3 on the base time of class counsel. The retainer between class counsel and the representative plaintiffs calls for a fee based on the higher of 25% of the total amount recovered or a multiple of three times the time spent. The proposed fee falls well within the latter.

50 Class counsel requests approval of the fee. It is the responsibility of the court to determine whether the fee is "fair and reasonable", having regard to the factors usually considered in the approval of a lawyers fee, as well as the goals of the *C.P.A.*

51 The factors to be considered include:

(a) the time expended by the lawyer

(b) the complexity of the matter;

(c) the responsibility assumed by the lawyer;

(d) the monetary value of the matter;

(e) the importance of the matter to the client;

(f) the degree of skill and competence demonstrated;

(g) the results achieved;

(h) the ability of the client to pay;

(i) the client's expectation as to the amount of the fee.

52 A fee of $2 million is undoubtedly large. It may well exceed the total compensation payable to class members under the settlement. In considering this fee, I keep in mind the following:

(a) the fee is consistent with the retainer agreement and with the expectations of the representative plaintiffs;

(b) no portion of the fee falls on class members - they are entitled to compensation without deduction for fees;

(c) this was a complicated class action, both procedurally and substantively - Dell was a sophisticated and tough-minded opponent and it put up an aggressive defence;

(d) the result achieved for the class is reasonable; and

(e) a very substantial amount of time was expended on this matter by class counsel, over a period of more than four years, without any compensation and with no assurance of compensation unless the action was successful.

53 Class action legislation in Ontario was prompted, in part, by a concern that consumer claims could not be economically advanced on an individual basis. The costs of individual action, against large corporations, is simply

too high. Consumer class actions simply will not be undertaken by first rate lawyers, such as class counsel in this proceeding, unless they are assured of receiving fair - and I would add "generous" - compensation in appropriate cases. That compensation must take into account the risks they undertake - including the real risk of no payment at all, the risk of exposure to costs, and the cost of deferred recovery of compensation. Plaintiffs class action work is not for the faint-hearted. The defendants are frequently represented by large firms, with substantial hourly rates, which deploy teams of partners and associates who are able to mount an aggressive defence and no doubt endeavour to wear down plaintiffs counsel. Unless there are generous rewards for cases that are won, the number and quality of plaintiffs' counsel will inevitably decline.

54 Considering the foregoing, I approve class counsel's fee and disbursements.

Claims Administration and Reporting

55 The court will continue to exercise supervisory jurisdiction over the claims administration process until its conclusion. Class counsel will also remain involved. I wish to arrange a case conference with the claims administrator and counsel at an early date to discuss the claims administration protocol. This should include a provision to ensure that disallowed claims are subject to review by class counsel and ultimately by the court. The court should be copied on all reports from the claims administrator to counsel.

G.R. STRATHY J.

---

1 No doubt Dell's warranty would be voided if repairs were carried out by anyone other than an authorized repairer.

End of Document

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Jeffery v. Nortel Networks,***
2007 BCSC 69

Date: 20070119
Docket: S015159
Registry: Vancouver

Between:

Janie Jeffery and Ronald Mensing

Plaintiffs

And:

Nortel Networks Corporation, John A. Roth,
Frank A. Dunn, F. William Connor and Chahram Bolouri

Defendants

Brought under the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50

Before: The Honourable Mr. Justice Groberman

Reasons for Judgment

Counsel for the Plaintiffs	David A. Klein Nicola C. Hartigan
Counsel for the Defendants	Gregory J. Nash David K. Yule Steve J. Tenai
Date and Place of Hearing:	November 27, 2006 Vancouver, B.C.

2007 BCSC 69 (CanLII)

[1] This is an application to approve a settlement in proceedings under the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50.

The Action

[2] In the action, the plaintiffs allege that the defendant Nortel Networks Corporation ("Nortel") issued press releases between the fall of 2000 and February 15, 2001, which were materially misleading, and which had the effect of inflating the price of its common shares. On February 15, 2001, after the close of trading, Nortel issued a further press release, which contradicted its earlier financial performance forecasts. On February 16, 2001, share prices for Nortel on the Toronto Stock Exchange dropped sharply, from $46 per share to $32 per share. The share price continued to drop thereafter, and within one month, a share was valued at only $24.

[3] The plaintiffs allege that they directly or indirectly relied on the company's press releases in purchasing Nortel shares, and that they suffered damages when they held those shares beyond February 15, 2001. They claim compensation for those damages against Nortel and against the defendants Roth, Connor and Bolouri, who were directors and officers of Nortel at material times. The action has been discontinued as against Dunn.

[4] On June 27, 2006, I conditionally certified the action for the purpose of considering the fairness of the proposed settlement.

[5] The class that has been certified is defined as follows:

> [A]ll persons and entities, except Excluded Persons who, while resident in British Columbia at the time, purchased Nortel common

2007 BCSC 69 (CanLII)

> stock or call options on Nortel common stock or wrote (sold) put options on Nortel common stock during the ... period [from October 24, 2000 to February 15, 2001, inclusive].

[6] For the reasons that I gave at the time of the conditional certification, I am satisfied that the class as defined is appropriate, and propose to consider the settlement on that basis.

[7] There are three parallel actions in other jurisdictions: ***In re Nortel Networks Corp. Securities Litigation***, Consolidated Civil Action No. 2001 Civ 1855 (RMB), proceeding in the United States District Court for the Southern District of New York; ***Frohlinger v. Nortel Networks Corporation***, No. 02-CL-4605 in Ontario's Superior Court of Justice; and ***Association de Protection des Épargnants et Investisseurs du Québec c. Corporation Nortel Networks***, No. 500-06-000126-017 (District de Montréal) in Quebec's Cour Supérieure. These four actions have been the subject of a joint settlement, which is conditional upon the approval of all four courts.

[8] Both the "worldwide" action in the U.S. District Court and the Canada-wide action in Ontario's Superior Court of Justice could potentially have included the class represented in the current action. Nonetheless, both because of concerns over the possibility that the other actions would not be certified, and to ensure that the British Columbia plaintiffs had recourse to an action in the event that they were dissatisfied with any arrangements made in other jurisdictions, the plaintiffs decided to initiate and continue the current action. The work of plaintiffs' counsel in British Columbia, however, has been much less than it would have been had the U.S. and Ontario

2007 BCSC 69 (CanLII)

actions not been extant. While there has been work of considerable value done by counsel locally, the bulk of the counsel work has been performed elsewhere.

The Proposed Settlement

[9] On February 8, 2006, a conditional settlement was reached in the U.S. litigation, in a mediation process. Certain of the conditions were satisfied thereafter, and counsel in the other jurisdictions then participated in negotiating a settlement agreement settling all of the outstanding class proceedings.

[10] Pursuant to the settlement, Nortel and its insurers are to pay a total of US$431,667,428.48 to the members of the global class. The funds have been deposited in an interest-bearing trust account pending implementation of the settlement. In addition, Nortel agreed to provide free-trading common shares representing approximately 7.25% of the company's equity to members of the global class. The number of shares that were to be furnished in the settlement was initially 314,333,875, but as a result of a recent share consolidation, the number of new shares will be 1/10 of that number.

[11] The total value of the settlement will depend on the share price at the date of implementation, but is approximately US$1.16 billion. In addition to that amount, the plaintiff class will be entitled to receive 1/4 of any recovery that Nortel obtains in certain litigation against former senior corporate officers.

2007 BCSC 69 (CanLII)

Plan of Allocation

[12] Because the settlement settles worldwide claims, it is not possible, at this time, to calculate the proportion of the settlement proceeds that will go to members of the British Columbia class. They will be treated the same as members of the worldwide, Ontario, and Quebec classes. The amount each receives will be based on the number of shares that they purchased during the relevant period, and the purchase price of those shares. The goal is to allocate the damages in proportion to the loss that each class member suffered.

[13] I need not detail all of the provisions in the settlement agreement. Among the key provisions are those that ensure that claimants will be entitled to a *pro rata* share of the damages, that no amount will be returned to the defendants, even if the take up rate of the settlement is lower than expected, and that "put" and "call" option holders will be compensated in a manner that attempts to ensure that their entitlement is proportionate.

Applications for Approval of the Settlement

[14] Courts in all four jurisdictions in which parallel class actions are proceeding have heard applications for approval of the settlement. The U.S. District Court has approved the settlement and plan of allocation in a decision of the Honourable Judge Berman pronounced December 26, 2006. I understand that the application for approval of counsel fees remains under reserve in that court.

2007 BCSC 69 (CanLII)

[15] The application before the Ontario's Superior Court of Justice was heard by Winkler R.S.J. on November 6, 2006, and the application before the Quebec's Cour Supérieure was heard by Monast J.C.S. on November 16, 2006. Decisions as to whether to approve the settlement and plan of allocation are under reserve in those courts. The issue of approval of counsel fees has, I understand, been argued in the Ontario case, but was adjourned in the Quebec litigation.

2007 BCSC 69 (CanLII)

[16] At the close of argument, counsel for the parties indicated that they had no objection to the judges in the four jurisdictions engaging in confidential communications that they considered necessary. Pursuant to that consent, I have engaged in limited confidential communications with both Mr. Justice Winkler and Madame Justice Monast.

Tests for the Approval of a Settlement

[17] Section 35 of the ***Class Proceedings Act*** provides that settlement of a class proceeding may only occur with the approval of the court. In determining whether a settlement should be approved, the court must determine whether the settlement is "fair and reasonable and in the best interests of the class as a whole". The court is not required to determine whether the settlement is the best that could possibly be achieved; what is required is that the settlement fall within a range of reasonableness (***Sawatzky v. Societe Chirugiale Instrumentarium Inc.*** (1999), 71 B.C.L.R. (3d) 51 (S.C.)).

[18] The factors to be considered in approving a class proceeding settlement are now well-established. In ***Haney Iron Works Ltd. v. Manufacturers Life Insurance***

Co. (1998), 169 D.L.R. (4th) 565 (B.C.S.C.), Brenner J. (as he then was) quoted with approval the judgment of Sharpe J. (as he then was) in ***Dabbs v. Sun Life Assurance Co. of Canada***, [1998] O.J. No. 1598 (S.C.) setting out standards for approval. Both Sharpe J. and Brenner J. considered the eight factors set out in *Newberg on Class Actions* (3rd ed.) para. 11.43 to be apt in a Canadian context. The eight factors are as follows:

2007 BCSC 69 (CanLII)

1. Likelihood of recovery or likelihood of success;
2. Amount and nature of discovery, evidence or investigation;
3. Settlement terms and conditions;
4. Recommendations and experience of counsel;
5. Future expense and likely duration of litigation;
6. Recommendations of neutral parties, if any;
7. Number of objectors and nature of objections; and
8. The presence of arms-length bargaining and the absence of collusion.

[19] In ***Fakhri v. Alfalfa's Canada, Inc.*** 2005 BCSC 1123, 20 C.P.C. (6th) 70 at para. 8, Gerow J. added two additional factors to this list:

9. degree and nature of communications by counsel and the representative plaintiffs with class members during litigation; [and]
10. information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.

[20] In ***Reid v. Ford Motor Co.***, 2006 BCSC 1454, at paragraph 11, Gerow J. produced a slightly different list, this time adding the following as a factor:

> 11. if counsel fees were negotiated in the settlement, and if so, how big a factor are they; ...
>
> [This is actually the eighth factor in Gerow J.'s list in ***Reid***]

2007 BCSC 69 (CanLII)

[21] The various factors considered in ***Dabbs***, ***Sawatzky***, ***Fakhri***, and ***Reid*** do not form an exhaustive list, nor will all of them be relevant in every case. It seems to me that the various factors can be subsumed into four categories.

[22] The court first looks at the process by which the settlement has been reached. A court does not conduct independent investigations into the adequacy of a settlement; rather, it depends on the evidence put before it by the parties. The court must, therefore, be able to assess the completeness and candour of the evidence presented. In order to do this, it must satisfy itself that the investigations leading up to the settlement have been adequate, and that the settlement itself is not collusive or motivated by improper considerations.

[23] I would describe the first category of considerations for the court as those dealing with the adequacy of the groundwork done by counsel before entering into a settlement. Has counsel of sufficient expertise performed sufficient work to give the court confidence that the settlement proposal is based on a proper appreciation of the background facts, and does not spring from ignorance of important details? Of the factors listed above, factors 2 and 4 go primarily to this question.

[24] The second category of considerations is also concerned with the settlement process. Is the court confident that the proposed settlement is the product of a reasonable negotiating process, in which the parties have reached an agreement

without collusion and without extraneous facts motivating the negotiators? Of the factors listed in para. 18 above, factors 8, 10 and 11 are examples of considerations that will assist the court in determining the adequacy of the negotiation process.

[25] If the court is satisfied that the process leading to settlement was satisfactory, it will be in a position to consider the third and most important category of considerations: the substance of the settlement. Does the proposal reflect an appropriate balancing of the costs and benefits of settlement? In other words, should the matter be settled on the proposed terms, or would the plaintiffs be better served by continuing the litigation. Of the factors listed above, numbers 1, 3, 5 and 6 are primarily concerned with this overall question.

[26] Even if the settlement appears to be acceptable, the court must be cognizant of the fact that it is dealing with the rights of the members of the represented class. Parties represented in a class action by the representative plaintiff may play very limited roles in directing the litigation, but it remains the fact that it is conducted for their benefit. There is, therefore, a fourth category of considerations, which concerns itself with the views of the class members. The court must consider whether class members have been adequately informed of the proposed settlement, and whether they have, for the most part, found it to be an appropriate one. Factors 7 and 9 in the above list are considerations that form part of this fourth category.

[27] If there is an indication that a large proportion of the class are not satisfied with the settlement, the court should be cautious in approaching the application for approval.

2007 BCSC 69 (CanLII)

[28] In summary, then, the court must consider four broad questions before approving the settlement of a class actions:

- Has counsel of sufficient experience and ability undertaken sufficient investigations to satisfy the court that the settlement is based on a proper analysis of the claim?
- Is there any reason to believe that collusion or extraneous considerations have influenced negotiations such that an inappropriate settlement may have been reached?
- On a cost/benefit analysis, are the plaintiffs well-served by accepting the settlement rather than proceeding with the litigation? and
- Has sufficient information been provided to the members of the class represented by representative plaintiffs, and, if so, are they generally favourably disposed to the settlement?

2007 BCSC 69 (CanLII)

Has Counsel of Sufficient Experience and Ability Undertaken Sufficient Investigations?

[29] Counsel for the plaintiffs in the various jurisdictions appear to be experienced in class proceedings, and to be recognized as skilled litigators. Certainly that is the case with the plaintiffs' British Columbia counsel.

[30] It appears that there have been very significant resources devoted to determining the facts underlying the claim, and to assessing the strength of the case. Substantial discovery processes have been undertaken, and experts have been engaged to analyse the issue of damages. Through discovery, expert analysis, and mediation, the plaintiffs have gained adequate knowledge of the financial position of the defendant. These procedures, along with meticulous legal research have allowed the plaintiffs to assess the strength of their case. I am

satisfied that both the skill brought to bear on the issues and the effort expended have been adequate.

Have Collusion or Extraneous Considerations Tainted the Negotiations?

[31] The settlement agreement is the product of a judicial settlement process undertaken before Judge Robert W. Sweet of the U.S. District Court for the Southern District of New York. There is no suggestion that the negotiations were other than at arms length, or that any party was influenced by extraneous considerations. Indeed, the settlement appears to be the product of a gruelling negotiation process. I am satisfied that the result is a hard-fought compromise.

[32] The only extraneous factor that might be suggested is the interest of counsel in getting paid. I am satisfied, however, that counsel's desire for fees did not motivate them to accept a settlement offer that might otherwise be unacceptable. It should be noted that the settlement itself does not determine the amount of counsel fees that will be paid. Counsel's fees must be approved by the courts of the various jurisdictions. In any event, there is no reason to believe that counsel's interests in any way diverged from those of their clients. Counsel were aware that achieving the best settlement for their clients in this case would also enhance their own prospects of being well-remunerated.

[33] I am satisfied that no inappropriate considerations motivated counsel in negotiations.

2007 BCSC 69 (CanLII)

Cost/Benefit Analysis

[34] In assessing whether the proposed settlement is within the range of those which are reasonable, the court must balance the amount of the settlement against the potential for greater compensation for the plaintiffs if the litigation is allowed to continue, on the one hand, and the costs and risks attendant on such litigation, on the other.

2007 BCSC 69 (CanLII)

A. Potential Recovery

[35] There are difficulties in estimating the amount by which the price of Nortel shares was inflated by the alleged misrepresentations. The parties have placed before the court an estimate by Ms. Jane D. Nettesheim, a financial economist, and vice president of Stanford Consulting Group.

[36] The analysis is based on the decrease in value of Nortel shares on February 16, 2001. Ms. Nettesheim estimates the inflation caused by the misrepresentation as the difference between the diminution in value of Nortel common shares and the diminution in the value of other shares on the exchange on that day. In this way, she attempts to separate the factors unique to Nortel's share price collapse from more general market forces that were at work. Ms. Nettesheim estimates that the misstatements resulted in an artificial inflation of Nortel's share values by 27.5%, or a total of $7.1 billion.

[37] The plaintiffs have also filed an affidavit of Professor Ron Giammarino of the University of British Columbia Faculty of Commerce and Business Administration. Professor Giammarino endorses Ms. Nettesheim's approach.

[38] As I indicated to counsel during the hearing of this matter, Ms. Nettesheim's report appears to me to represent a significant simplification of matters, and without further evidence, it is difficult to know what weight should be given to it. In particular, it would have been helpful had she addressed questions such as the following:

- was the Nortel press release responsible for a general decline in investor confidence on February 16, such as to have been partially responsible for the drop in share prices for companies other than Nortel?
- on the other hand, did the sale of Nortel shares provide investors with capital that was invested elsewhere, thus dampening the decline in share prices for other companies?
- were there factors other than the Nortel press release that might have been at work – in particular, despite the market efficiency that is postulated, might there have been other bases for a correction in the price of Nortel common shares?
- was the effect of the February 15, 2001 press release fully reflected in the market on February 16, 2001, or did the losses on subsequent days also reflect a correction based on the press release?

[39] I have, as I have indicated, little evidence before me by which I can gauge the effect of these and other factors on Ms. Nettesheim's damage assessment. Based on what I do have before me, it appears to me that while the analysis of Ms. Nettesheim has some value as evidence, it represents a conservative estimate of the plaintiffs' losses.

2007 BCSC 69 (CanLII)

[40] While there are many variables that will affect the actual recovery of class members, it appears that it will exceed 11% of the damages that they suffered based on Ms. Nettesheim's damage estimates. This recovery, while not insignificant, does not represent a particularly high rate of recovery.

2007 BCSC 69 (CanLII)

B. Litigation Risks

[41] As the parties point out, there are a number of risks facing the plaintiffs in this case. First, there is the issue of certification. I have conditionally certified the class proceeding in this case, for the purpose of settlement. The certification is without prejudice to the defendants' right to revisit the issue if the settlement is rejected.

[42] There is some doubt as to whether the plaintiff class would be certified in the face of objection by the defendants. There are cases in which issues of concern to some investors have been found not to raise "common issues" and in which a class proceeding has been found not to be the preferable procedure (***Samos Investments Inc. v. Pattison***, 2003 BCCA 87, 10 B.C.L.R. (4th) 234 is an example). In the case at bar, there are significant differences among the members of the plaintiff class, in terms of the timing of their purchase and sale of shares, the representations that they were aware of at material times, and the nature of their purchases or sales (some of the class members dealt in call or put options rather than in shares *per se*). While I am disposed to think that these differences would not prevent certification of this matter, even in the face of objections by the defendants, I accept that the matter is not an entirely clear one. The plaintiffs face a risk, if not a particularly large one, that the matter might not be certified, or, if certified, might later

be decertified. Without certification, I have little doubt that many members of the plaintiff class would be unable to pursue any remedy.

[43] The plaintiffs also face potential difficulties in their claim of negligent misrepresentation, in that they must demonstrate reliance on the defendants' misrepresentations. Many of the members of the plaintiff class may be unable to demonstrate actual reliance on representations made in Nortel's press release. The settled law does not make it clear that investors in the stock market will succeed in an action for negligent misrepresentation when their reliance on a misrepresentation is only implicit or indirect. While I expect that such indirect or implicit reliance would be sufficient to found the cause of action, I accept that the plaintiff's face some risk in proceeding on that basis.

[44] Other potential difficulties facing the plaintiffs include proof of negligence (or fraud) by the defendants, and proof that their damages are causally related to that negligence (or fraud). While the material before me suggests that the plaintiffs have a fairly strong case on both of these issues, I accept that the risk of being unsuccessful on one or both of them is not negligible.

C. Nortel's Ability to Pay

[45] By far the biggest risk facing the plaintiffs is the risk that the defendants will be unable to satisfy any judgment that they obtain.

[46] The value of the defendant company has been notoriously volatile. It is reasonable to believe that the present litigation, and other litigation, has had and, if

2007 BCSC 69 (CanLII)

not settled, would continue to have a destabilizing effect on the company. When that destabilizing effect is added to the volatility of the markets for Nortel's products and services, it leads to the very significant possibility that the plaintiffs would be unable to recover any award given them after trial.

2007 BCSC 69 (CanLII)

[47] There is strong reason to believe that the plaintiffs will be best served if Nortel is allowed to remain as a viable enterprise. Many members of the plaintiff class still hold Nortel stock, and, under the proposed settlement, they will receive some compensation in Nortel stock.

[48] More importantly, the plaintiffs say that the settlement that has been reached represents the most the Nortel can reasonably pay in cash, and also includes shares that represent substantially all of Nortel's capacity to issue new common shares.

[49] While it is true that the plaintiffs might recover substantially more damages at trial than they will obtain under the proposed settlement, I am satisfied that the risks and costs of going ahead with the litigation are not justified by the potential gains. The proposed settlement passes the cost/benefit analysis.

Are the Class Members Adequately Informed, and Do they Object

[50] I turn, then, to the fourth category of considerations – the views of the class members.

A. Notice of this Application

[51] On June 27, 2006, the court made an order for publication of notice of the settlement application, and that order has been complied with.

[52] The efforts to give notice to potential class members in this case have been thorough. There has been a broad media campaign to publicize the proposed settlement and the court processes. There has also been a direct mail campaign directed at probable investors. I am advised that over 1.2 million claim packages were mailed to persons around the world. In addition, packages have been available through the worldwide web site *www.nortelsecuritieslitigation.com* on the internet. Toll-free telephone lines have been set up, and it appears that class counsel and the Claims Administrator have received innumerable calls from potential class members.

[53] In short, all reasonable efforts have been made to ensure that potential members of the class have had notice of the proposal and a reasonable opportunity was provided for class members to register their objections, or seek exclusion from the settlement.

B. Response of Class Members

[54] Class members had until September 19, 2006 to file objections to or to seek exclusion from the settlement, and until November 20, 2006 to file claims forms. Approximately 132,000 claimants have filed claims worldwide, approximately 5,000

2007 BCSC 69 (CanLII)

of whom are potential members of the British Columbia class. Thirteen members of the British Columbia class have filed requests to be excluded from the settlement.

[55] Among persons who appear to be members of the British Columbia class, there has been only a single objection to the settlement that has been filed. The substance of the objection is as follows:

> If I correctly understand the papers outlining the distribution, the people who are suffering the effects of the inflated stocks will receive mere pennies for each stock they purchased. At the same time, those who are attempting to, in part "right the wrong", namely the attorneys and their respective companies, will not only be receiving payment for their "fees", at a very high rate per hour, but also for the "expenses". After reading the amounts requested by some of the firms one is tempted to believe this entire exercise is a farce! True consideration is not really being given to those who were deliberately misled. Rather, it is proposed that those with the most power benefit.
>
> While I recognize the extensive training and certain level of expertise the attorneys involved have, I would hope that someone with equal power would still have the decency to rule that those individuals actually losing money due to misrepresentation would be properly compensated.

[56] The objection can be fairly said to raise two issues. First, the objector considers the settlement amount to be too low. While she is not correct in suggesting that the settlement will amount to "mere pennies for each stock ... purchased," it is the case that the settlement will compensate investors for only a fraction of their losses. I have taken the objector's views into account in the cost/benefit analysis referred to above.

[57] The other concern expressed is with respect to lawyers' fees and disbursements. To some extent, this concern may have been diminished by

2007 BCSC 69 (CanLII)

counsels' decisions to reduce their fees from those originally authorized in the proposed settlement. However, I suspect that the fees that are claimed will remain upsetting to the objector. Her point is easily understood – the cost of complex litigation is exorbitant, and it must seem to many successful plaintiffs that the process of going to court has meant that a just resolution has come with a very high price tag.

2007 BCSC 69 (CanLII)

[58] The appropriateness of lawyers' fees is not, however, a factor in determining the appropriateness of the proposed settlement here. Subject to what I have to say below on the subject of fees for lawyers in other jurisdictions, the court must determine the appropriateness of the fees separately from the appropriateness of the settlement. The lawyers will be entitled only to those fees that the court is convinced are reasonable in the circumstances.

[59] A small number of British Columbia residents who might be part of the plaintiff class have opted out of the settlement, presumably in order to be free to pursue their remedies individually. I am satisfied that the number is sufficiently small that it does not suggest any widespread dissatisfaction with the agreement among class members.

[60] In addition to the one objection from a British Columbia class member that I have mentioned, there have been thirty-five objections from persons who do not belong to the class. Some are not members of the plaintiff class in any jurisdiction, and complain that the class has not been defined broadly enough to include their potential claims. That does not appear to me to be an appropriate consideration at

this stage – I have already ruled on the appropriateness of the class definition in granting conditional certification of this action. As I have indicated, I am not persuaded that the certified class is in any way inappropriate.

[61] To the extent that members of the plaintiff classes in the Quebec, Ontario, or United States litigation have registered objections, it is my view that the substance of those objections can be (and has been) taken into account by the court in considering the cost/benefit analysis. They are, on the other hand, not relevant to the separate issue of whether there is significant dissatisfaction with the settlement among members of the plaintiff class. My jurisdiction extends only to approving or disapproving of the settlement in respect of persons represented by the representative plaintiff in the British Columbia litigation. It is dissatisfaction with the settlement within that class that I must be concerned about.

[62] The plaintiff class over which I have jurisdiction has been adequately informed of the proceedings and of the proposed settlement. There is very little objection to the proposed settlement among members of that class.

Acceptability of the Settlement - Summary

[63] The terms of the settlement itself are unexceptional. The compensation package is a large one, and I am convinced that the plaintiffs have succeeded in obtaining a settlement near the limits of Nortel's ability to pay. The plaintiffs will also retain certain rights to be compensated if Nortel succeeds in its actions against certain former directors and officers.

2007 BCSC 69 (CanLII)

[64] The proposed claims administration process is an efficient one, and the settlement appears to me to be a fair and equitable one in terms of the distribution of settlement funds among the claimants. The court, of course, will have ongoing jurisdiction over issues that may arise regarding class membership and the administration of the settlement.

[65] I am therefore satisfied that the settlement is an appropriate one, and that it ought to be approved.

2007 BCSC 69 (CanLII)

Fees

[66] Counsel for the plaintiffs in each jurisdiction worked together to achieve settlement, and they each seek payment of their fees out of the global settlement. U.S. counsel seek 8.5% of the total amount. Quebec counsel seek 0.45%. Ontario counsel seek $2.5 million, with the possibility of additional fees for work to be done after approval of the settlement. British Columbia counsel seek fees of $1,000,000, together with tax of $130,000 and disbursements of $21,434.13, for a total amount of $1,151,434.13.

[67] Section 38 of the ***Class Proceedings Act*** provides that the court must approve fees and disbursements to be paid to a solicitor.

[68] The fee agreement originally entered into by the representative plaintiffs and British Columbia counsel calls for a fee of 1/3 of the amount recovered by the plaintiff class. Section 38(2) of the ***Act*** provides that the agreement is not enforceable unless approved by the court. Counsel has chosen not to seek to

enforce the agreement. While the amount that will be recovered by the British Columbia class is uncertain, it is clear that the aggregate amount being sought for counsel fees will be far less than 1/3 of the total amount recovered.

2007 BCSC 69 (CanLII)

[69] As counsel is not attempting to enforce the fee agreement, I am required, pursuant to s. 37(7) of the ***Class Proceedings Act***, to "determine the amount owing to the solicitor in respect of fees and disbursements." I will first address the issue of the appropriateness of the fees for British Columbia Counsel.

[70] British Columbia courts have considered a number of factors in assessing the reasonableness of the fees sought by counsel. The list includes:

a) the results achieved;

b) the risks undertaken;

c) the time expended;

d) the complexity of the matter;

e) the degree of responsibility assumed by counsel;

f) the importance of the matter to the client;

g) the quality and skill of counsel;

h) the ability of the class to pay;

i) the client and the class expectation; and

j) fees in similar cases

See, for example, ***Cardozo v. Becton, Dickinson and Co.***, 2005 BCSC 1612, 29 C.P.C. (6th) 112 at para. 25. A similar list appears in ***White v. Canada (Attorney General)***, 2006 BCSC 561 at para. 27.

[71] In the case at bar, the settlement achieved is a good one. The plaintiffs' counsel undertook significant risks in taking the case on. There was no assurance that the case would be certified, and once certified, there remained risks that it might not succeed.

2007 BCSC 69 (CanLII)

[72] I am satisfied that the matter was complex, and that even though British Columbia counsel did not take on all of the responsibilities for the case, the time demanded of local counsel was very significant. While great care must be observed in making any use of "multipliers" in assessing the reasonableness of fee claims (see ***Endean v. Canadian Red Cross Society***, 2000 BCSC 971, 78 B.C.L.R. (3d) 28 (S.C.) at para. 19 *et seq.*) the base fee estimates put forward by counsel demonstrate that a huge amount of time has been expended on this case by local counsel. Given the complexities and the size of the class in British Columbia, it is not surprising that this is the case.

[73] British Columbia class counsel took on this case on a contingency basis, and faced a real risk of not being paid at all for their services. It is well recognized that when counsel assume a significant risk of not being paid, they are entitled to fees that exceed what would otherwise be reasonable when they succeed. The real risk of failure, with personal consequences to counsel cannot be ignored. An enhanced fee is appropriate.

[74] I am satisfied, in the circumstances, that the fees and disbursements now claimed by class counsel in British Columbia are reasonable.

[75] As I will indicate, because the fees and disbursements will be paid from a global settlement involving other jurisdictions as well as British Columbia, there is a potential that other jurisdictions will not share my view. Subject to what I will say about the need for approval of fees by other courts, I declare that a fee of $1,000,000 plus applicable taxes, and disbursements totalling $21,434.13 should be paid to British Columbia counsel.

[76] In my view, the ***Class Proceedings Act*** contemplates court approval of all aspects of a settlement, including all fees paid to lawyers and other professionals. It does not appear to me that the fees and disbursements of lawyers outside of British Columbia who have provided service to the plaintiffs in this proceeding are exempt from review by this court. Indeed, because the fees and disbursements of counsel in each jurisdiction will be drawn from the global settlement funds, each of the courts considering the settlement has jurisdiction to review the fees and disbursements claimed by all counsel.

[77] Multi-jurisdictional review of the fees and disbursements of all counsel presents practical difficulties. As K.J. Smith J. (as he then was) commented in ***Endean***, *supra*, at para. 30, "it cannot be forgotten that each province has its own laws and traditions in respect of solicitors' fees." Review by each jurisdiction of the fees of counsel in other jurisdictions could result in an unfortunate duplication of efforts, and in significant uncertainty. More importantly, such review would fail to accord due respect to the courts of other jurisdictions, and thus fail to respect the concept of comity.

2007 BCSC 69 (CanLII)

[78] The appropriate solution, in my view, is for each court to concentrate its review on the fees and disbursements of local counsel. While each court has the jurisdiction to review the fees and disbursements of counsel from other jurisdictions, as well, it is normally appropriate, as a matter of comity, for each to defer to courts in other jurisdictions to rule on the appropriateness of the fees and disbursements of their local counsel.

[79] In relying on the concept of comity, I do not suggest that it is appropriate for this court to abdicate its responsibilities under the ***Class Proceedings Act***. The court must be satisfied that given the fees that are claimed by all counsel from the global settlement, the amount left to be divided among members of the plaintiff class represents a reasonable settlement. I am satisfied that this test is satisfied in this case. Accordingly, the fees to be paid to Ontario, Quebec, and U.S. counsel is a matter on which I will defer to the courts of those jurisdictions. I am hopeful that they will take a similar approach to my ruling with respect to the fees and disbursements of British Columbia counsel.

The Order

[80] Aside from the issue of counsel fees, as discussed above, which may pose some difficulties in the wording of the draft order, there is one other difficulty. One provision of the draft states:

> THIS COURT ORDERS AND ADJUDGES that any appeal or challenge affecting the approval of the Plan of Allocation or this Court's approval of British Columbia Class Counsel fees shall in no way disturb or affect the balance of this Order and shall be deemed to be separate and apart from the balance of the Order.

2007 BCSC 69 (CanLII)

[81] I believe that the plan of allocation and the approval of counsel fees are logically and practically severable from the approval of the amount of the settlement, and of the mix of cash and shares. I do not, however, have jurisdiction to bind the Court of Appeal in terms of the remedies that it considers to be appropriate on an appeal, or in terms of its interpretation of the scope of any appeal before it. I do not think that it is appropriate for this court to attempt, in an order, to in any way define or limit the jurisdiction of higher courts.

2007 BCSC 69 (CanLII)

[82] I am therefore making an order in the form proposed by the applicant, with two exceptions. First, the order should reflect the limited nature of this court's approval of counsel fees and disbursements. Secondly, the paragraph referring to the effect of an appeal of the order will be excised. Should counsel wish to include a differently worded paragraph dealing with the severability of different parts of my judgment, but not purporting to limit the powers of an appeal court, I am prepared to consider their submissions on the matter.

"H.M. Groberman, J."
The Honourable Mr. Justice H.M. Groberman

January 24, 2007 – ***Revised Judgment***

Corrigendum to the Reasons for Judgment issued advising that in the second sentence of paragraph 24 should read as follows:

> Is the court confident that the proposed settlement is the product of a reasonable negotiating process, in which the parties have reached an agreement without collusion and without extraneous facts motivating the negotiators?

The fourth bullet in paragraph 28 should read as follows:

- Has sufficient information been provided to the members of the class represented by representative plaintiffs, and, if so, are they generally favourably disposed to the settlement?

The last sentence of paragraph 68 should read as follows:

> While the amount that will be recovered by the British Columbia class is uncertain, it is clear that the aggregate amount being sought for counsel fees will be far less than 1/3 of the total amount recovered.

The second sentence of paragraph 71 should read as follows:

> The plaintiffs' counsel undertook significant risks in taking the case on.

2007 BCSC 69 (CanLII)

John Wink Ltd. v. Sico Inc.

57 O.R. (2d) 705
[1987] O.J. No. 5

1987 CanLII 4299 (ON SC)

ONTARIO
HIGH COURT OF JUSTICE
REID J.
6TH JANUARY 1987.

Civil procedure -- Costs -- Security -- Impecuniosity -- Defendant demonstrating plaintiff's inability to pay costs -- Plaintiff relying on own poverty -- Claim not devoid of merit -- Order for security for costs set aside on appeal -- Rule 56.01(d).

On a motion under rule 56.01(d) for security for costs, the onus lies on the defendant to show that plaintiff has insufficient assets to satisfy an order for costs. Once that is established, the onus passes to the plaintiff to show either that it has sufficient assets or that it should be permitted to proceed to trial despite its lack of assets. Where the plaintiff relies on its own poverty and on the injustice which would result if it were not permitted to proceed to trial, no order for security should be made unless the claim is almost certain to fail. Accordingly, where the claim is not plainly devoid of merit, the action should be permitted to proceed without requiring the plaintiff to post security. The danger of injustice resulting from denying the claim is greater than the injustice to the defendant of possibly not being able to collect a costs award.

Cases referred to

Warren Industrial Feldspar Co. Ltd. v. Union Carbide Canada Ltd. et al. (1986), 54 O.R. (2d) 213, 8 C.P.C. (2d) 1; Hawaiian Airlines, Inc. v. Chartermasters, Inc. et al. (1985), 50 O.R. (2d) 575, 50 C.P.C. 224; Stoicevski v. Casement (1983), 43 O.R. (2d) 436, 43 C.P.C. 178

Rules and regulations referred to

Rules of Civil Procedure, rule 56.01(d) (rep. & sub. O. Reg. 221/86)

1987 CanLII 4299 (ON SC)

APPEAL from an order of Master Garfield granting a motion for security for costs.

Erwin P. Reidl, for plaintiff.

Daphne Jarvis, for defendant.

REID J.:-- This is an appeal against an order for security for costs made by Master Garfield under rule 56.01(d). The rule is still something of a novelty, in that it is a departure from the practice anteceding its introduction in January, 1985, with the new rules. Differing interpretations of its meaning and proper application have arisen. I am reluctant to add yet another view but I am not in complete agreement with all the views that have been expressed and feel constrained to set out my own.

Master Garfield gave reasons. They are now set out.

> There is no doubt that the material before me reveals that the defendant has established a prima facie case as to the insufficiency of assets of the plaintiff to pay costs if ordered to do so (see rule 56.01(d)).
>
> It is now incumbent upon the plaintiff to satisfy the onus of establishing that its case is meritorious and that it would be unjust to order security for costs against it.

As to the merits, I agree with counsel for the defendant that it is nigh on impossible at this state of the proceedings with the material I have before me to decide on the merits of this case. It would be mere speculation on my part to conclude that this action will succeed. The plaintiff has not discharged the onus.

The material also fails to support the proposition that the action or rather the supplies (paint) of the defendant contributed to the plaintiff's impecuniosity so that to order security for costs would be unjust. The Dunwoody Report (ex. "H" to the Mitchel Wine affidavit) lists numerous potential causes of the plaintiff's demise other than the alleged defective paint.

The Defendant is entitled to security. Counsel have not seriously argued against the applicability of the installment type of order as in Hawaiian Airlines, Inc. v. Chartermasters, Inc. et al. (1985), 50 O.R. (2d) 575, 50 C.P.C. 224. Accordingly, only the following items shall be allowed at this stage, as set out in the defendant's draft bill of costs:

"Paid to enter 22.00

Appearance Pleadings
$ 350.00

Discovery of documents
100.00

Paid for copies of Plaintiff's productions 63.45

Examinations for
2,500.00 discovery

Paid to Special Examiner 448.65

Motion for security for costs
75.00

1987 CanLII 4299 (ON SC)

$3,025.00 534.10
534.10
$3,559.10"

The amount of $3,559.10 shall be paid into court within 60 days of this date. An additional term shall be that the plaintiff may not set this action down for trial until a further order is obtained fixing the amount of further security, if any, that is to be furnished by the plaintiff, and the motion for such order may be brought by either party.

Costs shall be in the cause.

As I read his reasons, Master Garfield held that defendant had shown, prima facie, plaintiff's inability to meet a prospective costs order if its claim should fail. Thus, an onus to show that its claim would succeed arose which plaintiff could not meet because it was impossible to do so. Plaintiff must therefore accept a requirement to prepay costs that would, or could, destroy the claim itself. That, with respect, strikes me as a very hard decision indeed.

I have had the advantage of extensive argument and the review by counsel not only of the circumstances of the case but the decisions, both reported and unreported, on rule 56.01(d).

I agree with Trainor J.'s views on how a motion under rule 56.01(d) should proceed as set out in Warren Industrial Feldspar Co. Ltd. v. Union Carbide Canada Ltd. et al. (1986), 54 O.R. (2d) 213, 8 C.P.C. (2d) 1. The onus lies on defendant to show that there is good reason to believe that the plaintiff has insufficient assets. Thereupon the onus passes to plaintiff to show either that it has sufficient assets, or that it should be permitted to proceed to trial in spite of the lack of them, with the consequent prospect that a successful defendant will not be able to collect the costs awarded.

It is clearly essential to the interests of justice that citizens be reasonably secure against the prospect of being dragged through the courts by straw claimants. Therefore I think that the onus on a defendant who seeks to secure the

1987 CanLII 4299 (ON SC)

advantage of an order under rule 56.01(d) should not be set at too high a level. I agree with the principle inherent in Master Garfield's reasons that the onus on a defendant should not amount to proving an insufficiency of assets, in the sense of establishing it beyond a reasonable doubt. If the framers of the rules had intended that high an onus they would have said so. In my opinion, their careful use of a different phrase indicates an intention to place the onus at a lower level than that. I am satisfied with the master's expression "prima facie".

The defendant having shown a prima facie case, the ball returned to plaintiff's court. Plaintiff chose to rely on its poverty rather than deny it, and rested on the gross injustice that would be the result if poverty caused by the defendant secured the defendant against a trial.

There can be no question that an injustice would result if a meritorious claim were prevented from reaching trial because of the poverty of a plaintiff. If the consequence of an order for costs would be to destroy such a claim no order should be made. Injustice would be even more manifest if the impoverishment of plaintiff were caused by the very acts of which plaintiff complains in the action.

It is thus necessary to consider, where impoverishment has been shown or admitted, whether a claim should be allowed to proceed to trial, notwithstanding the risk to defendant of not being able to collect costs even if successful. Trainor J. says that special circumstances must be shown. Yet to do justice to both parties at this stage is a particularly difficult problem. Some have expressed or espoused the view that the question is to be answered by assessing the merits of plaintiff's claim, i.e., the likelihood of success. The merits, however, are merely a consideration in making "such order for security for costs as is just" and are by no means determinative. I agree with Master Sandler, who observed in Hawaiian Airlines, Inc. v. Chartermasters, Inc. et al. (1985), 50 O.R. (2d) 575, 50 C.P.C. 224, that in most cases, coming to a conclusion on the merits of a claim upon a motion for security for costs is likely to be impossible. This was also recognized by Trainor J. in Warren

1987 CanLII 4299 (ON SC)

Industrial Feldspar Co. Ltd. v. Union Carbide Canada Ltd. Although he regarded the merits of plaintiff's case and its prospects of success as relevant considerations in deciding whether to grant relief from posting security for costs, he did not treat them as determinative.

The impossibility of making a proper decision regarding the merits of a claim on insufficient information should be so obvious as not to require illustration. Yet an illustration is shown in this case. Five reports prepared by accountants, research foundations and others were placed before Master Garfield by both sides. He chose to rely on a statement in one of them for his conclusion that defendant's acts had not led to the loss of plaintiff's business, as plaintiff claimed. Yet, neither that, nor any other report was cross-examined upon. There was no opportunity, as there would have been at trial, to see and hear the authors. There was, as well, a basis in the other reports from which the opposite conclusion could be drawn. That is too close, for my comfort, to deciding a vital issue in the lawsuit not only without a trial, but on evidence of a very questionable nature.

In my respectful opinion, unless a claim is plainly devoid of merit, it should be allowed to proceed. That is the only "special circumstance" that I would require. While the adoption of this standard might allow some cases to go to trial that the trial will prove should not have proceeded, nevertheless, the danger of injustice resulting from wrongly destroying claims that should have been permitted to go to trial is to my mind a greater injustice. In my experience, there are very few claims that are entirely without merit that go to and through a trial. The onus on plaintiff is therefore not to show that the claim is likely to succeed. It is merely to show that it is not almost certain to fail.

It might be worth adding that because a party is seeking an indulgence the usual principle requiring it to be free of misconduct in the pursuit of its claim would apply.

I accept that the discretionary order of a master should be supported unless it is clearly wrong. This principle is subject

1987 CanLII 4299 (ON SC)

to the qualification that if the order amounts to a final disposition of an issue of the lawsuit a court on appeal must consider the issue without deference to the order made below: see Stoicevski v. Casement (1983), 43 O.R. (2d) 436. If an order for security stops a plaintiff in its tracks it has disposed of the suit. On either basis I think the order in appeal must be reversed. In my respectful opinion, Master Garfield clearly erred in two ways. The first error consisted in putting upon plaintiff the onus of "establishing that its case is meritorious" when he meant that plaintiff must prove that it was likely to win the lawsuit. The second error consisted in going further and deciding the merits of the action, while claiming not to, by holding that plaintiff had failed to establish the "proposition" that defendant's acts had contributed to plaintiff's impecuniosity.

There is nothing before me that persuades me that plaintiff's claim is groundless or frivolous. If the reports placed before Master Garfield had any value at all the fact that they can be read as supporting both sides suggest there is an issue to be tried.

In the circumstances, my opinion is that the action should be permitted to proceed to trial. The appeal is allowed. The order of Master Garfield is wholly set aside, so that it is not necessary for plaintiff to post security for costs and may proceed to trial. I say this because I understand from counsel that the action had already been set down and was on the trial list when the motion was made to Master Garfield. His order that plaintiff may not set it down was inappropriate. Further, the delay that has been caused by the motion makes an order expediting trial appropriate. If there is any difficulty about such an order counsel may speak to me. As presently advised, I would think that an order placing the action first on the trial list would be appropriate.

The trial judge will be in a better position than I to deal with the question of costs. I therefore refer the costs of this motion, and the costs order of Master Garfield, to the judge hearing the case.

1987 CanLII 4299 (ON SC)

Appeal allowed.

1987 CanLII 4299 (ON SC)

Federal Court  Cour fédérale

Date: 20130404

Docket: T-463-07

Citation: 2013 FC 341

2013 FC 341 (CanLII)

Ottawa, Ontario, April 4, 2013

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

DENNIS MANUGE

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER AND ORDER

[1] This proceeding was initiated by Statement of Claim filed on March 15, 2007. In mid-February 2008 a motion to certify the proceeding as a class action was argued before me at Halifax, Nova Scotia and by a decision rendered on May 20, 2008 I certified the proceeding as a class action: see *Manuge v Canada*, 2008 FC 624, [2008] FCJ no 787. That decision was appealed by the Defendant and on February 3, 2009 the Federal Court of Appeal set aside my certification Order: see *Canada v Manuge*, 2009 FCA 29, [2009] FCJ no 73. That decision was further appealed by the Plaintiff, Dennis Manuge, to the Supreme Court of Canada and on December 23, 2010 that Court,

by unanimous decision, restored my Order thereby allowing the action to proceed as a class action: see *Manuge v Canada*, 2010 SCC 67, [2010] 3 SCR 672.

[2] To their credit the parties then jointly proposed to bring an issue of law before the Court for summary determination. That matter was argued before me at Halifax and by decision rendered on May 1, 2012, I determined that the Defendant's interpretation of the applicable Service Income Security Insurance Plan Long Term Disability (SISIP LTD) policy and that, in particular, the practice of deducting monthly *Pension Act*, RSC, 1985, c P-6, disability benefits from the LTD income payable to disabled class members was unlawful: see *Manuge v Canada*, 2012 FC 499, [2012] FCJ no 512. That determination was not appealed and the parties undertook extensive negotiations with a view to working out the financial implications of my judgment.

2013 FC 341 (CanLII)

[3] These Reasons are issued in connection with a motion by the parties under rule 334.29 of the *Federal Courts Rules*, SOR/98-106 (Rules) seeking Court approval for their negotiated settlement of this class action. Counsel for the class also seek Court approval for their claim to legal fees under Federal Courts Rule 334.4 payable from the proceeds of the proposed settlement. That claim is opposed by counsel for the Defendant on the ground that the proposed amount of legal fees is excessive.

General Principles Applicable to Class Action Settlements

[4] Court approval of a class action settlement is appropriate where, in the overall circumstances, it is deemed to be fair and reasonable and in the best interests of the class as a whole: see *Bodnar v The Cash Store Inc.*, 2010 BCSC 145 at para 17, [2010] BCJ no 192. In *Chateauneuf*

v Canada, 2006 FC 286 at para 7, [2006] FCJ no 363, Justice Danièle Tremblay-Lamer, described the general approach to the approval of a class settlement in this Court:

> 7 The Court with a class action settlement before it does not expect perfection, but rather that the settlement be reasonable, a good compromise between the two parties. The purpose of a settlement is to avoid the risks of a trial. Even if it is not perfect, the settlement may be in the best interests of those affected by it, particularly when the risks and the costs of a trial are considered. It is always necessary to consider that a proposed settlement represents the parties' desire to settle the matter out of court without any admission by either party regarding the facts or regarding the law.

2013 FC 341 (CanLII)

[5] It is not open to the reviewing Court to rewrite the substantive terms of a proposed settlement nor should the interests of individual class members be assessed in isolation from the interests of the entire class: see *Dabbs v Sun Life Assurance Co. of Canada*, [1998] OJ no 1598 at paras 10-11, (available on QL).

[6] It will always be a particular concern of the Court that an arms-length settlement negotiated in good faith not be too readily rejected. The parties are, after all, best placed to assess the risks and costs (financial and human) associated with taking complex class litigation to its conclusion. The rejection of a multi-faceted settlement like the one negotiated here also carries the risk that the process of negotiation will unravel and the spirit of compromise will be lost.

The Terms of the Proposed Settlement

[7] The settlement proposed by the parties includes a number of advantageous financial and administrative terms. The value of the financial settlement has been estimated at more than $887 million which includes the net present value of monies payable in the future to disabled class

members. The financial effect of the settlement has also been extended voluntarily by the Defendant by the removal of similar offsets of *Pension Act* benefits from a number of other federal financial support programs.

2013 FC 341 (CanLII)

[8] The central component of the proposed settlement is the full recovery by approximately 7,500 class members or their families of all amounts unlawfully deducted or which would otherwise have been deducted in the future from their SISIP LTD income. The agreed retroactive recovery of benefits dates back to June 1, 1976, that being the date the *Pension Act* offset began. This part of the settlement resulted from a concession by the Defendant to abandon its limitations defences and to expand the class to include disabled Canadian Forces (CF) members who would otherwise have been left out. The agreement also provides for the recovery of offsets by the spouses and minor children of deceased members in lieu of the cumbersome and complex process of recognizing estate claims.

[9] In addition, the parties have negotiated reasonable rates for pre and post-judgment interest dating back to 1992 totalling more than $80 million as of February 14, 2013. Interest continues to accrue at $1.3 million per month.

[10] It is acknowledged by the parties that the payment of LTD benefits to members of the class will attract income tax. Because SISIP LTD benefits constitute taxable income, the payment of income tax is essentially unavoidable. In order to mitigate the impact of tax on lump sum recoveries, disabled recipients will be permitted to spread their retroactive refunds over the years it would have been payable if that option reduces their tax exposure. Further tax mitigation measures

include a cash top up of 3.27% on retroactive LTD benefits payable to members and the right to deduct legal fees as an expense incurred in the recovery of taxable income.

[11] In recognition of the hardships experienced by some members of the class, the parties have agreed to establish a $10 million bursary fund to be administered over a period of 15 years by the Association of Universities and Colleges of Canada. This fund can be accessed by class members and their families for part-time or full-time study and is expected to generate bursaries of up to $1,300.00 for each eligible applicant.

[12] The parties have also negotiated a streamlined process for administrating the payment of refunds and for resolving future claim disagreements. Specifically, a number of members of the class were subjected to *Pension Act* offsets that exceeded the value of their SISIP LTD benefits. These members came to be identified as "zero sum" members. Because the SISIP administrator had not maintained medical and financial information for zero sum members, it was not possible to readily determine their ongoing eligibility for LTD benefits. This barrier to recovery was resolved, in part, by allowing the SISIP administrator to access medical data from other government sources and by establishing proxy indicators for determining a person's ongoing level of disability. A proxy would include the recognition of "total disability" under other disability programs such as the Canada Pension Plan. For members released after November 30, 1989, the Defendant has agreed unconditionally to treat all zero sum members as disabled during the initial 24 month own-occupation disability period.

2013 FC 341 (CanLII)

[13] For class members who disagree with the Defendant's assessment of disability or with the amount payable a simple and binding appeal process has been established. Class counsel have undertaken to represent those members on any appeal brought before an agreed and experienced arbitrator who will be paid by the Defendant.

[14] The proposed settlement also provides for the appointment of a Monitor who will be responsible for assessing the Defendant's compliance with its terms. The Monitor will report quarterly and will be paid by the Defendant.

[15] Finally, save for a remaining issue between the parties concerning the calculation of Consumer Price Index (CPI) benefits payable under the SISIP policy (to be resolved later by the Court), the settlement provides for a release of the Defendant from further liability in connection with claims arising, or which could have been raised, in this litigation.

The Views of Class Members

[16] The Preliminary Notice of Settlement invited class members to write to counsel either supporting or opposing the terms of settlement. Two hundred and sixty-nine responses were received by counsel and submitted by affidavit to the Court. A small number of class members wrote directly to the Court. At the hearing of the motion to approve the proposed settlement, a number of class members appeared and, of those, several addressed the Court. The vast majority of those submissions expressed strong approval of the terms of settlement including the claim to legal costs. Only 15 of the written submissions expressed general disagreement with the settlement and

2013 FC 341 (CanLII)

another 18 opposed only the claim to legal fees. A further 30 class members advocated for the Defendant to satisfy the claim to legal fees advanced by class counsel.

[17] The overwhelming tone of the submissions to the Court was complimentary to Mr. Manuge and to his legal team and strongly supportive of the settlement. A few examples will be sufficient to illustrate this general view. George Hrynewich wrote the following:

> As for the settlement, I will get back what was clawed back by SISIP. The interest amounts are fine as far as I am concerned, because honestly, I probably would have spent the money and not made any interest on it. Lawyer fees—of course everyone would like to see things like this lower, but I was expecting them to be higher, so I feel that they are fair. They did a lot of work for us and put up with a lot. It would be nice to see them give Mr. Manuge a little bit more for his work in starting the suit and carrying on with it. We cannot escape income tax, and I would rather see them hold back too much now and have the Canada Revenue Agency (CRA) give me a refund later, than have to scramble to pay money back to CRA next year. In summary, I have to say that I am satisfied that we accomplished the main goals that I wanted to see accomplished when I joined this lawsuit. I did not join this expecting to get rich and I think the settlement is reasonable and fair.
>
> Perhaps most of all I would like to see this end, and end while we are ahead. If someone could promise me that I would definitely get more money, but that it would take several more years and might cause us to lose some of the other things we have gained, I would say no thanks. You would have to be able to guarantee that I would get hundreds of thousands of dollars, if not a million, before I would say that I would even think about it. But this is just my opinion and I will respect the opinion of the majority of the suit members, as well as the judgment and decisions of the court.

Marcel Pellerin wrote:

> Hello my name is Marcel Pellerin and I vote YES to accept this settlement proposal.

2013 FC 341 (CanLII)

> I would have liked more tax relief, however I am very pleased that this whole thing is almost over.
>
> The stress anxiety and physical illness that this has caused me over the last 10 years is more than I could continue to bare.
>
> Thank you so very much to our legal team and Mr. Manuge. You have achieved a wonderful thing for the class [i]ncluding me and my teenage daughter.

Dana Morris wrote:

> I would like to thank you and your staff for the work you have done on our behalf with this Class Action. This was a monumental task that clearly was not for the weak. Your diligence and professionalism should set a standard for all to emulate.
>
> I still find it difficult, no, impossible to guess-estimate the amount that would come our way however at this point it is a mute point! Had it not been for the courage of Dennis Manuge and Peter Driscoll, as well as their determination to see it through, we (the class members) would have absolutely nothing to look forward or dream about.
>
> I, as a class member and disabled Veteran, with my family, support the Agreement and the proposed legal fee percentage as outlined by McInnes Cooper in the email dated 9 January 2013 sent to all Class Members.
>
> I can't say this enough, "THANK YOU so very much" for giving us hope and "a little piece of ourselves back".

[18] Given the strong support for the settlement expressed by the vast majority of class members who made submissions and the general notoriety of this case and its outcome within the community of disabled veterans, I am satisfied that the settlement is viewed very favourably by almost all class beneficiaries. Certainly, if there was general dissatisfaction with the settlement, I would have

2013 FC 341 (CanLII)

expected that more than a few members of the class would have expressed their concerns to the Court.

[19] It is apparent from the submissions received from class members that some of the opponents to the proposed settlement mistakenly believe that the Court has the authority to unilaterally amend its terms. With the exception of the approval of legal fees under Federal Courts Rule 334.4, the Court has no authority to alter a settlement reached by the parties or to impose its own terms upon them. The Court is limited to either approving or rejecting a settlement in its entirety.

2013 FC 341 (CanLII)

[20] Three recurring issues of concern to some class members had to do with the payment of income tax on retroactive payments of LTD income, the unwillingness of the government to contribute to the legal costs incurred by the class and the absence of an award for general or punitive damages. A few individuals had specific concerns including the mother of a deceased veteran who objected to the exclusion of extended family from the class.

[21] The concern expressed by a few members of the class about the failure to incorporate a recovery for general damages is not persuasive. This was a breach of contract claim where such recoveries are infrequently recognized and certainly not in substantial amounts. Counsel also point out with some justification that the agreed $10 million bursary fund represents a form of surrogate recovery for the personal hardships experienced by some members of the class over the years. Protecting claims to general damages would also have required class members to produce individual medical evidence and presumably to testify about the hardships they had experienced. In my view

such an approach would have been more time-consuming, expensive and complex than warranted by the benefits that would likely have been generated.

[22] The criticism that the settlement ought to have imposed upon the government an indemnity obligation for legal costs fails to recognize that in this Court legal costs are not, except in exceptional circumstances, payable by either party to a class proceeding regardless of the outcome: see Federal Courts Rule 334.39. This provision was adopted to eliminate a practical barrier to the commencement of a class proceeding by a representative plaintiff who might otherwise be exposed to a substantial costs award if the case was ultimately unsuccessful. In the absence of any provision in our Rules for the separate payment of costs, it was not unreasonable for the parties to negotiate a settlement that provided for legal costs to be borne out of the settlement proceeds.

2013 FC 341 (CanLII)

[23] A few members of the class complain that income tax will be payable on their retroactive LTD payments. Taxes are, however, the inevitable consequence of the application of the *Income Tax Act*, RSC, 1985, c 1 (5th Supp.), and the manner in which SISIP LTD premiums were paid over the years. Under the proposed settlement, class members are entitled to a 3.27% gross up for taxes and will be able to elect to receive benefits over time if that creates a more favourable tax outcome. These measures will mitigate the impact of income tax on taxable recoveries. It must also be kept in mind that had class members received their full LTD benefits in accordance with the SISIP policy that income would have been taxable at the time of receipt.

[24] No class action settlement will ever be perfect. Recovery is always limited to those who meet the definition of a class member under the terms of certification. In cases like this involving

thousands of unique individual claims, it is impossible and undesirable to treat every beneficiary equally in either financial or administrative terms. It is inevitable that a settlement like this one will leave a few people behind or benefit some ahead of others. In this case those distinctions are of insufficient weight to reject the proposed settlement.

2013 FC 341 (CanLII)

[25] Notwithstanding the concerns expressed by a few members of the class, I have no hesitation in approving the proposed settlement of this action. It is a generous, complete and thoughtful resolution of the issues that were raised in the litigation and it will provide substantial financial assistance to thousands of disabled CF veterans and their families. The terms of settlement are also the product of extensive negotiations between the parties. It would not serve the interests of the vast majority of class members – many of who are suffering financially – to send the parties back into further discussions to address the concerns of a handful of those who oppose the arrangement. It is also a settlement that is supported by the vast majority of class members who took the opportunity to make their views known to the Court. In short, it represents a fair and reasonable compromise that is in the best interests of the class as a whole and it is, accordingly, approved.

[26] I would be remiss if I failed to recognize legal counsel, Mr. Manuge and the Government of Canada for the generosity of spirit and compromise that so obviously motivated their negotiations and which led to the resolution of the long-standing grievance that was at the heart of this case. Without the tenacity of Mr. Manuge, the essential goodwill of the parties and the hard work of all legal counsel involved, this settlement would not have been possible.

[27] The claim by class counsel to legal costs is a different matter. The parties do not agree on that issue and, in any event, it is left to the Court under Rule 334.4 to determine the appropriate amount for those costs.

2013 FC 341 (CanLII)

[28] At the heart of the application of Rule 334.4 is the requirement that legal fees payable to class counsel be fair and reasonable: see *Parsons et al v Canadian Red Cross Society et al*, 49 OR (3d) 281, [2000] OJ no 2374 [*Parsons et al*]. In determining what is fair and reasonable the Court must look at a number of factors including the results achieved, the extent of the risk assumed by class counsel, the amount of professional time actually incurred, the causal link between the legal effort and the results obtained, the quality of the representation, the complexity of the issues raised by the litigation, the character and importance of the litigation, the likelihood that individual claims would have been litigated in any event, the views expressed by the class, the existence of a fee agreement and the fees approved in comparable cases. Some authorities have also recognized a broader public interest in controlling the fees payable to the legal profession: see *Endean v Canadian Red Cross Society*, 2000 BCSC 971, at para 73, 2000 BCJ no 1254 [*Endean*].

The Quality of Legal Representation and the Results Achieved

[29] The certification and liability determinations that provided the impetus for this settlement resulted from the skillful and tenacious advocacy of class counsel in the context of an adversarial contest involving equally skilled and tenacious opposing counsel. The issues were thoroughly briefed and persuasively argued and there is no question that the high quality of the legal work performed by class counsel led to the favourable liability outcome.

[30] The terms of settlement are equally impressive. Every dollar deducted will be returned to class members or their families with appropriate interest. Notwithstanding the impact of legal fees, the amounts recovered by class members will provide meaningful and, in many cases, badly needed compensation. The Defendant's withdrawal of its limitation defences will add many more claimants to the class and will allow for recoveries dating back to 1976. A $10 million bursary program will be put in place as a surrogate for potential claims to general damages. As discussed above, general damages are notoriously difficult to prove in breach of contract cases. That is particularly true for cases where claimants are medically disabled and the psychological impacts arising from financial deprivation are often hard to isolate from other underlying conditions. The solution adopted by the parties to resolve this issue was novel and creative. The same can be said for the inclusion of surviving spouses and dependant children in lieu of the immense difficulties that would arise from involving the estates of deceased members. Simple and cost effective measures have been put in place to resolve any ongoing disputes about entitlements and it is anticipated that the take-up rate for beneficiaries will approach 100%. These are results that would not have been reasonably contemplated by anyone at the outset of this litigation. Indeed, if settlement negotiations had been undertaken before my judgment was rendered, a reasonable outcome would have been substantially less favourable to the class than this one. The excellence of the legal representation provided by class counsel and the success that was achieved in the settlement negotiations are factors that favour a significant premium in the assessment of costs.

2013 FC 341 (CanLII)

Litigation Risk

[31] There can be no doubt that legal counsel for the class exposed themselves to a significant level of risk in taking on this case. Once the case was finally certified as a class action, counsel

were committed to bringing it to a final conclusion on behalf of all of the members of the class: see *Slater Vecchio LLP v Cashman*, 2013 BCSC 134, [2013] BCJ no 151.

[32] In the ordinary course of this type of litigation, counsel could expect to be engaged for many years. In this case tens of thousands of pages of documents were expected to be discoverable and extensive witness examinations and other pre-trial work was contemplated. When class counsel accepted the retainer there was no expectation that the determinative legal issue would be resolved in a summary way and that no appeal would be taken from that decision. Given the Defendant's adversarial approach to the motion to certify, counsel would have assumed that they were exposing themselves to a financial risk measured in the potential loss of professional time and disbursements of probably tens of millions of dollars. This was also not a case where the Defendant's liability approached a level of certainty. The claim to Charter relief was doubtful at best and the point of contractual interpretation that ultimately drove the settlement was neither a sure thing nor invulnerable to appeal. While there was likely a political dimension to the ultimate settlement, it is doubtful that much, if anything, would have been recovered if my liability ruling had been unfavourable to the class and had then withstood an appeal.

[33] Even the motion to certify this action exposed counsel to considerable risk. Although my decision to certify was reinstated by the Supreme Court of Canada, the likelihood of obtaining leave to that Court was only about one in ten. Furthermore, that decision turned on a contentious issue of jurisdictional law that had long been unresolved in the national jurisprudence. Counsel for Mr. Manuge undertook a three-year process to achieve certification. They also assumed tens of

2013 FC 341 (CanLII)

thousands of dollars of out-of-pocket expenses and agreed to indemnify Mr. Manuge for his potential exposure to legal costs before the Supreme Court of Canada.

[34] The litigation risk that class counsel assumed is also illustrated by the fact that the grievance that was at the centre of the case had been well-known for more than 30 years and had attracted no litigation either individually or as a class proceeding until Mr. Manuge's claim was taken up by Mr. Peter Driscoll in 2007.

2013 FC 341 (CanLII)

[35] Counsel for the Defendant point out that the litigation risk decreased significantly once a decision was taken not to appeal my judgment. In the result, it is argued that the value of professional time incurred by class counsel after that point ought to be discounted.

[36] Counsel for the class argues that the Defendant's initial opposition to the proceeding was the cause of much of the legal work that was incurred. According to this view, the Defendant's initial conduct in the defence of the claim diminishes the weight of its current argument that the claim to legal fees is excessive.

[37] At this stage, I am not particularly concerned about the positions taken by the parties before the settlement was achieved. It is sufficient to observe that the litigation risk assumed by class counsel is primarily measured by the risk they assumed at the outset of the case. This point was made by Justice Warren Winkler in *Parsons et al*, above, in the following passages:

> [29] Moreover, class action litigation introduces additional complications. Complex class actions subsume the productive time of counsel. The risk undertaken by counsel is not merely a function of the probability of winning or losing. Some consideration must also

be given to the commitment of resources made by the class counsel and the impact that this will have in the event the litigation is unsuccessful. Winning one of two class actions may be a reasonable hallmark of success. However, for the lawyer who's first action turns out to be a loser, the complete exhaustion of resources may leave him or her unable to conduct another action. Thus the real risk undertaken by class counsel is not merely a simple reciprocal of the "judgmental probability of success" in the action, even if that calculation could be made with any degree of certitude. There is a point in complex class action litigation where, degree of risk notwithstanding, class counsel may truly be, as Mr. Strosberg put it in his submissions, "betting his or her law firm". This must be considered in assessing the "risk" factor in regard of the appropriate fee for counsel.

...

[36] It is apparent from the record that even though this litigation was conducted from the middle of 1998 forward as a negotiation toward a settlement, the risks assumed by class counsel were no less real at any point than if that time had been devoted to a disposition through a trial process.

[37] In addition, the legislation enabling class proceedings introduces several features that distinguish these actions from ordinary litigation. One aspect that bears on the risk inherent in class actions is the requirement of court approval of any settlement reached. Protracted negotiations involve a commitment of the time and resources of counsel and the litigants. However, in a class proceeding, a court will not approve a settlement that it does not regard as being in the best interests of the class, regardless of whether class counsel take a different view. Thus, class counsel may find themselves in the position of having committed time and resources to the negotiation of a settlement, that they believe is in the best interests of the class, only to find that the court will not approve the settlement achieved. While this creates a risk simpliciter, it also creates an advantage for a defendant who can successfully extend the negotiations to the point that class counsel's resources are exhausted before making a "final settlement offer" that may not ultimately receive court approval. In those cases, class counsel may have exhausted their resources attempting to obtain a reasonable settlement only to find themselves, as a consequence, unable to pursue the litigation. Accordingly, the risk in a class proceeding is not merely a function of whether or not litigation is anticipated and whether or not that litigation will be successful. Rather, there are risks inherent in the adoption of, and commitment to, any particular strategy for achieving a resolution.

2013 FC 341 (CanLII)

> [38] In view of the foregoing, I am unable to accept the contention that there was less risk in this proceeding merely because the parties chose to proceed down a negotiation route. Moreover, contrary to the submissions made by certain of the intervenors, it is apparent that the time and resources committed to the negotiations by the class counsel meant that the risk was increasing rather than decreasing as the negotiations continued. As the parties moved toward a settlement, the negotiations became more difficult as the issues narrowed with the result that the risk of an insurmountable impasse increased rather than diminished. This made the negotiations more perilous as they progressed…
>
> …
>
> [42] … The expenditures of class counsel in terms of time and money were at risk of loss if any politician in authority decided as a matter of expediency or policy not to settle the class proceedings or decided to unilaterally institute a no-fault compensation program and thereby bypass class counsel and the litigation. There was always the inherent danger that the pan-Canadian settlement would be impossible to achieve, either because of a reluctance on the part of a particular government or a class in a particular action to approve an agreement.

2013 FC 341 (CanLII)

[38] In my view the litigation risk assumed by class counsel was substantial and almost certainly exceeded the tolerance level of others. This is a factor favouring a premium costs recovery, in part, to motivate counsel to take on difficult class litigation involving potentially deserving claims that might not otherwise be pursued.

Time and Effort Expended

[39] The affidavit of lead counsel, Mr. Driscoll, discloses that the two firms retained on behalf of the class worked for more than 6 years (involving 20 legal professionals) and amassed more than 8500 hours of unbilled time. Considerable further work remains including the direct supervision of the refund process and monitoring and assisting with individual appeals. The efforts undertaken to

date to respond to enquiries from hundreds of highly engaged class members have been considerable and will undoubtedly continue. Out-of-pocket expenses are now approaching $200,000.00 and are estimated to exceed $260,000.00 before the case is concluded. All of the file expenses have been borne by counsel and were, in considerable measure, at risk. Class counsel value their current unbilled time at more than $3.2 million. This seems to me to be a reasonably fair valuation. However, it is important to recognize that much of the billable time expended and all of the file disbursements have been carried by these law firms for several years and that considerable work remains to monitor and manage the individual claims of class members.

2013 FC 341 (CanLII)

The Importance of the Litigation to the Class

[40] This was important litigation dealing with a long-standing, contractual grievance involving thousands of disabled CF veterans. Since 1976 the practice of deducting *Pension Act* disability payments from SISIP LTD benefits had been the source of hardship drawing considerable third-party criticism. Until my liability judgment was delivered, the Government of Canada forcefully defended its position. The settlement of this class action will provide meaningful compensation for several thousand deserving CF veterans and will likely represent the fourth highest financial payout in Canadian class action history. These are factors that favour the award of a costs premium to class counsel.

The Public Interest

[41] If there is a public interest that pertains to matters such as this, it is more properly situate around the interests of the class than the supposed interest of the general public in controlling compensation for lawyers engaged in class litigation. In my view it is relevant in assessing the

reasonableness and fairness of class action legal fees to consider the impact of those fees on the individual recoveries of class members. This, I think, is what was of concern in *Killough v Canadian Red Cross Society*, 2007 BCSC 941, [2007] BCJ no 1486 [*Killough*], where at para 8 the Court referred to the impact of the agreed fee on the fund that would otherwise be available to the class.

2013 FC 341 (CanLII)

[42] For someone like Mr. Manuge whose claim to retroactive LTD benefits is estimated at less than $10,000.00, the deduction of legal fees of about $1,500.00 could not be considered to be unfair or unreasonable. However, for a CF veteran suffering from a major, work-limiting disability, the deduction of more than $37,000.00 from an award of $250,000.00 will result in a meaningful financial deprivation. In short, those who are arguably the most in need of their retroactive recoveries are the ones carrying most of the burden of legal costs. This is a factor that supports a reduction in the award of costs to class counsel.

The Contingency Fee Agreement, the Claim to a Percentage Recovery and the Use of a Multiplier

[43] I accept that a contingency fee agreement entered into between legal counsel and a representative plaintiff in a proposed class proceeding may be a relevant and, sometimes, a compelling consideration in the final assessment of legal fees. It strikes me, nonetheless, that such a fee agreement will not necessarily be a primary consideration because it is most often executed at an early point in time when very little is known about how the litigation will unfold. I made essentially

the same point in my decision to certify this proceeding in *Manuge v Canada*, 2008 FC 624 at para 34, [2008] FCJ no 787:

> [34] One other concern raised by the Crown involves the magnitude of the contingency fee that would be payable under the terms of the Retainer Agreement entered into between Mr. Manuge and his legal counsel. That Agreement provides for a fee of 30% of any favourable financial judgment plus disbursements. The Agreement also duly notes that the fee payable "shall be subject to approval by the Court". There is certainly nothing inappropriate about a contingency fee arrangement in a case like this one where the outcome is unpredictable and where the amounts individually in issue appear insufficient to support litigation. The amount of fee payable at the end of a class proceeding is, of course, subject to assessment by the trial court and must bear some reasonable relationship to the effort actually expended and to the degree of risk assumed by counsel. I have no reservations about the ability of the Court to deal with this issue, if necessary, in the exercise of its supervisory jurisdiction.[1]

2013 FC 341 (CanLII)

[44] When Mr. Manuge entered into the fee agreement with his legal counsel, no one knew that the issue of certification would ultimately reach the Supreme Court of Canada or that the determinative liability issue would be finally resolved after a short hearing on agreed evidence and without extensive discovery or a trial. Similarly, no one could have accurately predicted the outcome of the negotiations that led to the settlement now before the Court including the willingness of the Respondent to abandon what was likely a viable, if partial, limitations defence.

[45] The contingency fee agreement that was executed by Mr. Manuge and which purported to award legal fees of 30% of amounts recovered on behalf of members of the class is of no particular

[1] Also see *Parsons et al v Canadian Red Cross Society et al*, 49 OR (3d) 281 at para 58, [2000] OJ no 2374.

significance to this assessment. That is so because Mr. Manuge and class counsel have essentially walked away from the agreement. What they are now seeking is the approval of legal fees representing approximately 7.5% of the gross value of the settlement inclusive of past and future benefits. It is also proposed that the fees be payable wholly from the past amounts due to class members which would represent about 15.7% of the total value of the retroactive entitlements of class members.

2013 FC 341 (CanLII)

[46] Apart from the obvious fact that the fees now claimed represent about one-quarter of the amount provided for in the initial contingency fee agreement, I was not provided with a clear explanation for how the figure of $65 million was reached beyond the observation that the figure was set at less than the amount of accrued interest included within the settlement. The figure claimed for legal fees is thus not much more than a number and a very large number at that.

[47] The use of percentages and multipliers to assess class action legal fees is appropriate, but mainly to test their reasonableness and not to determine absolute entitlement. Each approach has its place. The multiplier appears to be a tool better suited to cases where the social benefits achieved may be greater than the amounts recovered and where a percentage approach would likely under-compensate counsel. In the so-called common-fund cases the use of a percentage appears to be preferred because it tends to reward success and to promote early settlement.

[48] In my view there is a danger in placing undue emphasis on either a multiplier or a percentage recovery in a case like this. My concern is the same as that expressed by Justice Ian Pitfield in *Killough*, above, in the following passages:

> 45 With respect, other factors do not elevate the contribution of counsel in this action to the level of contribution of counsel in relation to the earlier settlement. While time accumulated on the matter and comparative multipliers are relevant and useful, caution must be exercised when using them as benchmarks for the assessment of the reasonableness of any fee. The principal concern is that there is no means of assessing whether the accumulated time was necessary and represented a reasonable and productive use of counsel's time. Class actions must not represent an open-ended invitation to accumulate time without regard to productivity.
>
> 46 The accumulation of substantial time charges in relation to a legal matter does not always justify compensation at base rates or multiples thereof. Conversely, low time endeavours may justify fees that are many multiples of the book value of accumulated time.
>
> 47 Multipliers and percentage of recovery comparisons are completely arbitrary. The efficacy of multipliers is affected by the reasonableness, which cannot be assessed with any confidence, of the base of accumulated time and hourly rates from which the multiplier is derived. The percentage of recovery comparison is reduced and therefore made to appear more favourable by comparing the total fee to a global settlement amount that included the benefit pool, the administration fund, goods and services tax and provincial sales tax where applicable, and the aggregate of legal fees. Legal fees were included notwithstanding the repeated assertion in affidavits and submissions that legal fees were independent of any other settlement consideration.
>
> 48 In sum, while counsel must be fairly and reasonably compensated for the risk assumed by and the work done on behalf of any class, the assessment of fairness and reasonableness is ultimately more subjective than it is objective.

[49] The Defendant places considerable emphasis on the relatively low value of professional time expended by class counsel and then argues for the use of typical multiplier of 1.5 to 3.5. This seems to me to be overly simplistic and largely insensitive to the factors favouring a premium recovery. The efficiency of counsel in getting to an excellent result is something to be rewarded and not discouraged by the rigid application of a multiplier to the time expended. Here I agree with the

2013 FC 341 (CanLII)

views expressed by Justice George Strathy in *Helm v Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602 at paras 25-27, [2012] OJ no 2081:

> 25 The proposed fee represents a significant premium over what the fee would be based on time multiplied by standard hourly rates. Is that a reason to disallow it? If the settlement had only been achieved four years later, on the eve of trial, when over a million dollars in time had been expended, would the fee be any more or less appropriate? Should counsel not be rewarded for bringing this litigation to a timely and meritorious conclusion? Should counsel not be commended for taking an aggressive and innovative approach to summary judgment, ultimately causing the plaintiff to enter into serious and ultimately productive settlement discussions?
>
> 26 Plaintiff's counsel are serious, responsible, committed and effective class action counsel. They are entrepreneurial. They will likely take on some cases that they will lose, with significant financial consequences. They will take on other cases where they will not be paid for years. To my mind, they should be generously compensated when they produce excellent and timely results, as they have done here.
>
> 27 For those reasons, I approve the counsel fee.

Also see *Vitapharm Canada Ltd. v F. Hoffmann-La Roche Ltd.*, [2005] OJ no 1117 at para 107, [2005] OTC 208.

[50] It can be equally unhelpful to look for guidance from authorities where legal fees have been approved as a percentage of the amounts recovered. A reasonable fee should bear an appropriate relationship to the amount recovered: see *Endean*, above, at para 80. Cases that generate a recovery of a few million dollars may well justify a 25% to 30% costs award. It is more difficult to support such an approach where the award is in the hundreds of millions of dollars. Presumably that is the reason why class counsel are not relying on the initial contingency fee allowance of 30%. That is also the reason that the three authorities that represent the strongest comparators to this case in terms

2013 FC 341 (CanLII)

of amounts recovered fall at the bottom of the scale of costs awarded in percentage terms: see *Baxter v Canada (Attorney General)*, [2006] OJ no 4968, 83 OR (3d) 481; *Endean*, above, and *Killough*, above.[2] These comparable decisions do not support an award of costs in this case of approximately 7.5% or, in financial terms, $65 million.

2013 FC 341 (CanLII)

Conclusion

[51] Having regard to all of the considerations outlined above, I will approve legal fees in an amount equal to 8% of the retroactive refunds payable to class beneficiaries (including the cancellation of debts owing by class members to Manulife Financial). This figure is approximately 4% of the total value of the settlement. In addition I will approve the deduction of an amount equal to 0.079% of refunds payable to class beneficiaries (including the cancellation of debts by class members to Manulife Financial) as an indemnity for out-of-pocket expenses. Class counsel are also authorized to deduct required goods and services tax, harmonized sales tax and/or provincial sales tax from refunds payable to class beneficiaries and to remit those amounts to the Canada Revenue Agency or to the appropriate provincial agency.

[52] I am satisfied that the above recovery of legal costs is in keeping with the fees approved in the comparable cases. More importantly it represents a sufficient incentive to counsel to take on

---

[2] In *Baxter*, above, a costs award representing 4.87% of a projected payout of almost $2 billion was approved. This resulted in legal fees of between $85 and $100 million. In *Endean*, above, legal fees of $52,500,000 were approved representing 4.26% of the total amount recovered. In *Killough*, above, legal fees of $37,290,000 were agreed between the parties and were not to be deducted from the settlement proceeds. This figure was approved by the Court – albeit with reservations - and it represented 3.64% of the total award.

high-risk class litigation without, at the same time, unduly impacting on the much-needed recoveries of disabled CF veterans. I am grateful to counsel for their thorough briefing of the relevant jurisprudence and, in particular, to counsel for the Minister who brought the required adversarial balance to the process.

2013 FC 341 (CanLII)

Discretionary Payments

[53] Class counsel have undertaken to create a fund for veterans in need of legal assistance with the allocation of $1,003,420.00 from their costs award. In addition they propose to pay to Mr. Manuge an honorarium of $50,000.00 in recognition of his significant contribution to the prosecution of this action. Several members of the class argued that Mr. Manuge ought to receive more than $50,000.00. However, to the extent that the Court has any control over the use of costs awarded to counsel, I do not think it appropriate that Mr. Manuge receive more than the amount described in the Preliminary Notice of Settlement sent to class members. That was the basis on which the proposal would have been considered by class members and it is not desirable that a unilateral and *ex post facto* alteration be made at this stage. The proposal to establish a legal assistance fund for veterans is laudable and, if Court approval is required, it, too, is given.

[54] No award of costs is made in connection with this motion.

[55] I will leave it to counsel to make the required changes to the proposed settlement Order to be submitted to the Court for execution and issuance.

ORDER

THIS COURT ORDERS that the settlement of this action is approved on the terms proposed by the parties.

THIS COURT FURTHER ORDERS that the legal costs payable to class counsel are approved on the following terms:

(a) for legal fees, by the deduction of an amount equal to 8% of the refund and the cancellation of debts, if any, owing to Manulife Financial payable to each eligible class beneficiary;

(b) for disbursements, by the deduction of an amount equal to 0.079% of the refund and the cancellation of debts, if any, owing to Manulife Financial payable to each eligible class beneficiary; and

(c) by the deduction from refunds payable to class beneficiaries and the remission of all required goods and services tax, harmonized sales tax and/or provincial sales tax.

"R.L. Barnes"

Judge

2013 FC 341 (CanLII)

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-463-07
STYLE OF CAUSE:	MANUGE v HMTQ
PLACE OF HEARING:	HALIFAX, NS
DATE OF HEARING:	February 14, 2013
REASONS FOR JUDGMENT:	BARNES J.
DATED:	April 4, 2013

2013 FC 341 (CanLII)

APPEARANCES:

Peter J. Driscoll Dan Wallace and Ward K. Branch	FOR THE PLAINTIFF
Paul B. Vickery Lori Rasmussen and Travis Henderson	FOR THE DEFENDANT

SOLICITORS OF RECORD:

McInnes Cooper Barristers and Solicitors Halifax, NS	FOR THE PLAINTIFF
Branch MacMaster Barristers and Solicitors Vancouver, BC	
William F. Pentney Deputy Attorney General of Canada Ottawa, ON	FOR THE DEFENDANT

CITATION: McKillop and Bechard v. HMQ, 2014 ONSC 1282
COURT FILE NOS.: CV-10-41191 and CV-10-41734300CP
DATE: 20140227

2014 ONSC 1282 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **David McKillop by his Litigation Guardian Christine Victoria Grace Clarke,** Plaintiff

and:

Her Majesty The Queen in Right of the Province of Ontario, Defendant

AND RE: **Rosalind Bechard as Litigation Guardian of Mary Ellen Fox,** Plaintiff

and:

Her Majesty The Queen in Right of the Province of Ontario, Defendant

BEFORE: Conway J.

COUNSEL: *Kirk M. Baert, Celeste Poltak* and *David Rosenfeld*, for the Plaintiffs

Robert Ratcliffe, John Kelly and *Jonathan Sydor*, for the Defendant

HEARD: February 24, 2014

Proceeding under the *Class Proceedings Act, 1992*

REASONS FOR DECISION
(re: Settlement Approval)

Conway J.

[1] The plaintiffs move for approval of settlements on these two actions pursuant to s. 29(2) of the *Class Proceedings Act, 1992*, S.O. 1992, c.6 (the "**Act**").

[2] At the conclusion of the hearing, I approved the settlements and signed the settlement approval orders (the "**Settlement Approval Orders**"). These are my reasons for doing so.

The Actions

[3] These actions were brought in 2010 on behalf of residents of Rideau Regional Centre ("**Rideau**") and the Southwestern Regional Centre ("**Southwestern**") (collectively, the

"**Centres**"). They are companions to the litigation brought in 2009 on behalf of residents of the Huronia Regional Centre ("**Huronia**"). The Huronia class proceeding settled in September 2013. I approved the Huronia settlement on December 3, 2013: see *Dolmage v. HMQ*, 2013 ONSC 6686.

2014 ONSC 1282 (CanLII)

[4] Rideau and Southwestern, like Huronia, were provincially operated residential facilities for individuals with developmental disabilities. Rideau was located in Smith Falls, Ontario and Southwestern in Blenheim, Ontario. They were intended to provide a residential program of hospital care, activity, educational programs and adult training to individuals of all ages labelled mildly, moderately, severely and profoundly disabled. Most residents were admitted to the Centres as children.

[5] Rideau operated from 1951 to 2009, during which time it housed approximately 3000 individuals. Southwestern operated from 1961 to 2008, during which time it housed approximately 937 individuals.[1]

[6] The plaintiffs allege that the defendant (the "**Crown**") was negligent and breached fiduciary duties in its funding, operation, management, administration, supervision and control of the Centres. They claim that the Crown breached standards of care by knowing of and condoning overcrowding and understaffing; failing to implement abuse prevention policies; and deliberately exploiting residents for the Crown's own benefit. They allege that despite receiving reports and recommendations, the Crown failed to take adequate steps to improve the quality of care or living at the Centres or, even if some of the recommendations were followed, those measures were inadequate and failed to meet the standard of care.

[7] The actions were certified as class proceedings by Horkins J. in August 2011. The classes are defined as:

> (a) All persons who resided at [the Centres] between September 1, 1963 and [Rideau: March 31, 2009; Southwestern: October 31, 2008] who were alive as of [Rideau: September 24, 2008; Southwestern: December 29, 2008] (the "**Resident Class**"); and
>
> (b) All parents, spouses, children and siblings of persons who resided at [the Centres] between March 31, 1978 and [Rideau: March 31, 2009; Southwestern: October 31, 2008], who were alive as of [Rideau: September 24, 2008; Southwestern: December 29, 2008] (the "**Family Class**").[2]

---

[1] Rideau operated under various names over the years including the Ontario Hospital School, Smith Falls, the Rideau Regional Hospital School and the Rideau Regional Centre. Southwestern operated under the name Ontario Hospital School for Retarded Children at Cedar Springs and then Southwestern Regional Centre. Their respective catchment admission areas covered large areas surrounding Smith Falls and Blenheim, Ontario.

[2] The evidence is that there were approximately 2750 former residents of Rideau alive as of September 2008 and 1600 former residents of Southwestern as of December 2008.

[8] The cases progressed through significant documentary production, 15 days of discoveries, six case conferences, and mediation/settlement discussions. The trials were set to commence in March 2015 and last for approximately four months. Settlement negotiations started in November 2013 and the two settlement agreements were executed on December 23, 2013 (the "**Settlement Agreements**"). By the time the Settlement Agreements were signed, the Huronia action had reached the courthouse steps and extensive legal and factual investigations into the merits of that claim had been conducted. Since the issues in these two actions were virtually the same as those in Huronia, the claims were settled with the benefit of that investigation and preparation. The settlement negotiations were hard-fought, lengthy and supervised by experienced counsel.

2014 ONSC 1282 (CanLII)

The Settlement Agreement

Key Terms

[9] The key terms of the Settlement Agreements are virtually identical to those in the Huronia action (proportionate to the size of the respective classes). They include:

- a written apology to former residents from the Premier of Ontario;
- a settlement fund of $20,619,000 on the Rideau action and $12,081,000 on the Southwestern action (each, a "**Settlement Fund**"), for a total of $32.7 million;
- the Crown will pay for the cost of notice to the class and administration of the claims process, in addition to the Settlement Fund;
- the compensation awards will not be subject to tax or government claw-backs;
- the application process is paper-based and does not require former residents to testify or appear in person;
- the maximum compensation that a claimant can receive is $42,000;
- the documents produced in these cases will be deposited with Archives Ontario for the purpose of scholarly research and will be publicly accessible, subject to privacy provisions for personal information; and
- commemorative plaques will be located on or about the community of each Centre. The plaques will state that in 2014, the Government of Ontario issued an apology to former residents of the Centres who were harmed for the conditions over time. A Ministry representative will conduct an unveiling ceremony for the plaques, which will be publicized and recorded.

[10] Class counsel's legal fees, disbursements and taxes (in an amount approved by the court) will be deducted from the Settlement Funds before any amounts are paid to the class.[3]

The Compensation Scheme

[11] The Settlement Agreements provide a claims-based compensation scheme with two streams – Section A and Section B claims.

[12] Section A claims only require a claimant to solemnly declare that he or she was harmed at the Centre without providing any further details. Section A claims are eligible to receive up to $2000 in compensation. Section A claims in the aggregate are limited to 20% of the net Settlement Fund for the Centre.

[13] Section B claims require the claimant to provide details of the harm or abuse suffered while at the Centre. The parties have agreed that the Honourable Ian Binnie will oversee the claims administration process. Mr. Binnie and Crawford Class Action Services ("**Crawford**") will create protocols and procedures for reviewing and evaluating all claims and assigning points to the claims in accordance with the "Points Allocation System" in the Settlement Agreement.[4] Compensation will be based on the number of points allocated to the claim. Claims with the highest number of points will receive $35,000.

[14] If the Section B claims do not exhaust the net Settlement Fund, each claimant will receive an increase of up to 20% of his or her allotted compensation, or until the Settlement Fund is exhausted. The maximum that a claimant can receive is $42,000.

The Claims Process

[15] The claims process is entirely paper-based, so that claimants will not have to testify in order to receive compensation. A claim form can be completed by a class member's personal representative or family member if the class member is unable to do so.

[16] The claim forms are intended to be simple and easy to complete. To that end, class counsel has received input from Kinsella Media LLC (with expertise in plain language communication) and ARCH Disability Law Centre (a legal clinic for persons with disabilities) in preparing these forms.

Remaining Amount in the Settlement Fund

[17] If there are any funds remaining in the Settlement Fund after payment of legal fees and expenses and Section A and B claims, the Crown will make an investment of up to $1.7 million for Rideau and $1 million for Southwestern (Schedule D funding) into programs that will benefit

---

[3] The levy owing to the Law Foundation of Ontario will further be deducted from the Settlement Fund.
[4] The Points Allocation System has 6 categories of abuse – Levels 1, 2 and 3 physical assault and Levels 1, 2 and 3 sexual assault.

2014 ONSC 1282 (CanLII)

individuals with a developmental disability and their families. The parties have mutually agreed on the types of organizations that will receive this investment.

[18] If there are further amounts remaining in the Settlement Fund after the Schedule D funding is made, those amounts will revert to the Crown.

2014 ONSC 1282 (CanLII)

Non-Monetary Benefits

[19] In addition to the compensation scheme, the Settlement Agreements contain several non-monetary benefits for the class, including an apology pursuant to the *Apology Act*, preservation of the voluminous documents in this action for scholarly research, waiver of taxes and claw-backs on funds received, and commemorative plaques.

Law on Settlement Approval

[20] To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it.[5]

[21] The test is whether the settlement is fair, reasonable, and in the best interests of the class as a whole, not whether it meets the demands of a particular member. The settlement must fall within the range of reasonableness in order to obtain court approval – it need not be perfect.[6] The "range of reasonableness" test permits that a number of settlement possibilities may be in the best interests of a class when compared to the unpredictable alternative of costly protracted litigation. Compromises are to be expected.[7]

[22] There is a "strong initial presumption of fairness" when the settlement is negotiated at arm's-length and recommended by experienced class counsel.[8]

[23] The "zone or range of reasonableness" is not a static valuation test but one that permits for a whole host of variations depending upon the subject matter of the litigation and the nature of damages for which the settlement is intended to provide compensation.[9]

[24] In determining whether to approve a settlement, courts may consider, among other factors:

- The likelihood of recovery or success;
- the amount and nature of discovery, evidence or investigation;

---

[5] *Dabbs v. Sun Life Assurance Co. of Canada*, (1998) O.J. No. 1598 (Gen. Div.), at para. 30, aff'd (1998), 41 O.R. (3d) 97 (C.A.).
[6] *Dabbs*, at para. 30; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572, at paras. 69, 70 (S.C.J.).
[7] *Dabbs*, at para. 30; *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968, at para. 21 (S.C.J.).
[8] *Serhan (Trustee of) v. Johnson & Johnson*, 2011 ONSC 128, at paras. 55 and 56.
[9] *Parsons*, at para. 70.

- the terms of the settlement;
- the recommendation and experience of class counsel;
- future expenses and likely duration of litigation and its attendant risks;
- the recommendations of neutral parties;
- the number of objections or objectors, if any;
- the presence of good faith, arms-length bargaining and the absence of collusion;
- the degree and nature of communications by counsel and the representative parties with class members during the litigation; and
- information conveying to the court the dynamics of and positions taken by parties during the negotiations.[10]

2014 ONSC 1282 (CanLII)

Analysis

[25] Considering the above factors, I approve the proposed settlements, on the terms set out in the Settlement Agreements.

[26] As in the case of Huronia, each Settlement Agreement is multi-dimensional. Its terms reflect the sensitive nature of this litigation and the unique circumstances of the class members in the following ways:

- It provides both financial compensation and non-monetary benefits to class members.
- It recognizes that some class members may not wish to provide details of the harm suffered (Section A claims). For those members who do provide details (Section B claims), the structure reflects the varying levels of harm claimed through the Points Allocation System.
- The claims process is a simplified and paper-based one that avoids class members having to provide oral accounts and re-live their experiences.
- The apology from the Crown is a vital and extraordinary component of this settlement. The commemorative plaques will constitute an enduring public record of that apology.

---

[10] *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962, at para. 28.

- The other non-monetary benefits recognize the dignity of the Centres' residents and enable the history of the Centres to be recorded and preserved.

[27] The settlements reflect the very real litigation risks the plaintiffs face if these matters proceed to trial.[11] Class counsel acknowledges that the legal issues are numerous and complex and include (i) whether the Crown owed a duty of care to class members and whether any *prima facie* duty was negated by policy considerations; (ii) what the standard of care was at varying times over a lengthy period; (iii) whether the Crown breached the standard of care during this period; (iv) whether the Crown owed a fiduciary duty to class members; (v) whether the Crown breached that duty; (vi) whether claims are barred by limitation periods; and (vii) whether damages can be assessed on an aggregate basis (failing which damages would have to be assessed at individual hearings after trial). Class counsel further acknowledges the legal frailties of the Family Class members' monetary claims.

[28] There is no doubt that without a settlement, the proceedings will be protracted, the outcome uncertain and (even if successful) the class members will not receive compensation for years. There is no assurance that at the end of this process they will receive any more than they will get under these Settlement Agreements. Given the advanced age of class members and the historical nature of this litigation, the benefits of an immediate and certain settlement cannot be overstated.

[29] The Rideau settlement is supported by Mr. McKillop and his litigation guardian. Ms. Fox's litigation guardian supports the Southwestern settlement.[12] Experienced class counsel supports both settlements. The settlements have further received the support of People First of Ontario (a self-advocacy group for persons with intellectual disabilities) and Community Living Ontario (a non-profit, province-wide federation that promotes and facilitates the full participation and inclusion of people who have an intellectual disability).

[30] I have carefully considered all of the written and oral objections to the settlement.[13] I understand that to some objectors the amount of the Settlement Fund is just not enough.[14] While it is true that more is always better, this is a compromise arrived at after lengthy, adversarial and hard-fought arm's length negotiations. It was arrived at on the eve of trial, after counsel had the chance to evaluable a considerable amount of information and the risks that lie ahead if these cases proceed to trial.

---

[11] I note that the Huronia settlement occurred at the doorstep of trial, so class counsel had a meaningful opportunity to assess these risks after productions and discovery had been completed.

[12] There was no affidavit filed on behalf of Ms. Fox with respect to the settlement. Ms. Fox's litigation guardian (her sister) filed an affidavit in support of the settlement.

[13] There were five written objections on each of the Rideau and Southwestern actions. In addition, six class members (or someone on their behalf) spoke at the hearing.

[14] Some objectors submit that the Crown should be paying the legal fees on top of the Settlement Fund. They have filed a petition with the Premier for the Crown to pay those fees over and above the Settlement Fund. In my view, this objection is another way of saying that the amount of the Settlement Fund is not enough.

2014 ONSC 1282 (CanLII)

[31] Some object that compensation will not be provided to anyone who was not alive as at the applicable date (Rideau: September 24, 2008; Southwestern: December 29, 2008). The reason for this is that the claims of those who died before those dates are statute barred: see *Dolmage v. Ontario*, 2010 ONSC 1726, at para. 153.

[32] Some object that the claims process may be difficult for certain class members. I note that the settlement has been designed to facilitate the making of claims. It is a paper-based process and others (such as family members) can complete the claim form on behalf of a class member. Class members will also be receiving support from Crawford, Community Living Ontario, ARCH Disability Law Centre and People First Ontario in completing their claims forms.

[33] Some object that compensation should be based on other factors, such as the length of time that a class member lived at the Centre, rather than on harm suffered. I am satisfied that the basis of compensation in the settlements, harm suffered, is a fair one.

[34] Some object to the Crown's reversionary interest. I note that under the Settlement Agreements if there are excess funds remaining after claims have been paid, two things must happen before any amounts revert to the Crown: first, Section B claimants are entitled to a 20% increase in payment and second, the Schedule D funding will be made.[15] That strikes me as a reasonable balancing of interests.

[35] A settlement is a compromise that reflects the risks, delays and expense of continuing litigation: see *Stewart v. General Motors of Canada Ltd.*, 2008 CarswellOnt 6590 (S.C.J.), at para. 23.

[36] In my view, this settlement, viewed as a whole, fairly achieves that compromise. It recognizes that class members are entitled to financial compensation but that a discount is appropriate to reflect the realities of continued litigation. At the same time, the significant non-monetary terms will benefit the residents of the Centres and their families. Considering the context in which it was reached, and the interests of those affected by it, the settlement falls within the "zone of reasonableness".

[37] I have concluded that the settlements are fair, reasonable and in the best interests of the class members and I approve them.

Next Steps

[38] Class counsel brought a motion for approval of its legal fees on all three actions. I heard that motion on February 25, 2014. I approved the legal fees and disbursements at the conclusion of the motion. I will release separate written reasons on the fee approval motion.

---

[15] I also note that the Schedule D funding is designed to benefit persons with individuals with a developmental disability and their families generally, regardless of whether they make a claim under the settlements.

2014 ONSC 1282 (CanLII)

[39] I also held a case conference with counsel on February 26, 2014 to finalize the form and content of the notices of approval of settlement, their method of dissemination and the form and content of the claim forms. The 120 day claims period will not start to run until after I have finally approved these notice and related issues.[16]

[40] Under the Settlement Approval Orders, the court will retain jurisdiction over the parties and all class members for purposes of implementing, enforcing and administering the Settlement Agreements. The order also requires the plaintiffs and Crawford to report regularly to the court until administration of the Settlement Agreements has been completed.

Honorarium to Representative Plaintiffs

[41] Class counsel sought approval of honorarium payments of $5,000 for each of the representative plaintiffs, to recognize "the significance and difficulty for Mr. McKillop and Ms. Fox who have suffered abuse, to come forward on behalf of all other residents, to tell their stories and to confront a painful past". This honorarium is payable out of the Settlement Funds after all claims of class members have been satisfied.

[42] Both of these representative plaintiffs have committed a significant amount of time to directing this litigation right up to fixing a date for trial. They were involved through pleadings, certification, examinations for discovery and preparation for trial. Their participation required them to travel from their homes outside Toronto. Most important, they were the face of these actions and their personal experiences became matters of public record. They were required to recount experiences that no doubt have been extremely difficult and emotional for them. The honorarium is, in the words of Perell J.,[17] "not an award but a recognition that the representative plaintiffs meaningfully contributed to the class members' pursuit of access to justice".

[43] I approve an honorarium of $5,000 to each of Mr. McKillop and Ms. Fox, to come from the Settlement Funds remaining after all claims of class members have been paid.

Order

[44] Order accordingly.

Conway J.

Date: February 27, 2014

[16] Counsel recognized that the Crown's lists of class members required updating and cross-referencing to its databases, as many addresses were incomplete or incorrect. I am satisfied that the steps taken to update these lists, combined with the other steps taken by the parties, were adequate to provide notice of the settlement approval hearing to class members so that they could attend or file an objection. However, further updating and cross-referencing is being conducted to ensure that class members receive notice of when and how to make a claim.
[17] See *Johnston v. The Sheila Morrison Schools*, [2013] O.J. No. 1126, at para. 43.

2014 ONSC 1282 (CanLII)

Merlo v. Canada, [2017] F.C.J. No. 773

Federal Court Judgments

Federal Court

Toronto, Ontario

A.M. McDonald J.

Heard: May 24, 2017.

Judgment: May 30, 2017.

Docket: T-1685-16

[2017] F.C.J. No. 773 | 2017 FC 533

Between Janet Merlo and Linda Gillis Davidson, Plaintiffs, and Her Majesty the Queen, Defendant

(101 paras.)

Case Summary

Civil litigation — Civil procedure — Parties — Class or representative actions — Settlements — Approval — Motion by representative plaintiffs for approval of proposed settlement of class action allowed — Action related to gender and sexual orientation based harassment and discrimination of women who worked in RCMP — Settlement Agreement contained non-monetary and monetary terms — Non-monetary terms represented relief that would not otherwise be available to class following trial — Settlement Agreement was fair, efficient and in best interests of the class — Payment of honorarium of $15,000 to each representative plaintiff and legal fees of 15 per cent also approved.

Motion by the representative plaintiffs for approval of a proposed settlement of a class action. The class action related to gender and sexual orientation based harassment and discrimination of women who worked in the RCMP. The representative plaintiffs made allegations of gender-based bullying, discrimination, and harassment, which they both experienced while they were employed with the RCMP. The plaintiffs claimed that this harassment and discrimination had impacted their careers within the RCMP and had caused them to suffer physical and psychological damage, personal expense, and loss of income. The Settlement Agreement contained non-monetary and monetary terms. The non-monetary terms were significant as they represented relief that would not otherwise be available to the class following a trial as they would be beyond the jurisdiction of the court, such as institutional change initiatives within the RCMP, a public apology, and the creating of a scholarship.

HELD: Motion allowed.

The Settlement Agreement was fair, efficient and in the best interests of the class. The inclusive class definition and a class period that dated back to 1974 provided compensation to class members who would otherwise be barred because of limitation periods from successfully pursuing an action. Considering the very personal and painful nature of the claims, the settlement process included a non-adversarial claims process with numerous safeguards to protect the privacy of claimants. The amount allocated for non-pecuniary damages for the psychological injuries caused by workplace harassment was in line with or exceeded the amounts awarded in reported cases. Ensuring a confidential process for claimants was an overarching feature of the settlement because of the nature of the psychological injuries. All parties acted in good faith and there was no evidence of collusion. The payment of an honorarium of $15,000 to each of the representative plaintiffs was reasonable due as this was an exceptional case and the contributions of the plaintiffs were worthy of recognition in the form of

honorarium payment. Approval of legal fees in the amount of 15 per cent was also approved.

Statutes, Regulations and Rules Cited:

Federal Court Rules, Rule 55, Rule 334.4, Rule 334.29

Counsel

David A. Klein, Angela Bespflug, Won J. Kim, Megan B. McPhee, Aris Gyamfi, for the Plaintiffs.

Mitchell R. Taylor, Charmaine De Los Reyes, Sarah Hagen, for the Defendant.

ORDER AND REASONS

A.M. McDONALD J.

1 This matter was certified as a class action for settlement purposes by Order of this Court on January 13, 2017. This class action relates to gender and sexual orientation based harassment and discrimination of women who worked in the Royal Canadian Mounted Police [RCMP].

2 This is a Motion by the Representative Plaintiffs seeking approval of the terms of the proposed settlement of this class action. The Defendant [Canada] consents to the terms of the settlement. The proposed settlement has a number of features and benefits that extend beyond a strictly monetary compensation scheme and as a result, the Settlement Agreement goes well beyond what the Plaintiffs may have been awarded after a trial.

3 For the reasons that follow, I approve the settlement, I approve the payment of an honorarium of $15,000 to each of the Representative Plaintiffs, Ms. Merlo and Ms. Davidson, and I approve counsel fees.

I. Background

4 On October 6, 2016, the Representative Plaintiffs and the Defendant reached an agreement to settle the claims for gender and sexual orientation based harassment and discrimination of women who worked in the RCMP since September 16, 1974 [Settlement Agreement]. The settlement is national in scope, therefore the Representative Plaintiffs consolidated the action filed in British Columbia in 2012 by Ms. Merlo [Merlo Action], and an action filed in Ontario in 2015 by Ms. Davidson [Davidson Action].

5 In their claims the Representative Plaintiffs make allegations of gender-based bullying, discrimination, and harassment, which they both experienced while they were employed with the RCMP. The Plaintiffs claim that this harassment and discrimination has impacted their careers within the RCMP and has caused them to suffer physical and psychological damage, personal expense, and loss of income.

6 On certification as a class action, the primary class was defined to include all female current and former living Regular Members, Civilian Members and Public Service Employees who worked within the RCMP since September

16, 1974. This date is significant as it is the first date on which women were eligible to join the RCMP. Including historical claims is significant as those claims would have been otherwise time barred due to the expiry of limitation periods.

7 Secondary class members were defined to include those with a derivative claim in accordance with applicable family law legislation arising from a family relationship with a primary class member.

8 In support of this Motion for approval the parties rely upon the following Affidavits:

* Affidavit of Whitney Santos sworn May 11, 2017 [Santos Affidavit]
* Affidavit of Mandy Ng affirmed May 11, 2017
* Affidavit of Janet Merlo sworn May 10, 2017
* Affidavit of Linda Gillis Davidson affirmed May 11, 2017

II. Key terms of the Settlement Agreement

9 The Settlement Agreement contains non-monetary and monetary terms.

10 The non-monetary terms are significant as they represent relief that would not otherwise be available to the class following a trial as they would be beyond the jurisdiction of the court, i.e. institutional change initiatives within the RCMP, a public apology, and the creating of a scholarship. The following from the Settlement Agreement provides an overview of the Settlement terms:

> B. The Plaintiffs and the Defendant ("the Parties") recognize and acknowledge that gender and sexual orientation based harassment, gender and sexual orientation based discrimination, and sexual assault, including physical assault in the course of conduct constituting harassment have no place in the RCMP and wish to enter into this Settlement Agreement to:
>
> (a) restore confidence in the RCMP as an organization that values equity and equality;
>
> (b) implement measures to eliminate workplace harassment and discrimination in the RCMP; and
>
> (c) resolve the Claims of Primary Class Members who experienced and/or continue to experience gender and/ or sexual orientation based harassment and discrimination (as defined below) while working in the RCMP during the Class Period;
>
> C. The Parties agree to: a) implement change initiatives and best practices aimed at eliminating Harassment in the RCMP and increasing equality and b) compensate Class Members who suffered injury as a consequence of that Harassment.

11 The monetary terms of the settlement are outlined in the Santos Affidavit as follows:

> 11. As described in detail below, the Settlement provides six levels of compensation ranging from $10,000 to $220,000. For women whose claims are assessed at levels 5 and 6, compensation in an aggregate total of up to 10% of the claimant's award will be awarded to their spouses and children.
>
> *Compensation Levels*
>
> 12. The Settlement provides six levels of compensation. Each level sets out a non-exhaustive list of culpable conduct and effect on the victim. The multiple levels recognize that there are many different

forms of gender and sexual orientation based harassment and discrimination, and each will have a unique impact on the victim.

13. The amount of compensation paid for each level reflects the recoveries class members might recover at trial with some compromise to take into account potential litigation risks (defences, statutory bars, limitation periods, contributing causes, etc.) and the fact that the adjudication process under the Settlement is confidential and non-adversarial. There is also, of course, the benefit of receiving compensation now rather than having to wait for the uncertain outcome of a trial and potential appeals.

14. The Compensation Levels and criteria are in Schedule B, Appendix 6 of the Settlement Agreement

[...]

The Claims Process

15. The Settlement creates a confidential, non-adversarial procedure for assessing claims that is based on document review and claimant interviews. The process is designed to be a safe environment for class members to tell their stories.

[...]

Confidentiality

24. The Settlement incorporates numerous safeguards to protect the privacy of claimants and to maintain confidentiality in the claims process. Confidentiality was a significant concern for class members, many of whom had experienced retaliation while working within the RCMP after making complaints that they experienced harassment and/or discrimination. The Settlement incorporates multiple measures to protect the identity of claimants, thereby encouraging class members to feel safe when making claims under the Settlement.

III. Notice of Proposed Settlement

12 Following the certification of the class action, Class counsel undertook an extensive communication plan to advise potential class members of the proposed settlement and to advise them of the date of the settlement approval hearing. The right of class members to object to the settlement and the right to opt out were also detailed in the communications.

13 At the hearing, I was advised that communications were sent to over 20,000 class members. As well, a copy of the Settlement Agreement had been made available on Class counsel websites and on the Assessor's website.

IV. Issues

14 The following are the issues for determination on this Motion:

(a) Approval of the Proposed Class Settlement Agreement

(b) Approval of the Notice Plan and Appointment of Assessor

(c) Relief from Rule 334.21(2)

(d) Honorarium to Ms. Merlo and Ms. Davidson

(e) Class Counsel Fees and Disbursements

V. Analysis

(a) *Approval of the Proposed Class Settlement Agreement*

15 Rule 334.29 of the *Federal Court Rules, SOR/98-106* [*Rules*] provides as follows:

Approval

334.29 (1) A class proceeding may be settled only with the approval of a judge.

Binding effect

(2) On approval, a settlement binds every class or subclass member who has not opted out of or been excluded from the class proceeding.

* * *

Approbation

334.29 (1) Le règlement d'un recours collectif ne prend effet que s'il est approuvé par un juge.

Effet du règlement

(2) Il lie alors tous les membres du groupe ou du sous-groupe, selon le cas, à l'exception de ceux exclus du recours collectif.

16 On approving a settlement, the test to be applied "is whether the settlement is fair and reasonable and in the best interests of the class as a whole" (*Cardozo v Becton, Dickinson & Co*, 2005 BCSC 1612, 145 ACWS (3d) 381 citing at para 16 *Dabbs v Sun Life Assurance Co of Canada*, [1998] OJ No 1598, (24 February 1998), Ontario, 96-CT-022862 (Ont Gen Div) at para 9, aff'd (1998), 40 O.R. (3d) 429, 5 CCLI (3d) 18 (Ont Gen Div); *Haney Iron Works Ltd v Manulife Financial* (1998), 169 DLR (4th) 565, 9 CCLI (3d) 253 (BCSC) at para 27; and *Fakhri v Alfalfa's Canada*, 2005 BCSC 1123, 47 BCLR (4th) 379 at para 8) .

17 While the court has the power to approve or reject a settlement, it may not modify or alter a settlement (*Haney Iron Works, supra* at para 22; *Dabbs, supra* at para 10).

18 The settlement is judged by a standard of reasonableness, not perfection (*Châteauneuf v Canada*, 2006 FC 286 at para 7, 54 CCPB 47).

19 The factors to consider when the reasonableness of a settlement is being assessed have been delineated in a number of cases (*Fakhri, supra* at para 8) and are addressed below.

i. *Likelihood of recovery or the likelihood of success*

20 It is evident from the litigation history of the Merlo and Davidson actions that there are many complex issues with these claims. Success was not guaranteed.

21 There were various defences available to the Defendant. There was a risk that the Plaintiffs would not be successful at certification or at the common issues trial. Even if the Plaintiffs were able to get over these hurdles, they faced the prospect of appeals and individualized proceedings which could take an additional ten (10) years to complete. For these reasons, the Parties submit that any litigation discount factored into this settlement is outweighed by the potential litigation risks and inevitable delays of carrying on with the litigation.

22 Furthermore, as part of the settlement, potential barriers to recovery and defences which would have otherwise been available to Canada have been waived.

ii. *Amount and nature of discovery evidence*

23 The Parties submit that although this litigation has not reached the discovery phase, Class counsel developed a complete understanding of the underlying facts and circumstances of the claims.

24 The Santos Affidavit details the steps taken by Klein Lawyers LLP in 2012, in creating a detailed questionnaire that was sent to each potential class member who contacted the firm. In 2014, Klein Lawyers LLP contacted the approximately 150 class members who completed detailed questionnaires. With this information, Klein Lawyers LLP was able to prepare charts illustrating the types of harassment experienced by 147 class members, the impacts of that harassment, and the experiences of class members after reporting such behaviour to the RCMP.

25 I accept the submissions of Class counsel that even without discovery they had a wealth of information on the nature of the claims they were advancing. They were also well positioned to understand the factual matrix of these claims and the challenges they would face in moving forward with the litigation. Potential bars to recovery were a real risk. These factors informed the decision making process as counsel considered the proposed settlement and provided their recommendations to the Plaintiffs.

iii. *Settlement terms and conditions*

26 The Parties submit that the Settlement Agreement is fair, efficient and in the best interests of the class.

27 The inclusive class definition and a class period that dates back to 1974, provides compensation to class members who would otherwise be barred (because of limitation periods) from successfully pursuing an action. Further, considering the very personal and painful nature of the claims, the settlement process includes a non-adversarial claims process with numerous safeguards to protect the privacy of claimants.

28 There are 6 levels of compensation, ranging between $10,000.00 -- $220,000.00 dependent upon the nature of the conduct and its impact on the victim. Compensation is also available to spouses and children of claimants whose claims are assessed at the two highest levels (level 5 or level 6). The settlement is on a "claims made" versus a "lump sum" basis. This means there is no ceiling or cap on the total compensation that may be paid to members of the class. Therefore there is no risk of depletion of the settlement fund, nor is there any necessity to prorate claims. Simply put, every approved claim will be paid by the Defendant.

29 At this stage, Class counsel conservatively estimates there will be over one thousand (1,000) claimants with an estimated pay out of approximately 89 million dollars.

30 In the Settlement Agreement, the amounts allocated for non-pecuniary damages for the psychological injuries caused by workplace harassment is in line with, or exceeds, the amounts awarded in reported cases (*Sulz v Canada (AG)*, *2006 BCSC 99*, *263 DLR (4th) 58*, aff'd *2006 BCCA 582*, *276 DLR (4th) 391*; *Rees v Canada (Royal Canadian Mounted Police)*, *2004 NLSCTD 138*, *239 Nfld & PEIR 1*, rev'd *2005 NLCA 15*, *246 Nfld & PEIR 79*; *Martin v Alberta (Workers' Compensation Board)*, *2014 SCC 25*, *[2014] 1 SCR 546*; Clark v Canada, [1994] 3 FCR 323, *76 FTR 241*; *Unger v Singh*, *2000 BCCA 94*, *133 BCAC 265*; *Wong v Luong*, *2004 BCSC 1489*, *135 ACWS (3d) 354*; *Chancey v Chancey (1999), 86 ACWS (3d) 885*, *[1999] BCJ No 551* (SC); *Kinsella v Logan (1996), 179 NBR (2d) 161*, *63 ACWS (3d) 840* (CA). rev'ing *(1995), 163 NBR (2d) 1*, *55 ACWS (3d) 542* (QB); *Nagy v Canada*, *2005 ABQB 26*, *41 Alta LR (4th) 61*, aff'd *2006 ABCA 227*, *272 DLR (4th) 601*; *J.R.I.G. v Tyhurst*, *2001 BCSC 369*, *103 ACWS (3d) 635*, aff'd *2003 BCCA 224*, *226 DLR (4th) 447*).

31 The claims process will be handled the Honourable Mr. Bastarache, C.C., Q.C., who has previously administered class actions settlements involving institutional abuse. He also played a significant role in assisting the parties to reach this settlement. He is highly regarded by the parties and they are satisfied that he will act fairly and compassionately in the role as Assessor.

32 Ensuring a confidential process for claimants is an overarching feature of the settlement because of the nature of the psychological injuries. The settlement also includes a number of confidentiality safe guards which are particularly important for current serving members of the RCMP. The RCMP will not see the claims and they will not

know the identity of the claimants. The RCMP designated contact will work from a secured room with access to the physical premises and to the records restricted.

33 The settlement has strong support from class members. This settlement has a number of benefits beyond financial compensation, including an apology, change initiatives for the RCMP and the creation of a scholarship. These could not have been achieved through litigation.

iv. *Recommendations and experience of counsel*

34 Class counsel, Klein Lawyers LLP and Kim Orr Barristers P.C., are highly experienced in class action litigation. Both firms have practiced in the specialized area of class action litigation for over 20 years.

35 They have been involved in this litigation since the claims were filed. They recommend the settlement to Ms. Merlo and Ms. Davidson based upon a consideration of the benefits of the terms of the settlement as against the risks of continuing with the litigation. Their professional opinions are that the settlement affords the best opportunity for class members to be fairly compensated.

v. *Future expense and likely duration of litigation*

36 If this settlement is not approved, the Merlo Action and the Davidson Action will resume. In the Merlo Action, the Defendant objected to certification and the certification hearing took 7 days. In the Davidson Action, part of the claim was struck (*2015 ONSC 8008*, *262 ACWS (3d) 648*). The certification hearing started in 2016 and a decision has not yet been rendered.

37 Based on the history of those proceedings to date, the Plaintiffs face the prospect of appeals; followed by the probability of further individualized proceedings which themselves may be subject to appeals.

38 In reality, many years of litigation lie ahead if this settlement is not approved.

vi. *Recommendations of neutral parties*

39 The parties concede that they would not have reached this settlement without the assistance of the Honourable Mr. Bastarache, C.C., Q.C., who has been a neutral participant in the settlement negotiations since April 2016.

40 Additionally the parties were assisted by a number of experts who helped frame the terms of settlement, including the internal change initiatives within the RCMP, and also helped develop the compensation protocol.

41 Psychologist Dr. Daylen helped to develop the recommended assessment protocol for this matter and proposed the contents of the different compensation levels which later became integrated, with some modification, into the Settlement Agreement.

42 Professor Llewellyn is a Law Professor with an expertise in restorative justice. She provided guidance on the structure of the settlement process to ensure it was relational and restorative. Her recommendations assisted the parties in including restorative justice features in the Settlement Agreement such as change initiatives and the public apology.

43 Dr. Berdahl is an expert in organizational behavior and workplace harassment. She was retained to prepare a report for the certification application in the Merlo Action. Her report outlines the necessity for confidentiality in the claims process and she made recommendations on steps to advance positive cultural changes within the RCMP.

vii. *Number of objectors and nature of objections*

44 As of the date of the Motion, approximately 20,000 class members were provided with notice of the certification and notice of the settlement hearing. From that mass communication, only three written objections were received. Two of the objections are from individuals who are not included in the class definition. Therefore these were in effect objections to the class definition rather than objections to the settlement. The one other objection was from an individual who objected to the settlement amount on the basis that her claim would exceed the amounts provided for in the settlement. In which case, opting out of the settlement would have been the option open to this particular claimant.

45 No objections were voiced at the hearing.

viii. *Presence of good faith and absence of collusion*

46 Negotiations towards settlement in the Merlo Action started in early 2014 and continued into 2015. In January 2016, negotiations in both the Merlo and Davidson actions were undertaken and culminated in the Settlement Agreement. There were a total of ten in person settlement meetings and numerous conference calls and various forms of other communications.

47 The Parties explain that this litigation has been ongoing for over five (5) years, and that the successful rounds of negotiations included the assistance of the neutral party the Honourable Mr. Bastarache, C.C., Q.C..

48 Legal counsel for the Plaintiffs was assisted throughout the process by a number of experts who made important contributions to the framework of the Settlement Agreement.

49 Based on the above, I am satisfied that all parties acted in good faith and there is no evidence of collusion.

ix. *Communication with class members*

50 Following the certification of this class action on January 13, 2017, a robust notice distribution scheme to potential class members was undertaken. Class counsel estimates that over 20,000 notices were sent out. Notices were also published in newspapers throughout the country.

51 Class counsel advise that they have been contacted by over a thousand (1000) women wishing to participate in this Settlement

52 The representative Plaintiffs have also had a hands-on role in the settlement discussions and communication with potential class members.

x. *Information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation*

53 The Merlo and Davidson actions were pursued as stand-alone claims and although there was some settlement discussion, both actions continued along their litigation path.

54 As settlement negotiations in both the Merlo and Davidson actions were brought together, there were several reports addressing the issue of gender harassment within the RCMP. These reports provided the Parties with additional information as to the nature of the harassment problem in the RCMP and the steps that would be required to address the problem.

55 In early 2014, the Defendant expressed an interest in a global settlement. Negotiations continued through 2015 and 2016. The Settlement Agreement was signed by all parties on October 6, 2016.

xi. *Conclusion*

56 Having outlined and considered all the factors above, this Court finds the proposed Settlement Agreement fair, reasonable and in the best interests of the class as a whole. The Settlement Agreement is approved.

(b) *Approval of the Notice Plan and Appointment of Assessor*

57 In addition to approval of the Settlement Agreement, the Parties also seek approval that the office of the Assessor (Honourable Mr. Bastarache, C.C., Q.C.) be responsible for disseminating the Notice to class members. The Honorable Mr. Bastarache, C.C., Q.C., conducted individual interviews and assessments to determine compensation in an out of court settlement for victims of sexual abuse by Catholic priests in the Diocese of Bathurst and Archdiocese of Moncton, New Brunswick. Based on his experience in this role, as well as his many years as a Supreme Court Justice, the Representative Plaintiffs believe that the Honourable Mr. Bastarache, C.C., Q.C., will fairly assess the claims and will deal with all claimants in a sensitive and empathetic manner. The Honorable Mr. Bastarache, C.C., Q.C., retained Versailles Communications to prepare a Notice Plan. The Notice will inform class members of how they may submit claims. The proposed manner of distribution for the Notice is the same as the distribution that was approved by this Court for the Notice of Certification and Settlement Approval Hearing.

58 The Settlement Agreement is posted on the websites of Class counsel (Klein Lawyers LLP and Kim Orr Barristers P.C.), as well as on a settlement website which was created by the office of the Assessor (https://merlodavidson.ca/en/).

59 The Notice will be distributed by:

* direct mail to potential class members;
    * posting on the Assessor's website, Class counsel's websites, and the RCMP's website and intranet;
    * publication of the Notice in major Canadian newspapers;
* an advertising campaign on Facebook; and
* posting in all RCMP physical premises.

60 I approve the Notice Plan and I also approve the appointment of the Honorable Mr. Bastarache, C.C., Q.C., as the assessor to administer the settlement and determine which claimants are eligible for compensation pursuant to the terms of the Settlement Agreement.

(c) *Relief from Rule 334.21(2)*

61 The Representative Plaintiffs seek relief from the application of Rule 334.21(2) of the *Rules, supra*, which states:

> **334.21 (2)** A class member shall be excluded from the class proceeding if the member does not, before the expiry of the time for opting out specified in the certifying order, discontinue a proceeding brought by the member that raises the common questions of law or fact set out in that order.
>
> * * *
>
> **334.21 (2) (2)** Le membre est exclu du recours collectif s'il ne se désiste pas, avant l'expiration du délai prévu à cette fin dans l'ordonnance d'autorisation, d'une instance qu'il a introduite et qui soulève les points de droit ou de fait communs énoncés dans cette ordonnance.

62 They rely upon Rule 55 of the *Rules* which states:

> **55** In special circumstances, in a proceeding, the Court may vary a rule or dispense with compliance with a rule.
>
> * * *
>
> **55** Dans des circonstances spéciales, la Cour peut, dans une instance, modifier une règle ou exempter une partie ou une personne de son application.

63 They argue that this would be an appropriate case to apply the relief provided for in Rule 55.

64 This Court has held in *Chow v Canada (Minister of Citizenship and Immigration)*, *[1998] 161 FTR 156* at para 8, *46 Imm LR (2d) 231*, in explaining the requirement of special circumstances, that "implicit, in special circumstances is, on the one hand, justice and, on the other hand, that there be no prejudice." This Court further noted in *Pearson v Canada (2000), 195 FTR 31* at para 5, *100 ACWS (3d) 44*, that "any application of rule 55 must accord with the general principles espoused by the Federal Court Rules".

65 The general principles are explained at Rule 3 of the *Rules*, namely that:

> **3** These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.
>
> * * *
>
> **3** Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

66 The Parties submit that the Representative Plaintiffs should not be excluded from this proceeding, since allowing them to participate in the settlement claims process does not cause prejudice, actual or otherwise, upon the Defendant as they will discontinue the British Columbia and Ontario actions upon approval of the Settlement Agreement by this Court. They argue that the application of Rule 55 accords with the general principles of the *Rules* and specifically encompassed in Rule 3.

67 The Court accepts these submissions and finds that, in these specific circumstances, Rule 334.21(2) shall not apply to the Representative Plaintiffs.

(d) *Honorarium to Ms. Merlo and Ms. Davidson*

68 The payment of an honorarium of $15,000 to each the Representative Plaintiffs is requested on the basis that this is an exceptional case and the contributions of the Representative Plaintiffs are worthy of recognition in the form of honorarium payment. If approved, the payment will be payable out of Class counsel fees.

69 This request is based upon their important contributions to this litigation and their considerable time and efforts as the Representative Plaintiffs. They each commenced their own class actions in BC and Ontario, and actively advanced those claims. This included publicizing their personal account of the gender and sexual orientation harassment which they endured within the RCMP. This has required the public re-living of painful events.

70 They gave their name and gave their face to high profile class litigation and by necessity, they forfeited their privacy for the benefit of many others who can remain anonymous. Being prepared to spearhead such a cause comes at a personal cost and a deprivation of privacy.

71 They have both travelled for the litigation and Settlement meetings, they have given media interviews to raise awareness of this class proceeding, and encouraged other class members to come forward with their experiences. They have had personal contact with hundreds of potential class members.

72 In *Robinson v Rochester Financial Ltd*, 2012 ONSC 911 at para 43, [2012] 5 CTC 24, a list of considerations were identified in assessing whether the representative plaintiff(s) should receive an honorarium, as follows:

(a) active involvement in the initiation of the litigation and retainer of counsel;

(b) exposure to a real risk of costs;

(c) significant personal hardship or inconvenience in connection with the prosecution of the litigation;

(d) time spent and activities undertaken in advancing the litigation;

(e) communication and interaction with other class members; and

(f) participation at various stages in the litigation, including discovery, settlement negotiations and trial.

73 In *Eidoo v Infineon Technologies AG*, 2015 ONSC 2675, [2015] OJ No 2062, citing at paragraph 13 *The Law of Class Actions in Canada*, by Warren K. Winkler et al, (Toronto: Canada Law Book, 2014), the Ontario Superior Court explains how usually compensation to the representative plaintiff is appropriate uniquely in situations where the plaintiff has provided services which are over and above the usual duties of a representative plaintiff.

74 I have no difficulty concluding that this case warrants the award of honorarium to both Representative Plaintiffs, Ms. Merlo and Ms. Davidson, in the amount of $15,000.00 each.

(e) *Class Counsel Fees and Disbursements*

75 Approval of legal fees in the amount of 15% is also sought. Both Representative Plaintiffs signed contingency fee agreements agreeing to pay 33.3%, however, because of the structure of the settlement, class members will only be paying 15% of recovery toward legal fees.

76 No objections to the legal fees were raised.

77 The Federal *Rules* provide:

> **Approval of payments**
>
> **334.4** No payments, including indirect payments, shall be made to a solicitor from the proceeds recovered in a class proceeding unless the payments are approved by a judge.
>
> * * *
>
> **Approbation des paiements**
>
> **334.4** Tout paiement direct ou indirect à un avocat, prélevé sur les sommes recouvrées à l'issue d'un recours collectif, doit être approuvé par un juge.

78 In *Cardozo v Becton, Dickinson & Co*, (*supra* at para 25), the British Columbia Supreme Court outlined various factors to be considered by the court in assessing the reasonableness of fees. These factors are addressed below.

i. *Results achieved*

79 The terms of the settlement have been outlined above and offer advantages for class members which would not have been available had the matter proceeded through litigation. The class and class period are broadly defined, and the claims-made settlement ensures each approved claim will be paid. As well, the confidential and non-adversarial claims process is a significant feature of the settlement process considering the nature of the claims.

80 The monetary compensation available under the Settlement Agreement is reasonable and within the range of compensation that might be awarded at trial.

81 The Settlement Agreement also provides for non-monetary benefits for class members, namely, a public apology and the implementation of measures aimed at reducing and eliminating gender and sexual orientation based harassment in the RCMP.

82 Class counsel also successfully negotiated settlement terms that the Defendant would not rely upon limitation periods or statutory bars to any of the class claims.

83 Class counsel will also continue to be involved in settlement administration.

ii. *Risks undertaken*

84 The litigation risks assumed by Class counsel here was substantial. The fact that no other Canadian law firms filed parallel actions indicated that this matter was seen by other lawyers as being highly complex and unlikely to succeed. Furthermore, Class counsel pursued this litigation to completion on their own rather than with a consortium of counsel from various provinces.

85 Some of the risks associated with these claims included the fact that there was little accurate information as to the extent of gender and sexual orientation based harassment in the RCMP. Counsel was also aware that securing evidence to advance the claims was likely to require years of contested litigation and discoveries. There was a risk that the class would not be certified given the plethora of individual issues involved.

86 The Defendant opposed certification of both the Merlo and Davidson actions. Based upon the submissions filed in those actions which were included in the Motion Record, it is clear that Canada was forcefully defending the claims.

87 These were not claims that had a guarantee of success at the end of the day.

iii. *Time expended*

88 The Parties submit that Class counsel diligently litigated the actions and engaged in intense settlement negotiations. Class counsel devoted considerable time and resources to the prosecution of the actions. In some cases, they hired personnel specifically to work on these claims. Many of the class members were interviewed and a total of six experts were retained. Class counsel also covered the costs of disbursements. By taking on litigation of this magnitude, counsel states that they were unable to explore or embark on other potentially lucrative class actions.

iv. *Complexity of the matter*

89 This was multi-faceted complex class litigation with substantive legal complexity involving novel claims with potential legislative barriers. Expertise in in the areas of psychology, psychiatry, and the study of gender dynamics and gender and sexual orientation based harassment and discrimination were necessary. Additionally, class members were seeking more than monetary compensation. They wanted a public apology from the RCMP for the harassment experienced by class members, and they wanted to see initiatives and changes implemented within the

RCMP to reduce and eliminate harassment. While relief of this nature is outside the litigation realm, these were factors which the class members insisted upon and which added a level of complexity for Class counsel.

v. *Degree of responsibility assumed by counsel*

90 The Merlo Action in British Columbia was commenced in 2012 and the Davidson Action in Ontario was commenced in 2015. No other parallel actions were filed. Class counsel assumed complete responsibility for commencing and prosecuting this litigation.

vi. *Importance of the matter to the client*

91 As indicated in the Merlo and Davidson Affidavits, this was deeply personal litigation. Their claims were for serious psychological injuries that impacted their lives and the lives of other class members in many diverse and significant ways.

92 The Plaintiffs also wanted a settlement which would have a lasting impact of the culture of the RCMP by helping reduce the incidents of gender and sexual orientation based discrimination. Their insistence on an apology and change initiatives demonstrates the importance of this this litigation to the Plaintiffs.

vii. *Quality and skill of counsel*

93 As noted above, there is no question that Class counsel is highly experienced in the specialized field of class actions. Their experience has been noted in other class action decisions (*Ramdath v George Brown*, 2016 ONSC 3536 at para 2, [2016] OJ No 2803; *McSherry v Zimmer GMBH*, 2012 ONSC 4113 at para 21, 226 ACWS (3d) 351; *Richard v British Columbia*, 2010 BCSC 773 at para 12, 191 ACWS (3d) 734; *Rideout v Health Labrador Corp*, 2007 NLTD 150 at para 71, 270 Nfld & PEIR 90).

viii. *Ability of the class to pay*

94 Given the nature of the defences raised by the Defendant, class members could likely not have been able to afford to retain legal counsel on a fee for service basis. Of note as well is that Class counsel here did not seek any third party litigation financing in this case. In doing so, Class counsel incurred added financial risk.

ix. *Client and the class' expectation*

95 By signing the contingency fee agreements, Ms. Merlo and Ms. Davidson expected to pay legal fees of 33.33% of whatever they recovered. However, as Class counsel was able to negotiate a contribution from the Defendant toward Class Counsel Fees, the amount for legal fees that will be paid by each class member will only be 15%.

96 The Notice of Settlement Approval Hearing informs class members that Class counsel will ask the Court to approve a Class Counsel Fee of 15% payable from the compensation awarded to each class member under the Settlement Agreement.

97 No class member objected to the legal fees.

x. *Fees in similar cases*

98 The Parties submit that a contingency fee of 33.33% in a class action has been held to be presumptively valid on the basis of the decisions in *Middlemiss v Penn West Petroleum Ltd*, 2016 ONSC 3537, [2016] OJ No 2936;

Cannon v Funds for Canada Foundation, 2013 ONSC 7686, [2013] OJ No 5825.

xi. *Conclusion*

99 I am satisfied in all of the circumstances that the fees meet the criteria for approval and I therefore approve the fees. In addition to being reasonable, the fees are less than those provided for by the contingency fee agreements signed by both Ms. Merlo and Ms. Davidson. I would also note that the fact that Class counsel was willing to act on a contingency fee basis for these claims, which faced a number of hurdles, achieves one of the policy objectives of class proceedings which is access to justice for those who might not otherwise be able to afford legal representation.

100 Furthermore, pursuant to the Settlement Agreement, the Defendant has agreed to pay the reasonable disbursements. Accordingly there will be no deduction from the amounts paid to the class members for disbursements.

ORDER in T-1685-16

THIS COURT ORDERS that:

1) The Settlement of this action as set out in the Settlement Agreement, including the Recitals, and Schedules and Appendices, in Schedule "A" attached to this Order, is fair and reasonable and in the best interests of Class Members, and is approved.

2) The Settlement and this Order are binding on the Parties and on every Class Member, including Persons Under Disability, unless they opted out or are deemed to have opted out on or before the expiry of the Opt Out Period, being March 29, 2017, and are binding whether or not such Class Member claims or receives compensation.

3) The Parties to the Settlement Agreement may make non-substantive amendments to the Settlement Agreement, including its Schedules and Appendices, provided that each Party to the Settlement Agreement agrees in writing to any such amendments.

4) The Notice to Class Members of the approval of the settlement of this action shall be substantially in the form and content attached to this Order as Schedule "B" (the "Notice"). The Notice shall be distributed in accordance with the Notice Plan attached to this Order as Schedule "C".

5) The Notice shall be published within 10 business days of the "Implementation Date", as defined in the Settlement Agreement.

6) The Defendant, Her Majesty the Queen, shall pay the amounts required under the Settlement Agreement, including the cost of Notice and administration of the Settlement.

7) The Honourable Michel Bastarache, C.C., Q.C., is appointed as Assessor to administer the Settlement.

8) The Assessor cannot be compelled to be a witness in any civil or criminal proceeding, administrative proceeding, grievance or arbitration where the information sought relates, directly or indirectly, to information obtained by the Assessor by reason of the Settlement or the settlement claims process.

9) No documents received by the Assessor, directly or indirectly, by reason of the Settlement or the settlement claims process, are producible in any proceedings.

10) The RCMP and Canada shall release to the Assessor information and documents required by him or as otherwise required by the Settlement Agreement, including in the Schedules and Appendices.

11) Rule 334.21(2) does not apply to the Representative Plaintiffs, Janet Merlo and Linda Gillis Davidson, and neither is excluded from this proceeding despite not having discontinued the parallel proceedings in British Columbia and Ontario (namely, Supreme Court of British Columbia Action No. S-122255, *Merlo v Canada (AG)* and Ontario Superior Court of Justice Action No. CV-15-52473600CP, *Davidson v Canada (AG)* collectively the "Parallel Actions") prior to the opt out deadline.

12) The contribution to Class Counsel Fees payable by the Defendant, in the amount of $12 million plus applicable sales taxes is approved, and is ordered to be paid by the Defendant to Class Counsel within 30 days following the Court Approval Date. The sum of $6 million plus applicable sales taxes will be paid, by wire transfer, to each of Klein Lawyers LLP and Kim Orr Barristers P.C.

13) A payment by each Class Member of a Class Counsel Fee of 15%, plus applicable sales taxes, of the individual compensation paid to the Class Member under the Settlement, is approved. The 15% Class Counsel Fee is not payable on amounts paid to Class Members for reimbursement of out of pocket or travel expenses pursuant to Article 11.04 of the Settlement Agreement. The 15% Class Counsel Fee payable by each Class Member will be calculated by the Assessor who will hold back the Class Counsel Fee and applicable sales tax from the compensation otherwise payable to the Class Member. The Assessor will remit 50% of the Class Counsel Fees plus applicable sales tax to Klein Lawyers LLP and 50% plus applicable sales tax to Kim Orr Barristers P.C. by wire transfer on the first business day of each month for all payments made to Class Members in the prior month.

101 Upon the Court Approval Date, the Defendant, Her Majesty the Queen, and any and all other applicable provincial and territorial Ministers and governments who are liable for the actions of RCMP members acting as provincial constables under provincial legislation and/or other provincial-federal policing agreements, and their respective officers, agents, servants and employees ("Releasees"), are forever and absolutely released separately and severally by the Class Members from any and all actions, including claims made under the *Canadian Charter of Rights and Freedoms*, causes of action, common law, Quebec civil law and statutory liabilities, contracts, claims, grievances and complaints, and demands of every nature or kind available, asserted or which could have been asserted, whether known or unknown, including for damages, contribution, indemnity, costs, expenses and interest which any Class Member ever had, now has, or may hereafter have, directly or indirectly, arising from or in any way relating to, or by way of any subrogated or assigned right, or otherwise in relation to gender and/or sexual orientation based discrimination, bullying and Harassment while working in the RCMP that occurred during the Class Period (the "Released Claims"), and this release includes any such claim made or that could have been made in any proceeding including the Parallel Actions whether asserted directly by the Class Member or by any other person, group or legal entity on behalf of or as representative for the Class Member.

14) The obligations assumed by the Defendant, Her Majesty the Queen, under the Settlement Agreement are in full and final satisfaction of any and all claims by Class Members against the Releasees, including claims made under the *Canadian Charter of Rights and Freedoms*, relating to or arising from gender and/or sexual orientation based discrimination, bullying and Harassment while working in the RCMP that occurred during the Class Period.

15) Class Members are barred from making any claim or taking or continuing any proceedings arising out of, or relating to, the Released Claims against any Releasee or other person, corporation or entity that might claim damages and/or contribution and indemnity and/or other relief against the defendant, Her Majesty the Queen, including relief of a monetary, declaratory, or injunctive nature, under the provisions of the *Negligence Act*, RSO, 1990, c N-1, or its counterparts in other jurisdictions, the *Police Act*, *RSBC 1996, c 367* or its counterpart in other jurisdictions, the *Canadian Charter of Rights and Freedoms*, the common law, Quebec civil law, or any statutory liability.

16) The Representative Plaintiffs, Janet Merlo and Linda Gillis Davidson, are each awarded an honorarium of $15,000, which will be paid out of Class Counsel Fees.

17) This Court shall retain continuing jurisdiction over the Settlement and its implementation, interpretation and enforcement.

A.M. McDONALD J.

* * * * *

PRIVILEGED AND CONFIDENTIAL

THIS AGREEMENT is made as of the 6th day of October, 2016.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA, representing

HER MATESTY THE QUEEN IN

RIGHT OF CANADA (the "Defendant")

and

JANET MERLO AND LINDA GILLIS DAVIDSON,

as class action representative

plaintiffs

WHEREAS:

A. On March 27, 2012, the plaintiff Janet Merlo commenced Supreme Court of British Columbia Action No. S-122255, *Merlo v. Attorney General of Canada* against the Attorney General of Canada and the Minister of Justice of British Columbia. On March 25,2015, the plaintiff Linda Gillis Davidson commenced Ontario Superior Court of Justice Action No. CV-15-52473600CP, *Davidson v. Attorney General of Canada*. Ms. Merlo and Ms. Davidson (the "Plaintiffs") allege that they and fellow female Regular Members, Civilian Members and Public Service Employees who worked within the RCMP were subject to gender and/or sexual orientation based discrimination, bullying and harassment in the workplace and that RCMP leadership failed to exercise their duty to women in the RCMP to ensure that they could work in an environment free of gender and sexual orientation based discrimination and harassment;

B. The Plaintiffs and the Defendant ("the Parties") recognize and acknowledge that gender and sexual orientation based harassment, gender and sexual orientation based discrimination, and sexual assault, including physical assault in the course of conduct constituting harassment have no place in the RCMP and with to enter into this Settlement Agreement to:

   (a) restore confidence in the RCMP as an organization that values equity and equality;

   (b) implement measures to eliminate workplace harassment and discrimination in the RCMP; and

   (c) resolve the Claims of Primary Class Members who experienced and/or continue to experience gender and/or sexual orientation based harassment and discrimination (as defined below) while working in the RCMP during the Class Period;

C. The Parties agree to: a) implement change initiatives and best practices aimed at eliminating Harassment in the RCMP and increasing equality and b) compensate Class Members who suffered injury as a consequence of that Harassment;

D. The Parties entered into an Agreement in Principle on May 25, 2016, for the resolution of the Claims of the Class Members as de fined in this Agreement;

E. The Parties wish to settle all outstanding Claims relating to or arising from the allegations that the Primary Class. Members were subject to gender and/or sexual orientation based discrimination, harassment and bullying while working within the RCMP;

F. For the purposes of settlement, the Parties, subject to the Approval Order, have agreed to merge the *Merlo* action and *Davidson* action by filing a new statement of claim in the Federal Court, and discontinue the actions commenced in the Supreme Court of British Columbia and the Ontario Superior Court of Justice;

G. The Parties, subject to the Approval Order and the expiration of the Opt Out Period without the Opt Out Threshold being met or waived by the Defendant, have agreed to settle the Merlo action and Davidson action upon the terms contained in this Agreement;

H. The Parties, subject to the Approval Order, agree to resolve all claims of Class Members relating to allegations of gender and/or sexual orientation based harassment, discrimination and bullying while working in the RCMP upon the terms contained in this Agreement, save and except those actions brought by individuals who opt out or are deemed to have opted out of the Class Action in the manner set out in this Agreement and save and except those who have already been compensated or provided a release or consent dismissal order;

THEREFORE, in consideration of the mutual agreements, covenants and undertakings set out herein, the Parties agree that all actions, causes of action, liabilities, claims and demands whatsoever of every nature or kind for damages, contribution, indemnity, costs, expenses and interest which any Class Member ever had, now has or may hereafter have arising in relation to the Claims asserted by the Class Members, whether such claims were made or could have been made in any proceeding including the Class Actions, will be finally settled based on the terms and conditions set out in this Agreement up on the Implementation Date, and the Releasees will have no further liability except as set out in this Agreement.

ARTICLE 1 -- INTERPRETATION

1.01 Definitions

In this Agreement, in addition to the terms defined in the description of the Parties and in the recitals set out above, the following terms will have the following meanings:

"Agreement" means this settlement agreement, including its recitals and Schedules and Appendices, as amended, supplemented or restated from time to time;

"Agreement in Principle" means the Agreement between the Attorney General of Canada, as represented by the Department of Justice and the Plaintiffs, as represented by Klein Lawyers and Kim Orr, signed in counterpart on May 25, 2016. Where there exists an inconsistency between this Agreement and the Agreement in Principle, this Agreement governs;

"Approval Date" means the date the Federal Court issues the Approval Order;

"Approval Order" means the judgment or order of the Federal Court approving this Agreement as fair, reasonable and in the best interests of the Class Members for the purposes of settlement of the Class Action pursuant to the applicable class proceedings legislation and the common law;

"Assessor" means, subject to the approval of the Federal Court, The Honourable Michel Bastarache, C.C., Q.C. agreed upon by the Parties to administer the Claims Process or, in the event the Honourable Michel Bastarache,

C.C., Q.C. is unable or unwilling to act, another person who is a retired jurist, subject to the approval of the Federal Court;

"Business Day" means a day other than a Saturday or a Sunday or a day observed as a holiday under the laws of the Province or Territory in which the person who needs to take action pursuant to this Agreement is situated or a holiday under the federal laws of Canada applicable in the said Province or Territory;

"Canada" or "Government" means the Government of Canada;

"Certification Order" means the order of the Federal Court certifying the Class Action for settlement purposes;

"Change Initiatives" means the initiatives detailed in Schedule E to this Agreement;

"Child" means a natural or legally adapted child of the Primary Class Member, or a person for whom the Primary Class Member has custody under a court order or domestic contract, or a person toward whom the Primary Class Member has demonstrated a settled intention to treat as a child of her family, except under an arrangement where the child is placed for valuable consideration in a foster home by a person haying lawful custody;

"Claim" means a claim made by a Primary Class Member for compensation under this Agreement by submitting a Claim Form, attached as Appendix 1 to Schedule B to the Assessor in accordance with this Agreement;

"Claimant" means a Primary Class Member who makes a claim by completing and submitting a Claim Form;

"Claim Deadline" means 180 days from the first publication of the Notice of Settlement Approval;

"Claim Form" means the application form in Appendix 1 to Schedule B of this Agreement;

"Class Action" means the Class Action commenced in the Federal Court;

"Class Counsel" means Klein Lawyers LLP and Kim Orr Barristers P.C.;

"Class Member" means a Primary Class Member and/or a Secondary Class Member;

"Class Period" means the period from September 16, 1974 to the Approval Date;

"Claims Process" means the plan outlined in this Agreement, including Schedules and Appendices, for the submission, assessment, determination and payment of Claims made pursuant to the settlement of the merged *Merlo* action and *Davidson* action as set out in this Agreement;

"Cohabit" means to live together in a conjugal relationship outside marriage for a period of not less than three years, or in a relationship of some permanence, if the cohabiting individuals are the natural or adoptive parents of a child;

"Consent to Disclosure of Information" means the form in Appendix 2 of Schedule B to this Agreement;

"Court" means Federal Court;

"*Davidson* action" means Ontario Superior Court of Justice Action No. CV-15-52473600CP commenced by Linda Gillis Davidson on March 25, 2015;

"Decision" means the decision of the Assessor with respect to a Claim and as set out in paragraph 33 of Schedule B to this Agreement;

"Designated Contact" means the individual(s) designated as the RCMP point(s) of contact for the Assessor under Schedule D to this Agreement;

"Family Members" means the Children and current Spouse of a Primary Class Member as defined in this Agreement;

"Harassment" means improper conduct in the workplace by any Regular Member, Special Constable, Cadet, Auxiliary Constable, Special Constable Member, Reserve Member, Civilian Member, Public Service Employee, including any Temporary Civilian Employee, working within the RCMP, male or female, that is directed at and offensive to another Regular Member, Special Constable, Cadet, Auxiliary Constable, Special Constable Member, Reserve Member, Civilian Member, Public Service Employee, including Temporary Civilian Employee working within the RCMP, including, but not limited to, at any event or any location related to work, and that the individual engaging in such improper conduct knew or ought reasonably to have known would cause offence or harm. It comprises objectionable act(s) comment(s) or display(s) that demean, belittle, or cause personal humiliation or embarrassment, and any act of intimidation or threat. It also includes harassment within the meaning of the *Canadian Human Rights Act*, R.S.C. 1935, c. H-6, based on sex, sexual orientation, marital status, and family status. Harassment can be a series of incidents but can also be one severe incident which has a lasting impact on the individual. Harassment by members of the public is not harassment for the purposes of this Agreement. In this Agreement, "Harassment" refers collectively to gender and sexual orientation based harassment, gender and sexual orientation based discrimination, and sexual assault, including physical assault in the course of conduct constituting harassment;

"Implementation Date" means the latest of:

(a) the day following the last day on which a Class Member may appeal or seek leave to appeal the Approval Order; and

(b) the date of a final determination of any appeal brought in relation to the Approval Order;

"*Merlo* action" means Supreme Court of British Columbia Action No. S-122255 commenced by Janet Merlo on March 27, 2012;

"Opt Out Form" means the form attached in Schedule H of this Agreement;

"Opt Out Period" means the 60 day period following the publication of the Notice of Certification and Settlement Approval Hearing;

"Opt Out Threshold" means the Opt Out Threshold set out in Article 5.02 of this Agreement;

"Parties" means collectively and individually the signatories to this Agreement;

"Primary Class Members" means female current and former living Regular Members, Civilian Members and Public Service Employees (who are appointed by the Commissioner of the RCMP under the delegated authority of the Public Service Commission pursuant to the *Public Service Employment Act*, R.S.C., 1985, c. P-32; amended S.C. 2003, c. 22, ss.12, 13) who worked within the RCMP during the Class Period, who experienced and/or continue to experience gender and/or sexual orientation based harassment and discrimination while working in the RCMP during the Class Period, and who have not opted out or are not deemed to have opted out of the Class Action on or before the expiry of the Opt Out Period.

For the purposes of this Agreement only **"Regular Members"** includes Regular Members, Special Constables, Cadets, Auxiliary Constables, Special Constable Members, and Reserve Members

For the purposes of this Agreement only **"Public Service Employees"** includes Temporary Civilian Employees who, prior to 2014 were appointed under the now-repealed subsection 10(2) of the *RCMP Act*, R.S.C., 1985, c. R-10;

"Released Claims" means any and all actions, causes of action, common law, Quebec civil law and statutory liabilities, contracts, claims, grievances and complaints, and demands of every nature or land available, asserted or which could have been asserted whether known or unknown including for damages, contribution, indemnity, costs, expenses and interest which any Class Member ever had, now has, or may hereafter have, directly or indirectly arising from or in any way relating to or by way of any subrogated or assigned right or otherwise in relation to gender and/or sexual orientation based discrimination, bullying and harassment while working in the RCMP that occurred during the Class Period, and including any such claim made or that could have been made in any proceeding including the Merlo and Davidson actions, whether asserted directly by the Class Member or by any other person, group or legal entity on behalf of or as representative for the Class Member;

"Releasee" means the Defendant in the Class Action commenced in the Federal Court merging the *Merlo* and *Davidson* actions, the B.C. (Minister of Public Safety and Solicitor General), and any other applicable provincial and territorial Ministers and governments who are liable for the actions of RCMP members acting as provincial constables under provincial legislation and/or other provincial-federal policing agreements, and their respective officers, agents, servants and employees;

"Request for Deadline Extension" means the form in Appendix 3 to Schedule B of this Agreement, to be submitted when a Claimant makes a request to extend the Claim Deadline;

"Secondary Class Members" means all persons who have a derivative Claim, in accordance with applicable family law legislation, arising from a family relationship with a Primary Class Member;

"Secondary Class Member Claim Form" means the form in Appendix 1 to Schedule C;

"Spouse" means:

(a) either of two persons who are currently married to each other or who have together, in good faith on the part of a person relying on this clause to assert any right, entered into a marriage that is voidable or void, and are living together; OR

(b) either of two persons who are not married to each other and have co-habited for a period of not less than three years, or are in a relationship of some permanence, if they are the natural or adoptive parents of a Child;

"Travel Expenses" has the meaning set out in the National Joint Council Travel Directive.

1.02 This Agreement is not to be construed as an admission of liability by any of the defendants named in the *Merlo* action or the *Davidson* action

1.03 Headings

The division of this Agreement into Articles and Sections and the insertion of a table of contents and headings are for convenience of reference only and do not affect the construction or interpretation of this Agreement. Unless something in the subject matter or context is inconsistent therewith, references to Articles, Sections and Schedules are to Articles, Sections and Schedules of this Agreement.

1.04 Extended Meanings

In this Agreement, words importing the singular number include the plural and vice versa and words importing

persons include individuals, partnerships, associations, trusts, unincorporated organizations, corporations and governmental authorities. The term "including" means "including without limiting the generality of the foregoing".

1.05 No Contra Proferentem

The Parties acknowledge that they have reviewed and participated in settling the terms of this Agreement and they agree that any rule of construction to the effect that any ambiguity is to be resolved against the drafting Parties is not applicable in interpreting this Agreement.

1.06 Statutory References

In this Agreement, unless something in the subject matter or context is inconsistent or unless otherwise provided, a reference to any statute is to that statute as enacted on the date hereof or as the same may from time to time be amended, re-enacted or replaced and includes any regulations made thereunder.

1.06 Day for any action

Where the time on or by which any action required to be taken hereunder expires or falls on a day that is not a Business Day, such action may be done on the next succeeding day that is a Business Day.

1.07 Final order

For the purposes of this Agreement a judgment or order becomes final when the time for appealing or seeking leave to appeal the judgment or order has expired without an appeal being taken or leave to appeal being sought or, in the event that an appeal is taken or leave to appeal is sought, when such appeal or leave to appeal and such further appeals as may be taken have been disposed of and the time for further appeal, if any, has expired.

1.08 Schedules

The following Schedules and Appendices to this Agreement are incorporated into and form part of this Agreement as fully as if contained in the body of this Agreement:

SCHEDULE A - NOTICE PLAN

Appendix 1 -- Notice of Certification and Settlement Approval Hearing

Appendix 2 -- Notice of Settlement Approval

Appendix 3 -- Letter to Class Members by Direct Mail

SCHEDULE B -- CLAIM PROCESS

Appendix 1 -- Claim Form

Appendix 2 -- Consent to Disclosure of Information

Appendix 3 -- Request for Deadline Extension

Appendix 4 -- Class Member List and Verification of Class Membership

Appendix 5 -- Identification of Previous Claims

Appendix 6 -- Compensation Levels

Appendix 7 -- Compensation Amounts

Appendix 8 -- Request for Reconsideration of a Level 2 Claim

Appendix 9 -- Certification of No Prior Compensation

Appendix 10 -- Travel Claim

Appendix 11 -- Release of Documents and Information held by the RCMP

SCHEDULE C -- SECONDARY CLASS MEMBER CLAIMS

Appendix 1 - Secondary Class Member Claim Form

SCHEDULE D -- RCMP DESIGNATED CONTACT AND CLAIMS SUPPORT PROCESS

SCHEDULE E -- CHANGE INITIATIVES

SCHEDULE F -- JOINT COMMUNICATIONS PLAN

SCHEDULE G -- NO RETALIATION DIRECTIVE

SCHEDULE H -- OPT OUT FORM

1.09 Currency

All references to currency in this Agreement are to lawful money of Canada.

ARTICLE 2 -- EFFECTIVE DATE OF AGREEMENT

2.01 Date when Binding and Effective

This Agreement will become effective and be binding on the Defendant and on all the Class Members (including Persons under Disability) and the Class Action Plaintiffs, on the Implementation Date.

2.02 Effective in Entirety

None of the provisions in this Agreement will become effective unless and until the Court approves all the provisions of this Agreement, including all Schedules.

ARTICLE 3 -- IMPLEMENTATION OF THE AGREEMENT

3.01 Class Action

The *Merlo* and *Davidson* actions will be merged into a uniform omnibus Statement of Claim and filed in the Federal Court. The Statement of Claim will name the plaintiffs named in the original Claims and will name as defendant, Her Majesty the Queen.

3.02 Content of Class Action

The Class Action will define the classes, allege claims and seek relief with such modifications to the *Merlo* and *Davidson* claims as is necessary to correspond with this Agreement, including the scope of the Primary and Secondary classes and relief.

3.03 Consent Certification/Approval of Notice of Certification and Settlement Approval Hearing

1) Concurrent applications will be brought for approval of the Notice of Certification and Settlement Approval Hearing and for consent certification of the Class Action for the purposes of settlement in accordance with the terms of this Agreement.

2) At the same time, or at a time to be agreed upon by the Parties, the Parties will make an application seeking orders that:

   (a) the RCMP and Canada release to the Designated Contact information and documents required by the RCMP to compile a List of female Regular RCMP Members, Civilian Members and Public Service Employees who have worked within the RCMP during the Class Period as set out in Appendix 4 to Schedule B of this Agreement:

   (b) the RCMP and Canada compile a list of individuals who have been paid further to a civil claim, grievance or harassment complaint, including a complaint to the Canadian Human Rights Tribunal and/or who have had a prior civil claim, grievance or harassment complaint, including a complaint to the Canadian Human Rights Tribunal, otherwise resolved in respect of the same event(s) and injury(ies) as claimed in the Claim Form, in accordance with Appendix 5 to Schedule B. The list will include the name, date of birth and regimental number, if available, of the individual;

   (c) directing the RCMP to provide the aforementioned lists to the Office of the Assessor in accordance with Appendices 4 and 5 to Schedule B of this Agreement.

3.04 Approval Order

An application to obtain an Approval Order of this settlement will be heard following the expiry of the Opt Out Period. The Approval Order submitted to the Court for approval will include provisions:

(a) incorporating by reference this Agreement in its entirety including all Schedules and Appendices;

(b) ordering and declaring that the Order is binding on all Class Members, including Persons Under Disability, unless they opt out or are deemed to have opted out on or before the expiry of the Opt Out Period;

(c) ordering and declaring that on the expiry of the Opt Out Period all Class Members, unless they have opted out or are deemed to have opted out on or before the expiry of the Opt Out Period, have released the Releasees from any and all actions, including claims made under the Canadian Charter of Rights and Freedoms they have, may have had or in the future may acquire against the Releasees relating to or arising from gender and/or sexual orientation based discrimination, bullying and harassment while working in the RCMP during the Class Period;

(d) ordering and declaring that on the expiry of the Opt Out Period all Class Members who have not opted out on or before the expiry of the Opt Out Period may not commence any proceedings seeking compensation or other relief arising from or in relation to gender and/or sexual orientation based discrimination, bullying and harassment while working in the RCMP during the Class Period;

(e) ordering and declaring that the obligations assumed by Canada under this Agreement are in full and final satisfaction of all claims against the Releasees, including claims made under the Canadian Charter of Rights and Freedoms, relating to or arising from gender and/or sexual orientation based discrimination, bullying and harassment while working in the RCMP during the Class Period;

(f) ordering and declaring that on the expiration of the Opt Out Period all Class Members who have not opted out may not commence any proceedings seeking compensation or other relief arising from or in relation to gender and/or sexual orientation based discrimination, bullying and harassment while working in the RCMP during the Class Period against any person who may in turn claim against the Defendant;

(g) ordering and declaring that the Notice Plan in Schedule A to this Agreement is approved by the Court;

(h) ordering the RCMP and Canada to release to the Assessor information and documents required by him or as otherwise required in the Agreement, including Schedules and Appendices, in accordance with the terms of this Agreement;

(i) ordering and declaring that judgments or orders will be sought from the Court in such form as is necessary to implement and enforce the provisions of this Agreement and to supervise the ongoing performance of this Agreement;

(j) ordering and declaring that the Assessor(s) shall not be compelled to be (a) witness(es) in any civil or criminal proceeding, administrative proceeding, grievance or arbitration where the information sought relates, directly or indirectly, to information obtained by the Assessor(s) by reason of the Settlement or the settlement claims process; and

(k) ordering and declaring that no documents received by the Assessor(s) shall be compelled to be produced in any civil or criminal proceeding, administrative proceeding, grievance or arbitration where the documents or information therein relate, directly or indirectly, to information sought by the Assessor(s) by reason of the Settlement or the settlement claims process.

3.05 *Merlo* Action and *Davidson* Action

Upon approval of the settlement by the Federal Court the Plaintiffs will discontinue their actions in the Supreme Court of British Columbia and in the Ontario Superior Court of Justice, namely *Merlo v. Attorney General of Canada*, Supreme Court of British Columbia Action No. S-122255, and *Davidson v. Attorney General of Canada*, Ontario Superior Court of Justice Action No. CV-15-52473600CP.

3.06 Court Materials

The Parties agree to exchange materials for review and comment prior to filing such materials with the Court.

3.07 Time of Filing Court Materials

The Parties agree that no Court materials relating to this Class Action and this Agreement will be filed with the Federal Court until a date and place for filing is expressly agreed to by the Parties.

ARTICLE 4 -- NOTICE

4.01 Notice

1) Canada agrees to pay the reasonable costs of any notices to the class which may be ordered by the Court.

2) Subject to the approval of the Court, notice to the class shall be implemented as set out in the Notice Plan attached as Schedule A to this Agreement.

ARTICLE 5 -- OPT OUT PERIOD

5.01 Opt Out Period

There will be an Opt Out period of 60 days following the first publication of the Notice of Certification and Settlement Approval Hearing.

5.02 Opt Out Threshold

In the event that the number of eligible Claimants opting out or deemed to have opted out under the Certification Order exceeds fifty (50), this Agreement will be rendered void and the Certification Order set aside in its entirety

subject only to the right of Canada, in its sole discretion, to waive compliance with this Section of the Agreement. Canada has the right to waive compliance with this Section of the Agreement until thirty (30) days after the end of the Opt Out Period.

5.03 Opt Out

Any Class Member may opt out of this Agreement by delivering to Class Counsel an executed Opt Out Form, attached as Schedule H to this Agreement, within the Opt Out Period.

5.04 List of Opt Outs

Class Counsel promptly provide to the Defendant and to the Assessor, after the expiry of the Opt Out Period, copies of all Opt Out Forms received by Class Counsel.

ARTICLE 6 - THE ASSESSOR

6.01 Appointment of Assessor

Subject to the approval of the Court and as agreed upon by the Parties, the Honourable Michel Bastarache, C.C., Q.C. will be appointed the Assessor to administer the Claims Process and to assess the Claims made by Class Members for compensation, with such powers, rights, duties and responsibilities as agreed to by the Parties and approved by the Court. The Assessor is not an agent, servant, or employee of Canada or a government institution for the purposes of the *Access to Information Act*, R.S.C., 1985, c. A-1, the *Privacy Act*, R.S.C., 1985, c. P-21 and the *Library and Archives of Canada Act*, S.C. 2004, c. 11, and acts solely on his own behalf as agreed to jointly by the Parties in the Agreement and authorized by the Court in the Approval Order.

6.02 Alternative Assessor

If the Honourable Michel Bastarache, C.C., Q.C. is unable or unwilling to act, the Parties will agree upon another person who is a retired jurist and seek the Court's approval.

6.03 Additional Assessors

The Parties and the Assessor may jointly agree to retain one or more additional Assessors to provide for the timely assessment of Claims and if so, to jointly seek the approval of the Court. The additional Assessors are not agents, servants, or employees of Canada or a government institution for the purposes of the *Access to Information Act*, R.S.C., 1985, c. A-1, the *Privacy Act*, R.S.C., 1985, c. P-21 and the *Library and Archives of Canada Act*, S.C. 2004, c. 11 and act solely on their own behalf as agreed to jointly by the Parties in the Agreement and authorized by the Court in the Approval Order.

6.04 Assessor's Duties

Subject to obtaining the approval of the Court, the Assessor's duties and responsibilities will include:

(a) establishing and staffing an Office of the Assessor;

(b) implementing the Notice Plan approved by the Court;

(c) retaining an experienced claims administrator to assist with notice and other administrative functions as required;

(d) developing a Claim Form for compensating Class Members;

(e) developing, installing and implementing systems and procedures for receiving, processing, evaluating and making decisions respecting Claims including making all necessary inquiries to

obtain information and documents (including consulting medical personnel) to determine the validity of any Claim;

(f) receiving and responding to all inquiries and correspondence respecting Claims, supplying Claim Forms, reviewing and evaluating all Claims, and rendering decisions in respect of Claims;

(g) receiving compensation payments on behalf of the Class Members from the RCMP IN TRUST and forwarding the compensation to the eligible Claimant within a reasonable period of time;

(h) keeping or causing to be kept accurate accounts of activities, preparing such financial statements, reports and records for administrative and fiscal purposes as are determined by Canada; and

(i) drafting a report that will provide an overview of the Assessor's observations and recommendations stemming from his work in assessing Claims.

6.05 Decisions of the Assessor

The Assessor will render a Decision in respect of a Claim to a Claimant promptly after the decision is made in accordance with paragraph 33 of Schedule B to this Agreement. A Decision of the Assessor in respect of a Claim will, subject to the limited right of a Claimant assessed at Level 2 to request a reconsideration as set out in the Claims Process in Schedule B of this Agreement, be final and binding upon the Claimant. For further clarity, there is no right of appeal or judicial review from any Decision of the Assessor.

6.06 Fees

The fees, disbursements and other costs of the Assessor, including the Office of the Assessor will be paid by Canada.

ARTICLE 7 --CLAMS PROCESS

7.01 Objective

The objective of the Claims Process is to provide just compensation for meritorious Claims in a process that is both sensitive to and supportive of Primary Class Members in bringing issues forward and at the same time ensures that Claims are properly, fairly and expeditiously assessed on the basis of adequate and sufficient validation which is proportionate to the severity of the injuries alleged.

7.02 Establishment of the Claims Process

A Claims Process will be established as set out in Schedule B of this Agreement The Assessor will assess each Claim and render a decision in accordance with Schedule B.

7.03 Claims Process

1) A Class Member making a Claim will complete a Claim Form identifying herself by name and setting out in detail the particulars of the harassment complained of (including events, actors, location, time frame) and of the alleged injury and damage (collectively referred to as "injury") caused.

2) The Claimant send the Claim Form to the Office of the Assessor and, at the same time or within the time allotted in Schedule B, will provide all relevant supporting documentation in her possession or control, including medical records and reports. The Claimant will also provide consent to the release of documents in the possession of the RCMP, medical practitioners, hospitals and government health authorities, and other third parties if consent is required. Relevant documents and information include:

   (a) the particulars of the occurrences of harassment (including where, when and who was involved), any reports made by the Claimant at the time, and resulting actions and results;

(b) names and contact information of any witness to the harassment;

(c) evidence of injuries sustained as a result of the alleged harassment, including but not limited to physical and psychological medical records, and provincial healthcare print outs (e.g. OHIP, Pharmanet, or other provincial equivalent), whether in the possession of the RCMP or the Claimant's healthcare providers;

(d) the Claimant's personnel file and any other file in the possession of the RCMP which may be relevant to the Claimants career progression (i.e. training, assignments, job competitions); any conduct, complaint or grievance file in relation to the matters in question in the possession of the RCMP; and

(e) any information or documents relevant to the Claimant's attempts to mitigate her injury or loss.

7.04 Denial of Claim if Prior Compensation Received

The Assessor will deny a Claim upon determining that a previous civil claim, grievance or harassment complaint for compensation for harassment, including a complaint to the Canadian Human Rights Tribunal, made by a Claimant with respect to the same event(s) and injury(ies) as claimed in the Claim Form has been resolved. This determination will be made in accordance with Appendix 5 to Schedule B of this Agreement.

7.05 Claim Deadline

1) Applications to the Claims Process will not be accepted prior to the Implementation Date or after the Claim Deadline, subject to an extension being granted in exceptional circumstances in accordance with Schedule B.

2) The Assessor may grant to individual claimants an extension of the Claim Deadline in exceptional circumstances. A Primary Class Member may make a Request for Deadline Extension to the Assessor within 100 days after the expiration of the Claim Deadline for a deadline extension based on exceptional circumstances provided the Claimant includes with the request

   (a) a Request for Deadline Extension Form in Appendix 3 to Schedule B of this Agreement;

   (b) reasons for the request that demonstrate exceptional circumstances;

   (c) a competed Claim Form; and

   (d) supporting documentation as set out in Schedule B of this Agreement;

3) Where an eligible Claimant does not submit a claim in the prescribed form and in accordance with this Agreement that Claimant will not be admitted to the process and any such entitlement to make a claim for compensation will be forever extinguished.

4) All Claims which have been submitted prior to the Claim Deadline or further to an extension granted in accordance with this Agreement shall be processed in accordance with Schedule B of this Agreement.

5) No person may submit more than one Claim Form on her own behalf.

ARTICLE 8 -- PAYMENT OF COMPENSATION

8.01 Payment of Compensation

Payment of compensation will be made in accordance with the applicable legislation and government directives and policies. In accordance with Schedule B of this Agreement, funds for the payment of compensation will be provided to the Office of the Assessor by the RCMP IN TRUST within 7 business days of receipt by the RCMP of the documentation from the Assessor requesting funds for payment of compensation, unless exceptional circumstances necessitate an additional period of time in which case the RCMP shall make best efforts to pay compensation expeditiously within such extended periods. The Assessor will make payment to the Claimant within 60 days of the

date on which a Decision is rendered by him in respect of a Claimant, in accordance with Schedule B of this Agreement

8.02 Other Government Benefits

1) There will be no amounts deducted from the compensation awarded to a Claimant under this settlement agreement in relation to any benefits paid or payable under the federal *Pension Act*, *R.S.C. 1985, c. P-6* ("*Pension Act*"). Nothing in this Agreement prevents government officials who adjudicate or administer pensions under the *Pension Act* from making pension adjustments in accordance with the applicable legislation.

2) For the purposes of this Settlement, the defendant will not seek a stay under section 111 of the *Pension Act* in relation to any of the Class Members' Claims.

ARTICLE 9 -- PROVINCIAL HEALTH INSURERS

9.01 Subrogated and Direct Claims for Recovery

Counsel for the Plaintiffs will contact provincial and territorial health insurers to determine if they will be pursuing a health care cost recovery claim for this action, and if so, the nature of their Claim. Counsel for the British Columbia Ministry of Health has advised that British Columbia will not pursue a health care recovery claim for this action.

ARTICLE 10 -- RELEASES

10.01 Releases

The Approval Order will declare that:

(a) upon the Approval Date, the Releasees are forever and absolutely released separately and severally by the Class Members from the Released Claims; and

(b) the Class Members are barred from making any claim or taking or continuing any proceedings arising out of or relating to the Released Claims against any Releasee or other person, corporation or entity that might claim damages and/or contribution and indemnity and/or other relief under the provisions of the *Negligence Act*, R.S.O., 1990, c. N-3, or its counterparts in other jurisdictions, the *Police Act*, *RSBC 1996, Chapter 367* or, its counterpart in other jurisdictions, the common law, Quebec civil law or any statutory liability for any relief whatsoever, including relief of a monetary, declaratory, or injunctive nature, from the Releasees.

10.02 Cessation of Litigation

1) The Parties will cooperate to obtain approval of this Agreement and to facilitate general participation by Primary Class Members in the Claims Process.

2) On the Approval Date, Class Counsel will undertake to refrain at any time from commencing or assisting or advising on the commencement or continuation of any action or proceeding against the Releasees in any way relating to or arising from any and all claims asserted in the *Melo* and *Davidson* actions. Nothing in this Agreement prevents Class Counsel from assisting with the administration of the Agreement, informing Class Members of the provisions of the Agreement, assisting Class Members with their Claims under the Agreement, or advising Class Members to obtain independent legal advice before deciding whether to opt out.

10.03 Consent to Dismissal

Each Class Member who has commenced any action or proceeding relating to the same matters asserted in the Class Action must consent to a dismissal of such action or proceeding against the Releasees without costs before receiving any payment under the Claims Process.

ARTICLE 11 -- CLASS COUNSEL FEES AND DISBURSEMENTS

11.01 Legal Fees

Canada will pay $12,000,000.00 (twelve million dollars) plus applicable PST, GST and HST to Class Counsel as a contribution toward Class Counsel fees.

11.02 Payment of Legal fees

Payment shall be made to Class Counsel within 30 days following the Approval Date. The sum of $6 million plus applicable sales taxes will be paid to each of Klein Lawyers LLP and Kim Orr Barristers P.C.

11.03 Disbursements

Canada will pay reasonable disbursements to Class Counsel as agreed or assessed by the Court. Class Counsel shall submit itemized Lists of Disbursements together with receipts or other supporting documentation satisfactory to Canada as soon as possible and at least 1 (one) month prior to the settlement approval hearing.

11.04 Claimant Expenses

Canada will re-imburse a Claimant for out-of-pocket expenses incurred to obtain documentary evidence in support of her Claim and for travel of more than 50 kilometers from her residence if required by the Assessor to attend a personal interview with the Assessor, in accordance with National Joint Council Travel Directive.

ARTICLE 12 -- CHANGE INITIATIVES

12.01 Implementation of Change Initiatives

The Parties acknowledge that the RCMP has implemented or is in the process of implementing many change initiatives, including those set out in Schedule E of this Agreement. The RCMP agrees to make efforts to implement these change initiatives as soon as practicable, and in any event by December 31, 2017.

12.02 Apology

Without constituting an express or implied admission of fault or liability, the Commissioner of the RCMP will provide the Class Members with an apology, as defined in the *Apology Act*, *SO 2009, c 3*, at a time to be agreed upon by the parties, regarding Harassment in the RCMP. Such apology will not be admissible in any civil or criminal proceeding, administrative proceeding or arbitration as evidence of the fault or liability of any person in connection with that matter.

12.03 No Retaliation

The RCMP shall issue a directive substantively as set out in Schedule G, that there is to be no retaliation for making a Claim under this settlement

ARTICLE 13 -- SCHOLARSHIP FUND

13.01 Establishment of Scholarship Fund by RCMP

The RCMP will establish a scholarship fund, details of which will be at its discretion, with the objective of recognizing outstanding work in the area of anti-Harassment and the promotion of anti-Harassment principles.

ARTICLE 14 -- CONFIDENTIALITY

14.01 Confidentiality

Any information provided, created or obtained in the settlement and Claims Process, whether written or oral, will be confidential by the Parties and their counsel, all Claimants, the Assessor(s) and the Designated Contact, except where provided by law, and will not be used for any purpose other than the settlement and Claims Process unless otherwise agreed by the Parties.

14.02 Destruction of Class Member Information and Records

Subject to the requirements of law, within six months of the completion of all Claimant assessments and payments through the Claims Process, the Office of the Assessor will destroy all Class Member information and documentation in its possession.

14.03 Confidentiality of Negotiations

Save as otherwise required by law, the undertaking of confidentiality as to the discussions and all communications, whether written or oral, made in and surrounding the negotiations leading to the Agreement in Principle and this Agreement continues in force.

14.04 The Assessor(s) shall not give evidence of the fault or liability of any person in connection with this matter in any civil or criminal proceeding, administrative proceeding or arbitration.

ARTICLE 15 -- CONBILNICATIONS

15.01 Public Communications

Save as otherwise required by law, the Parties will not engage in any media or public communications or disclosure of or about this Agreement until a date agreed to in writing by the Parties.

15.02 Joint Public Announcement

At the time agreed upon, the Parties will make a joint public announcement of this Agreement in accordance with the Joint Communication Plan in Schedule F of this Agreement.

ARTICLE 16-- CONDITIONS, AMENDMENT AND TERMINATION

16.01 Agreement is Conditional

This Agreement will not be effective unless and until it is approved by the Federal Court, and if such approval is not granted by the Federal Court on substantially the same terms and conditions contemplated in this Agreement, this Agreement will thereupon be terminated and none of the Parties will be liable to any of the other Parties hereunder.

16.02 Amendments

Except as expressly provided in this Agreement, no amendment or supplement may be made to the provisions of this Agreement and no restatement of this Agreement may be made unless agreed to by the Parties in writing and any such amendment, supplement or restatement is approved by the Courts without any material differences.

16.03 Termination of Agreement

This Agreement will continue in full force and effect until all obligations under this Agreement are fulfilled.

ARTICLE 17 - GENERAL

17.01 Entire Agreement

This Agreement, including all recitals, and Schedules and Appendices, constitutes the entire agreement between the Parties with respect to the subject matter herein and cancels and supersedes any prior or other understandings and agreements between the Parties with respect thereto. There are no representations, warranties, terms, conditions, undertakings, covenants or collateral agreements, express, implied or statutory between the Parties with respect to the subject matter hereof other than as expressly set forth or referred to in this Agreement.

17.02 Applicable Law

This Agreement governed by the laws of Canada and, where silent, the Laws of Ontario.

17.03 Counterparts

This Agreement may be executed in any number of counterparts, each of which will be deemed to be an original and all of which taken together will be deemed to constitute one and the same Agreement.

17.04 Official Languages

Canada will prepare a French translation of this Agreement. Prior to the Implementation Date, Canada will pay the costs of the preparation of an authoritative French version of this Agreement and such cost shall include costs of review by a designate of the Parties, The authoritative French version shall be executed by the same Parties who executed this Agreement and, once executed, the English and French language versions shall be of equal weight and force at law.

7.05 No assignment

Except as directed by court order, no amount payable under this Agreement can be assigned, and such assignment is null and void.

IN WITNESS WHEREOF the Parties have executed this Agreement this day of October, 2016.

David A. Klein,
Counsel for the Plaintiff,
Janet Merlo

Mitchell Taylor, Q.C.,
Counsel for the Defendant the
Attorney General of Canada

Won J. Kim,
Counsel for the Plaintiff,
Linda Gillis Davidson

Gina M. Scarcella,
Counsel for the Defendant the
Attorney General of Canada

* * * * *

SCHEDULE A

NOTICE PLAN

Merlo/Davidson Settlement - Overall Notice Plan

The following operations will be carried out as part of the Notice Plan:

1. News Release and News Conference announcing the proposed Settlement
2. Postings on Websites and Social Media
3. Notices, to be published in major newspapers across Canada and Other Supporting Advertizing
4. Direct Mail to Class Members
5. Ongoing Media Relations
6. Possible Additional Measures
7. Various Control and evaluation Measures
8. Possible Follow-up Measures

Subject to approval from the Court, the RCMP will forward the list of past and present female employees going back to September 16 1974.This list will be used to prepare the direct mail operation, as well as the advertizing program.

1. News Release and News Conference Announcing the Proposed Settlement

A news conference was held on October 6, 2016, as early as possible after the government of Canada approved the projected Settlement Agreement to prevent leaks that might have resulted in rumours, bad or incomplete information, and confusion. See Schedule A.

2. Postings on Websites and Social Media

The independent assessor has his own website that became operational as of October 6, 2016. The full content of

the website is described in Schedule B to this plan. The website contains full information on the settlement. Official documents, as well as all the forms required by the Claimants, will be added pending the Court's approval.

Hyperlinks will also be created with the websites of the RCMP, and Klein Lawyers and Kim Orr.

The independent assessor will also create a Facebook page, a Twitter account, a Youtube channel and TO BE DETERMINED. These will act as touts to the website.

3. Notices to be Published in Major Newspaper Across Canada and Other Supporting Advertizing if Required

A NOTICE OF CERTIFICATION AND SETTLEMENT APPROVAL HEARING was published in major Canadian newspapers on DATES (see Schedule B to this plan).

A NOTICE OF SETTLEMENT will be published in the 7 to 10 day period following the Court's approval of the Settlement.

A specialized media placement agency has been retained. Following best practices, this agency will analyse the information on the list of class members once it becomes available to construct a media placement plan designed to reach the greatest number of Class Members.

4. Direct Mail to Class Member

As provided for in the Agreement.

5. Ongoing media relations

Beyond the initial news conference, the independent assessor will regularly update the media on his activities. The advertising program itself will be announced before it is carried out. Regular updates will be published. A media spokesperson will be available at all times.

6. Possible Additional Measures

State-of-the-art communications plans rely on research, the most reliable often being that conducted with the primary targets of the campaign, here, the Class Members. We have no access to Class Members. We have suggested to their lawyers they might ask them about what they feel would be the most effective means to reach them, apart from the direct mail operation which will be carried out. For instance, have they turned to other support networks, such as unions, women's groups or community networks? Have they themselves formed into a network we could work with to better inform them? What third-party source would they trust as a source of information? If we are provided with additional information of this nature, we will refine our plan accordingly.

7 Various Control and Evaluation Measures

Evaluation will remain difficult. We have no way of determining if women who do not answer have chosen not to participate or were never cognisant of the Settlement. The only way to determine this would be to poll women on the list that have not answered, asking them whether they knew about the Settlement or not, an obviously difficult proposition ethically since the very fact of being questioned could cause additional anxiety.

Several indicators will be closely monitored to evaluate the efficiency of the independent assessor's Notice and Communications Plan. These include:

News conference and Ongoing Media Relations

* Number of media present
* Coverage
* Follow-up requests

Website and Social Media

* Number of visits on the different pages of the website and social media
* Number of downloads of the forms

Direct mail

* Number of delivered/returned envelopes
* Number of requests for forms, either by telephone or through the website

Advertising program (traditional and social media)

* Reach and frequency are calculated beforehand using recognized statistical tools.

Confidential call-in telephone line

* Number of calls
* Topics

8. Possible Follow-up Measures

The direct mail and advertising program will be concentrated in the first 40 days following the first announcement of the Settlement. Should the various control and evaluation measures indicate a low response rate, advertising through traditional and social media, and media relations, could be intensified.

SCHEDULES

Schedule A:

Statistics on the number of journalist and media attending the press conference, as well as details of the e-mailing of material to journalists not attending, will be added here. We might also append the material distributed to the media.

Schedule B:

Detailed description of the content of the website, including indications as to content to be added pending the Court's approval of the Settlement.

* * * * *

SCHEDULE A -- APPENDIX 1

NOTICE OF CERTIFICATION AND SETTLEMENT APPROVAL HEARING

RCMP Gender Harassment and Discrimination Class Action

If you are a female or identified as a female and were an RCMP Regular Member (for purposes of this Proposed Settlement includes Regular Members, Special Constables, Cadets, Auxiliary Constables, Special Constable Members, and Reserve Members), Civilian Member or Public Service Employee (for purposes of this Proposed Settlement includes Temporary Civilian Employees) working within the RCMP, this notice may affect your legal rights. Please read it carefully.

Class action lawsuits were initiated alleging gender based harassment and discrimination within the RCMP. The Defendants, while not admitting liability, have agreed to a settlement of these lawsuits. A federal court class action has been certified on consent, conditional on court approval of the settlement.

Who is Eligible for the Proposed Settlement?

To be eligible to participate in the settlement, you must be a member of the class. The class is defined as:

Primary Class Members: female current and former living Regular Members, Civilian Members and Public Service Employees (who are appointed by the Commissioner of the RCMP under the delegated authority of the Public Service Commission pursuant to the *Public Service Employment Act*, R.S.C., 1985, c. P-32; amended S.C. 2003, c. 22, ss.12, 13) who worked within the RCMP during the Class Period who experienced and/or continue to experience gender and sexual orientation based harassment and discrimination while working in the RCMP during the Class Period, and who have not opted out or are not deemed to have opted out of the Class Action on or before the expiry of the Opt Out Period.

> For the purposes of this Settlement **"Regular Members"** includes Regular Members, Special Constables, Cadets, Auxiliary Constables, Special Constable Members, and Reserve Members
>
> For the purposes of this Settlement **"Public Service Employees"** includes Temporary Civilian Employees who, prior to 2014 were appointed under the now-repealed subsection 10(2) of the *RCMP Act*, R.S.C., 1985, c. R-10;

Secondary Class Members: all persons who have a derivative claim in accordance with applicable family law legislation arising from a family relationship with a member of the Primary Class.

If you *do not* wish to participate in the class action, you must deliver a signed Opt-Out Form to Class Counsel received or postmarked no later than ******, 2016. If you do not exclude yourself by that date, you will be included in this lawsuit and will be bound by the court's judgement on the settlement. The Opt-Out Form can be obtained from Class Counsel at the address below. It is also available on Class Counsel's websites.

If you have an ongoing lawsuit with respect to gender or sexual orientation based harassment or discrimination in the RCMP, and you wish to participate in the proposed class action settlement, you must discontinue your lawsuit before ****, 2016. If you do not, you will be deemed by s. 334.21(2) of the Federal Courts Rules, *SOR/98-106* to have opted out of the class action. Please contact your lawyer to discuss your options.

The Terms of the Proposed Settlement

The settlement contains numerous change initiatives directed at eliminating workplace harassment and discrimination in the RCMP. The settlement also provides compensation for members of the Primary Class who experienced gender or sexual orientation based harassment or discrimination while working in the RCMP during the Class Period. Compensation is available for Secondary Class Members where the Primary Class Member's Claim is assessed at either of the two highest severity levels.

You can obtain a copy of the settlement agreement and the applicable schedules by contacting Class Counsel at the address below. These documents are also available on Class Counsel's websites.

The Approval Hearing and Your Right to Participate

A motion to approve the settlement is scheduled to be heard on **, 2016 at 10 am at the Federal Court of Canada, Trial Division, ****. Class Counsel will also ask the court to approve an award of fees and disbursements for their work in achieving the settlement.

If you agree with the proposed settlement, you do not have to do anything at this time. If the court approves the settlement, a notice will be published setting out the procedures for submitting a Claim.

If you disagree with the proposed settlement, you have the right to object. You may do so by delivering a letter to Class Counsel in advance of the hearing, which Class Counsel will then provide to the court. In your letter, you should provide your name, contact information, and a brief statement of the nature and reasons for your objection.

What are the Financial Consequences?

If the settlement is approved by the court and you have not opted out of the class action prior to the opt-out deadline, you will be bound by the terms of the settlement.

The defendants have agreed to pay Class Counsel's disbursements and are making a contribution toward class counsel fees. Class Counsel will request a further class counsel fee of 15% plus applicable sales tax payable from the compensation awarded to class members under the settlement. The award of class counsel fees is subject to court approval.

For More Information

For more information about the settlement, contact Class Counsel at:

* * * * *

SCHEDULE A -- APPENDIX 2

NOTICE OF SETTLEMENT

RCMP Gender Harassment and Discrimination Class Action

If you are a female or identify as a female and were an RCMP Regular Member (for purposes of this Settlement includes Regular Members, Special Constables, Cadets, Auxiliary Constables, Special Constable Members, and Reserve Members), Civilian Member or Public Service Employee (for purposes of this Settlement includes Temporary Civilian Employees) working within the RCMP, this notice may affect your legal rights. Please read it carefully.

On ***, the Federal Court (Canada) approved a settlement of the class action *Merlo and Davidson v. Canada*. The class action concerns allegations of gender and sexual orientation based harassment and discrimination within the RCMP.

Who is Eligible for the Settlement?

To be eligible to participate in the settlement, you must be a member of the class. The class is defined as:

Primary Class Members: female current and former living Regular Members, Civilian Members and Public Service Employees (who are appointed by the Commissioner of the RCMP under the delegated authority of the Public Service Commission pursuant to the *Public Service Employment Act*, R.S.C., 1985, c. P-32; amended S.C. 2003, c.

22, ss.12, 13) who worked within the RCMP during the Class Period who experienced and/or continue to experience gender and sexual orientation based harassment and discrimination while working in the RCMP during the Class Period, and who have not opted out or are not deemed to have opted out of the Class Action on or before the expiry of the Opt Out Period.

> For the purposes of this Settlement **"Regular Members"** includes Regular Members, Special Constables, Cadets, Auxiliary Constables, Special Constable Members, and Reserve Members
>
> For the purposes of this Settlement **"Public Service Employees"** includes Temporary Civilian Employees who, prior to 2014 were appointed under the now-repealed subsection 10(2) of the *RCMP Act*, R.S.C., 1985, c. R-10

Secondary Class Members: all persons who have a derivative Claim in accordance with applicable family law legislation arising from a family relationship with a member of the Primary Class.

Anyone who has who has opted out of the class action is not eligible for compensation under the settlement.

What are the Terms of the Settlement?

The settlement contains numerous change initiatives directed at eliminating workplace harassment and discrimination in the RCMP. The settlement also provides compensation for Primary Class Members who experienced gender or sexual orientation based harassment or discrimination while working in the RCMP during the Class Period. Compensation is available for Secondary Class Members where the Primary Class Member's claim is assessed at either of the two highest severity levels.

You can obtain a copy of the settlement agreement and the applicable forms and protocols by contacting Class Counsel at the address below. These documents are also available on Class Counsel's websites.

How Do I Make a Claim?

Primary Class Members must submit a claim form together with all supporting documentation to the Assessor on or before ****. Primary Class Members whose claims are approved at either of the two highest levels will be provided with a Secondary Class Member Claim Form.

For More Information and to Obtain a Claim Form

For more information about the settlement or to obtain a Claim Form, contact Class Counsel:

Or contact the Office of the Assessor:

* * * * *

SCHEDULE A -- APPENDIX 3

LETTERS TO CLASS MEMBERS BY DIRECT MAIL

Text for letter from RCMP Commissioner to Primary Class Members and accompanying Notice of Certification and Settlement Approval:

> **RE: Merlo and Davidson Federal Court class action alleging gender and/or sexual orientation based discrimination, bullying and harassment against female RCMP members and public service employees**
>
> I am pleased that the parties in this litigation have reached a settlement agreement.

This agreement will now be submitted to the court for its review and approval. If the court approves the settlement it will then be implemented. The settlement has two main components: a) change initiatives to be implemented by the RCMP ; and b) a claims process to be administered by retired jurist the Honourable Michel Bastarache.

Historically, harassment in the RCMP has been a cultural problem. It is unacceptable. I and my senior management are committed to continuing to build on broad efforts that support a respectful and inclusive workplace.

You will find enclosed a Notice of Certification and Settlement Approval Hearing which provides more detail and information regarding who you should contact for more information about the terms of the proposed settlement and about making a Claim.

Text for Letter from RCMP Commissioner to Primary Class Members and accompanying Notice of Settlement:

RE: Merlo and Davidson Federal Court class action alleging gender and/or sexual orientation based discrimination, bullying and harassment against female RCMP members and public service employees

By letter dated XXXX you were advised that the parties in this litigation reached a settlement agreement which was subject to the approval of the Federal Court. I am pleased to advise that the Honourable Judge XXXX of the Federal Court approved the Settlement on ... ..DATE.

Enclosed please find a Notice of Settlement Approval which provides more detail about the Settlement and the process for making a Claim, including contacts from whom you can obtain more information.

* * * * *

SCHEDULE B

CLAIMS PROCESS

Sole Obligation of Canada

1. Canada shall pay compensation to the Claimants only as is set out and in accordance with this Claims Process.
2. Payment will be made to the Claimants in accordance with the determinations made by the Assessor as set out below.

Claimant Application

3. Applications to the Claims Process will not be accepted prior to the Implementation Date or after the Claim Deadline, subject to an extension being granted to an individual Claimant in exceptional circumstances in accordance with this Schedule.
4. The Assessor may grant to individual Claimants an extension of the Claim Deadline in exceptional circumstances. A Primary Class Member may make a request to the Assessor within 100 days after the expiration of the Claim Deadline for a deadline extension based on exceptional circumstances provided the Claimant includes with the request:
   (a) a Request for Deadline Extension Form in Appendix 3 to this Schedule;
   (b) reasons for the request that demonstrate exceptional circumstances;
   (c) a completed Claim Form; and

(d) supporting documentation as set out below, in the Claim Form or as requested by the Assessor.

5. No person may submit more than one Claim Form on her own behalf

6. Where an eligible Claimant does not submit a Claim Form as prescribed in this Agreement that Claimant will not be admitted to the Claims Process and any entitlement to make a Claim for compensation will be forever extinguished.

7. All Claims which have been submitted prior to the Claim Deadline or further to an extension granted in accordance with this Schedule shall be processed in accordance with this Schedule.

8. A Primary Class Member making a Claim will complete a Claim Form provided in Appendix 1 to this Schedule, setting out in detail the complaint and the alleged injury and damage (collectively referred to as "injury") caused.

9. In the Claim Form a Claimant will identify herself by name, provide particulars of the Harassment complained of (including events, actors, location, time frame) and will identify the injury caused.

10. A Claimant will provide the Claim Form in Appendix 1 to this Schedule to the Office of the Assessor within 180 days from the first publication of the Notice of Settlement Approval and, at the same time, or within 60 (sixty) days of the submission of the Claim Form, will provide all relevant supporting documentation in her possession or control, including medical records and reports.

11. The Assessor may make inquiries of a Claimant to request additional information or documentation to clarify any concerns, ambiguities or inconsistencies in the Claim. If the Claimant is represented by counsel, the request will be made to the Claimant's counsel. The Assessor may set a deadline of up to 60 days for the Claimant to provide the additional information or documentation, subject to the discretion of the Assessor to extend the deadline upon the written request of the Claimant or her counsel.

Consent to Release of Supporting Documentation

12. The Claimant will also provide written consent to the release of documents in the possession of the RCMP, medical practitioners, hospitals and government health authorities, and other third parties if consent is required, in the form contained in Appendix 2 to this Schedule.

13. Relevant documents and information that will be accepted will include, but not be limited to:

    (a) the particulars of the occurrences of Harassment (including where, when and who was involved), any reports made by the Claimant at the time, and resulting actions and results;

    (b) names and contact information of any witness to the Harassment;

    (c) evidence of injuries sustained as a result of the alleged Harassment, including but not limited to physical and psychological medical records; and provincial healthcare print outs (e.g. OHIP, Pharmanet, or other provincial equivalent), whether in the possession of the RCMP or the Claimant's healthcare providers;

    (d) the Claimants personnel file and any other file in the possession of the RCMP which may be relevant to the Claimant's career progression (i.e. training; assignments; job competitions);

    (e) any conduct, complaint or grievance file in relation to the matters in question in the possession of the RCMP; and

    (f) any information or documents relevant to the Claimant's attempts to mitigate her injury or loss.

Attestation

14. A Claimant seeking compensation shall certify in writing to the Assessor that the information provided in the Claim Form is true to the best of her knowledge, and that she has, to the best of her knowledge, provided to the Assessor, either directly or by providing her consent to its release, all relevant documents with respect to her Claim.

Verification of Class Membership

15. The Assessor will take the necessary steps to verify that the Claimant is a Primary Class Member in accordance with Appendix 4 to this Schedule.

Information and Document Gathering by the Office of the Assessor

16. The Office of the Assessor will ensure that all relevant information and documents have been gathered from the Claimant and the RCMP in accordance with Article 6 of the Agreement and this Schedule, keeping in mind principles of proportionality based on the nature and severity of the claim.

17. The Office of the Assessor will assemble all Claimant material in an organized manner (the "Claim Package"). The Assessor will provide to the Claimant information and copies of documents which pertain solely to the Claimant Copies of documents obtained from the RCMP and other government institutions containing third party information will not be provided or disclosed to the Claimant.

Prior Compensation

18. The Assessor shall make all reasonable attempts to determine whether a Claimant has been paid and/or a prior claim by her was otherwise resolved in respect of the same event(s) and injury(ies) as claimed in the Claim Form and will comply with Appendix 5 of this Schedule in so doing.

19. The RCMP shall carry out the measures set out in Appendix 5 of this Agreement in order to satisfy Canada regarding whether a Claimant has been paid and/or a prior claim by her was otherwise resolved in respect of the same event(s) and injury(ies) as claimed in the Claim Form.

Assessment and Determination of Claims

20. The Assessor shall determine the Claims in accordance with the Agreement, including the Schedules and Appendices to Schedules.

21. The Assessor will determine for each Claim whether it falls within levels 1, 2 or within levels 3 to 6 by adopting the factors of culpable conduct and effect on victim categorized in Levels 1 to 6 of "Compensation Levels" in Appendix 6 to this Schedule.

Level 1 and 2 Claims

22. For a Level 1 or 2 Claim, the Assessor will conduct a paper review of the Claim Package and determine:

    (a) whether, on a balance of probabilities, the alleged events occurred and, if so, in or in relation to the workplace, and during the Class Period;

    (b) whether the events found to have occurred constitute Harassment within the definition set out in the Agreement;

    (c) the nature and severity of harm suffered by the Claimant that was caused contributed to by the Harassment that is found to have occurred: and

(d) the level of compensation to be awarded in accordance with Appendix 7 of this Schedule.

23. Within 30 days of a Claimant being sent the Assessor's Decision of a Level 2 Claim, the Claimant may, by submitting a Request for Reconsideration of a Level 2 Claim Form in Appendix 8 to this Schedule, request that the Assessor reconsider his or her Decision where:

    (a) the Claimant provides reasonable grounds to show that the Claim should be determined in accordance with the process applicable to Levels 3, 4, 5 and 6 Claims; and

    (b) the Claimant has additional documentation or information that was not reasonably available to the Claimant prior to receipt of the Decision.

24. The deadline for submitting a Request for Reconsideration will be stipulated in a cover letter sent to the Claimant with the Level 2 Decision.

25. Upon receipt of a reconsideration request for a Level 2 Claim, the Assessor shall decide whether to reconsider the Claim in accordance with paragraph 23 of this Schedule and, if so, then the provisions applicable to higher level Claims apply, including a personal interview.

Level 3 to 6 Claims

26. For a Level 3 to 6 Claim the Assessor will review the Claim Package, including all supporting documentation, and will interview the Claimant. The Assessor, may, in his or her discretion, seek any information necessary to properly determine the Claim, including information from the RCMP.

27. The Assessor shall orally put to the Claimant in the interview any information which may be unfavourable to the Claimant's allegations, including third party information not otherwise disclosed to the Claimant, and give her an opportunity to respond. The Claimant shall treat as confidential any third party information put to her by the Assessor in the course of the Claims Process and shall not disclose such information in any manner to anyone other than legal counsel retained to act for her, if any in the Claims Process, and shall not use such information except for the sole purpose of advancing her Claim.

28. Claimants may retain a lawyer; however, these lawyers will not be permitted to participate in interviews. The Claimant may have a friend, family member or treating health care professional present at the personal interview for the purpose of providing emotional support.

29. If the Assessor requires a Claimant to travel more than 50 kilometers from her residence to attend a personal interview with the Assessor, upon submission of a Travel Claim in Appendix 10 to this Schedule, she will be reimbursed for personal travel expenses in accordance with the National Joint Council Travel Directive. Any person referred to in the previous paragraph who is accompanying the Claimant will not be reimbursed for travel expenses.

30. The Assessor will consult with a roster of consultants/experts, including but not limited to a medical doctor, a psychiatrist, and a human resources expert as deemed necessary by him to properly determine a Claim. The purpose of such consultation is to provide the Assessor with an expert opinion. The Assessor shall make his own determination on all aspects of the Claim.

Determination of Claim

31. Upon completion of the interview and review as set out above, the Assessor will then determine:

    (a) whether, on a balance of probabilities, the alleged events occurred and, if so, in or in relation to the workplace, and during the Class Period;

    (b) whether the events found to have occurred constitute Harassment within the definition set out in this Agreement;

(c) the nature and severity of the injury suffered by the Claimant that was caused or contributed to by the Harassment that is found to have occurred; and

(d) the level of compensation in accordance with the Compensation Levels in Appendix 6 of this Schedule.

32. The Assessor may deny any Claim as unproven or on the basis that the events do not constitute Harassment.

33. The Assessor shall render a Decision in respect of a Claim and provide it to the Claimant promptly after the Decision is made, setting out the Compensation Level determined and the amount of compensation to be paid. A Decision of the Assessor in respect of a Claim will, subject to the limited right of a Claimant assessed at Level 2 to request a reconsideration as set out in paragraph 23 of this Schedule, be final and binding upon the Claimant. For further clarity, there is no right of appeal or judicial review from any Decision of the Assessor.

Payment of Compensation

34. Payment of compensation to a Claimant will be administered by the Assessor, who will request and receive the necessary funds from the Director General, RCMP Corporate Accounting, Policy and Control ("the DG CAPC"). A request for funds can be made on a case-by-case basis or in bulk for an aggregate amount required for the payment of multiple Claims. The Assessor will make a request for funds to the DG CAPC either once per month, on the first day of the month, or twice per month, on the first and fifteenth day of the month.

35. When requesting funds for payment of compensation, the Assessor will provide to the DG CAPC a copy of the Assessor's Decision in respect of each Claimant listing the amount of compensation, with the Claimant's name redacted and replaced by a unique numerical pseudonym, together with a brief summary of the Assessor's justification for the Decision.

36. In order to comply with the *Financial Administration Act*, R.S.C., 1985, c. F-11 and Treasury Board policies, the RCMP must keep records of the name of any individual who receives compensation, the amount of the compensation and the reason for payment.

37. To satisfy government financial accountability and audit requirements, the Assessor will also provide a document to be seen only by the DG CAPC that identifies the names that correspond the unique numerical pseudonyms. In the event the DG CAPC is unavailable or unable to carry out the responsibilities set out in this Agreement, those responsibilities shall be carried out by the RCMP Chief Financial Administrative Office ("the CFAO"). Once the DG CAPC or the CFAO is satisfied as to the purpose of the payment and the individual recipient the DG CAPC or CFAO will issue the funds IN TRUST to the Assessor.

38. The DG CAPC stall keep a list of Claimants who are awarded compensation under the Claim Process, comprising Claimant name, compensation amount, and the numerical pseudonym applicable to that Claimant, as well as the Decision and short summary of the Assessor's justification. The list and the Decisions and summary for justification will be kept in a locked safe in a location to which only the DG CAPC, and, when the DG CAPC is unavailable or unable to carry out the responsibilities set out in this agreement, the CFAO, will have access. Only the DG CAPC and the CFAO will know the combination to the safe.

39. In the event that an audit or any other required process is undertaken, the list kept by the DG CAPC may be provided by the RCMP to the auditor to show compliance with government financial accountability and audit requirements.

40. The DG CAPC must also be satisfied that a Claimant has not already received compensation for the same event(s) and injury(ies) that are the subject of the Decision. The summary of justification sent to DG CAPC with the Decision of the Assessor with respect to each Claimant shall contain a statement

indicating that the Claimant has signed the Certification of No Prior Compensation form in Appendix 9 of this Schedule.

41. To preserve the confidentiality of the identity of Claimants, the Director General, RCMP CAPC will not disclose the names of Claimants within the RCMP except in accordance with paragraph 39 of this Schedule.

42. The Assessor will establish and maintain an interest-earning trust account that will be used to make payments to Claimants.

43. The trust account will be established with a Canadian financial institution that is a member of the Canadian Payments Association. The Assessor shall employ a transaction reconciliation service with the Canadian financial institution such that cheques and Electronic Funds Transfers (EFTs) must be matched and balanced by the institution against the issued cheque and EFT records on a daily basis.

44. All interest accrued in the trust account will be remitted to Canada, less any amount required to cover bank fees associated with the account.

45. The Assessor will make all deposits and withdrawals relating to Claimant compensation from the trust account identified in this Schedule.

46. The Assessor shall not deposit or make withdrawals from the trust account for any item other than Claimant compensation or for the reimbursement of expenses owed to the Claimant under this Settlement Agreement.

47. The RCMP will make payment to the Assessor's trust account within 7 business days of receipt by the RCMP of the documentation requesting funds for payment of compensation.

48. The Assessor shall withhold from payment to Claimants any percentage or amount ordered by the Federal Court to be paid to Class Counsel. The Assessor shall make such payment to Class Counsel in accordance with the order of the Federal Court.

49. Except in the case of Level 2 Claims, within 60 days of the date on which a Decision is rendered in respect of a Claimant, the Assessor shall make payment to the Claimant in an amount equal to the amount to which he has determined that she is entitled, less any amount withheld for payment to Class Counsel.

50. In respect of Level 2 Claims, the Assessor will make payment to the Claimant after any reconsideration of the Decision has been decided or after the thirty day period to seek a reconsideration of the Decision has elapsed and no request was submitted, whichever is later.

51. Quarterly, the DG CAPC, will attend at the Office of the Assessor and will review/reconcile the Assessor's trust account (i.e., matching names of payees, amounts, dates of deposit, dates of payment and balance of funds). The Assessor and the DG CAPC, will agree to a mutually convenient time for this meeting once per quarter of the Fiscal Year.

52. 120 days after the Assessor makes the final payment(s) to Claimants, at the completion of the Claims Process the DG CAPC, will attend at the Office of the Assessor to conduct a final reconciliation of all payments in the Trust Account records and the list(s) of Claimants.

53. Under paragraph 64(1) and 64(2)(b) of the *Financial Administration Act*, R.S.C., 1985, c. F-11 the RCMP is required to provide the name of an individual recipient of compensation to the Public Account, and may withhold same only if permission is given by the Public Account Committee through the Office of the Comptroller General. The RCMP will seek permission to withhold the names of individual recipients of compensation under this Agreement.

MERLO | DAVIDSON SETTLEMENT

THE HONOURABLE MICHEL BASTARACHE, C.C., Q.C.
INDEPENDENT ASSESSOR

CLAIM FORM

TABLE OF CONTENTS

I NOTE TO CLAIMANTS 2

II INSTRUCTIONS 5

III TIMELINE 7

IV CLAIM FORM 9

Section A Personal information 9

Section B Information related to harassment 13

Section C Treatment 19

Section D Other information about you 21

Section E Your education and work history 23

Section F Effects of gender or sexual orientation based or sexual orientation harassment on your employment and career 25

DECLARATION 30

AUTHORIZATION AND DIRECTION TO RELEASE INFORMATION 33

DRAFT - DO NOT USE

MERLO | DAVIDSON SETTLEMENT

THE HONOURABLE MICHEL BASTARACHE, C.C., Q.C
INDEPENDENT ASSESSOR

CLAIM FORM

I - NOTE TO CLAIMANTS

This *Claim Form* is part of an out-of-court dispute resolution process. This Claims Process is a voluntary, flexible, and confidential process. The Independent Assessor will consider the information that you provide and may discuss the events that happened to you in order to decide if, and how much compensation to award you.

The Claims Process is not a judicial process or arbitration. This is a private initiative of the RCMP and Merlo/Davidson Class Action Parties. This process is directed solely to female RCMP Members, Civilian Members or Public Service Employees working within the RCMP, or persons who identified as female who were subjected to gender or sexual orientation based discrimination and harassment by other RCMP Members whether male or female. (For purposes of this Settlement only, *Regular Member* includes Regular Members, Special Constables, Cadets, Auxiliary Constables, Special Constable Members and Reserve Members, and *Public Service Employee* includes Temporary Civilian Employees.)

Getting counseling, support and legal assistance

If you have any questions regarding this Claim Form or the Independent Claims Process, please call 1 844 348-0776 or email your questions to info@merlodavidson.ca.

Throughout this Independent Claims Process, you will be asked information about the discrimination or harassment you suffered while a Regular Member or a Civilian Member of the RCMP, or a Public Service Employee working within the RCMP. This Claim Form asks you to describe in detail the gender or sexual orientation based discrimination and harassment and how it has affected you. The questions contained in this Claim Form, including questions pertaining to the description of the gender or sexual orientation based harassment and discrimination, may disturb you. If you feel anxious or unwell when you think about your experience, or while you are filling out this Claim Form, we encourage you to seek support from someone, such as a family member, counselor, treating health care professional, friend, or someone else from your community.

Any legal fees incurred will be the sole responsibility of the individual who retained the legal services.

MERLO | DAVIDSON SETTLEMENT

PROVIDING COMPLETED CLAIM FORMS

Supporting documents

When you provide your Claim Form, please also provide any relevant documents that support your claim. Documents that are not immediately available can be sent as soon as they are available but no later than 60 days of submitting your Claim Form. You will receive notice of the date of assessment well in advance. The Assessor must be notified that documents will be sent after the filing of the Claim Form. These are documents that may confirm the details of the harassment or discrimination you experienced, that provide names of witnesses to the harassment, that confirm the injuries or harm you experienced (like physical or psychological medical records), your personnel file, files from any RCMP complaint or grievance, and any documents about your efforts to recover from your injuries or losses.

Providing consent to release information

You will also be asked to provide written consent to allow the Independent Assessor to request the release of documents and records possessed by the RCMP (without compromising confidentiality), medical practitioners, hospitals, government health authorities and other third parties to provide more information about your claim. These documents will be kept strictly confidential.

Categories of compensation

The RCMP and Merlo/Davidson Class Action Parties have agreed to six categories of compensation. The Independent Assessor will conduct a preliminary assessment of your claim once the Claim Form is received.

Interview

The Independent Assessor will decide Level 1 and Level 2 claims on the basis of the Claim Form and supporting documents only. For Level 3 to Level 6 claims, the Independent Assessor will interview the claimants.

Within 30 days of a claimant being sent the Assessor's decision of a Level 2 claim, the claimant may request that the Independent Assessor reconsider the decision if she provides reasonable grounds to show that the claim should be determined in accordance with the process applicable to Levels 3, 4, 5 and 6 claims, and if she has additional documentation or information that was not reasonably available to her before receiving the Independent Assessor's decision. A request for reconsideration form can be obtained from the Independent Assessor for that purpose. It is also available online.

As stated earlier, you may retain a lawyer; however, lawyers will not be permitted to participate in interviews. You may be accompanied to an interview by a family member, a treating health care professional or a friend to assist you.

DRAFT - DO NOT USE

MERLO | DAVIDSON SETTLEMENT

Deadline for submitting the Claim Form

All completed Claim Forms, along with a photocopy of a government issued piece of photo identification and all supporting documents must be sent to the Independent Assessor within 180 days from the first publication of the court approval of the Notice of Settlement Approval, that date being XXXX.

You do not need to send the Claim Form in right away, but you must send it before XXXX in order to be eligible for compensation. Any supporting documentation that is not included with the Claim Form must be submitted no later than 60 days after you have submitted your Claim Form.

In exceptional circumstances, the Independent Assessor may provide an extension. You must make a request for an extension within 100 days after the expiry of the deadline. A request for an extension can be made by obtaining from the Independent Assessor and sending a form prepared for that purpose. It is also available online.

This form must be completed and sent to the Independent Assessor, along with any additional sheets of paper, as well as a photocopy of a government issued piece of identification. If convenient, this form can be completed online on the secure server managed by the Independent Assessor. If you choose to complete it by hand, please send it back by mail and NOT by email. If the form was sent to you by mail, please use the prepaid self-addressed envelope that was provided with it. If you do not have a prepaid self-addressed envelope, please place the form along with the rest of the required material in an envelope addressed to:

Confidential Letter
Office of the Independent Assessor
130, Albert Street, Suite 1103
Ottawa (Ontario) K1P 5G4

Additional information

The Independent Assessor may consult with medical, psychiatric and human resources experts to help him in making a decision about your complaint.

There is no right to appeal or seek judicial review of the Independent Assessor's decision.

ALL CLAIMS ARE CONFIDENTIAL.

MERLO | DAVIDSON SETTLEMENT

II - INSTRUCTIONS

Complete all sections of the Claim Form that apply to you by providing as much information and detail as possible. If you have supporting documents like emails or pictures, please attach those to your Claim Form or send them later if necessary, as mentioned earlier. If your Claim Form is incomplete, you will be asked to provide more details; this may delay the processing of your claim.

The information you provide in your Claim Form is a very important part of what the Independent Assessor will consider when deciding whether or not to award you compensation, and if so, the amount of the compensation. If there are differences between what is stated in the Claim Form and what is said to the Independent Assessor or elsewhere, these differences may negatively impact your claim. An explanation for these differences should be provided to the Independent Assessor.

WHEN FILLING OUT THE CLAIM FORM, REMEMBER TO:

Read all questions and requests for information carefully before answering.

If you fill in this Claim Form by hand, please write legibly and use a pen with **black ink**.

Answer all the sections of the Claim Form that apply to you. If you cannot remember an exact date, you may provide an approximate period of time. If a section or a question does not apply to you or if you do not know an answer, please write "Not Applicable" (N/A) or "Don't Know". Do not try to guess the answers, but provide as much detail as you remember.

If your Claim Form is incomplete, you will be contacted for more details. In such case, you can consult your counsel to assist in providing the required information; this may however delay the Independent Assessor's decision about whether your claim will be accepted into the Independent Claims Process. As such, please provide as much detail as possible on the Claim Form.

Use as many extra sheets of paper as you need to provide complete and detailed information about your claim while making sure to attach these extra sheets to your Claim Form. You may also write notes or draw pictures that would help you explain your claim. If you use extra sheets, please write the question number the extra sheets relate to at the top of each page, and write "see attached extra sheets" in the space provided to answer the question in the Claim Form.

Make sure you have read and signed the **Authorization** and **Direction to Release Information** form also found at the end of the Claim Form.

Make sure to read and sign the **Declaration** found at the end of the Claim Form.

MERLO I DAVIDSON SETTLEMENT

AFTER FILLING THE CLAIM FORM, ALSO REMEMBER TO:

- Review all of your answers to make sure they are as complete as possible.
- Make a copy of your Claim Form for your records.

NEXT STEPS:

Providing notice of any changes: If you need to make changes to any information in your Claim Form after you have sent it to the Independent Assessor, please immediately advise the Office of the Independent Assessor in writing of these changes. Examples of important changes include a change of address and new information about your claim.

Destruction of documentation: Subject to the requirements of law, within six months of the completion of all claimant assessments and payments, the office of the Assessor will destroy all Class member information and documentation in its possession.

DRAFT - DO NOT USE

III - PROJECTED TIMELINE

Here is an overview of the claims process. This overview is designed to help you better understand the claims process and does not supersede the official documents. Please read these documents carefully.

DATE	CLAIMS PROCESS
XXXX (First publication of the approval by the Federal Court of the Notice of Settlement Approval.)	Claimants have 180 days to file their claim by submitting the required forms. The forms are available on the Independent Assessor's website, or can be mailed to them. At all times during the process, claimants can ask for information by calling the Independent Assessor's office.
From XXXX to YYYY (180 day period)	**All claimants** must complete the following forms: • Claim Form • Consent to Disclosure of Information Form • No Prior Compensation Form These forms must be forwarded to the Independent Assessor before YYYY. Any supporting documentation not included in the Claim Form must be forwarded no later than 60 days after the Claimant has submitted her Claim Form .
YYYY	Final day on which Claim Forms can be received by the Independent Assessor. In certain circumstances, the Independent Assessor can grant an extension of this deadline. Claimants must then fill out the Recuest for Deadline Extension Form.
ZZZZ	Final day on which the Deadline Extension Form can be forwarded to the Independent Assessor.
Months following **ZZZZ**	The Independent Assessor analyses the Claim Forms using a six-level scale agreed to by the parties to the Settlement. He decides compensation for Level 1 and Level 2 claims on the basis of the information provided by the claimants in the forms and accompanying documents. Level 2 claimants can also ask for reconsideration of this determination in exceptional circumstances if they so desire by filling out the Level 2 Reconsideration Form within 30 days of being sent the Assessor's decision. He conducts face to face interviews with claimants determined to be in Categories 3, 4, 5 and 6. Depending on the number of claims, and as the Independent Assessor will conduct all of the interviews personally, this process will likely require between 24 to 36 months before all claims can be processed.

Draft - Do not use

MERLO | DAVIDSON
SETTLEMENT

PLEASE READ THE FOLLOWING BEFORE PROCEEDING TO THE NEXT PAGE

The following questions ask for detailed information about the gender or sexual orientation based discrimination and harassment you suffered. These questions may trigger painful memories and feelings. Because of this, we suggest that you proceed slowly and that you read and complete this form in a safe place.

We recommend that you read and complete the following pages with a support person near, such as a family member, counselor, treating health care professional, a friend, or someone else you trust.

MERLO I DAVIDSON SETTLEMENT

IV - CLAIM FORM

SECTION A PERSONAL INFORMATION

You may check all relevant boxes that apply to you:

- ☐ RCMP member
- ☐ Civilian member
- ☐ Auxiliary constable
- ☐ Special constable member
- ☐ Reserve member
- ☐ Cadet
- ☐ Public service employee
- ☐ Temporary civilian employee

1 Name

First Name(s) | Last Name

Other names you are known by (for example, maiden name, nicknames)

Name while employed by the RCMP

Rank / Classification | Regimental Number/ Personal Record Identifier (PRI)

2 Mailing Address

Street name and number | Apartment number, P.O. Box or RR#

City/Village | Province/Territory | Postal Code

DRAFT - DO NOT USE

CLAIM FORM

MERLO | DAVIDSON SETTLEMENT

3 Contact information

( )
Home Phone Number

Can we leave a message at this number?
☐ Yes ☐ No

( )
Cellular Phone Number:

Can we leave a message at this number?
☐ Yes ☐ No

Email address

Can we send you a message at this email address?
☐ Yes ☐ No

What is the best way to contact you? ☐ Home Phone ☐ Cell Phone ☐ Mail ☐ Email

4 Do you have a personal representative or a guardian?

☐ Yes ☐ No If you have a personal representative or a guardian, please provide the following information:

Name of personal representative or guardian

Street name and number Apartment number, P.O. Box RR#

City/Village Province/Territory Postal Code

( )
Phone Number Email

5 Are you represented by a lawyer?

☐ Yes ☐ No If you have a lawyer, please provide the following information:

Name of lawyer

Street name and number Office Number

City/Village Province/Territory Postal Code

( ) ( )
Phone Number Fax Number Email

DRAFT - DO NOT USE

MERLO | DAVIDSON SETTLEMENT

6	**Your date of birth**	Day	Month	Year
7	**Your Country & Province/State/Territory of birth**			
8	**Your Gender**	☐ Male	☐ Female	☐ Transgender
9	**Your Family**			

Current spouse's name

Occupation

Children's names

1 _____ 11 _____

2 _____ 12 _____

3 _____ 13 _____

4 _____ 14 _____

5 _____ 15 _____

6 _____ 16 _____

7 _____ 17 _____

8 _____ 18 _____

9 _____

10 _____

Please attach as many sheets of paper as necessary to fully answer the question

10 Do you have any health problems that you feel could prevent you from participating in the claims process if it was to be held more than six months from now?

☐ Yes ☐ No

If your answer is "Yes", please attach a note from a doctor confirming the nature of your health problem and the need for an accelerated consideration of your claim.

DRAFT - DO NOT USE

MERLO | DAVIDSON SETTLEMENT

Claimant Eligibility

You must confirm you were a female or identified as a female RCMP Member, a Civilian Member or Public Service Employee who worked in the RCMP, at any time between September 16, 1974 and XXXX. (For purposes of this Settlement only, *Regular Member* includes Regular Members, Special Constables, Cadets, Auxiliary Constables, Special Constable Members and Reserve Members, and *Public Service Employee* includes Temporary Civilian Employees.)

11 Please provide details confirming your service in the RCMP between September 16, 1974 and XXXX. **Please provide all postings with period served in each posting and rank. Please indicate the size of the detachment for each posting.** Please attach all supporting documentation to this form.

	Posting	From	To	Rank	Detachment Size
1					
2					
3					
4					
5					
6					
7					
8					
9					
10					
11					
12					
13					
14					
15					

Please attach as many sheets of paper as necessary to fully answer the question.

12 **Have you started at any time a court action or a grievance or harassment complaint for compensation, including a complaint to the Canadian Human Rights Tribunal, for compensation for gender or sexual orientation based discrimination and harassment by an RCMP member as describedabove, male or female?**

☐ Yes ☐ No

DRAFT - Do not use

MERLO | DAVIDSON SETTLEMENT

SECTION B INFORMATION RELATED TO THE GENDER OR SEXUAL ORIENTATION BASED DISCRIMINATION AND HARASSMENT

13 **Please complete the following chart with information relating to the gender or sexual orientation based discrimination and harassment you suffered while working within the RCMP. A more detailed account will be requested on the next page.**

	Incident of Harassment (Briefly describe the gender or sexual orientation based discrimination and harassment and any other wrongful act that you suffered)	Approximate Date(s) of Harassment (Month(s)/Year(s))	Where did it happen?	Who Harassed You? (Name of the person, position and title of the person)
1				
2				
3				
4				
5				
6				
7				
8				
9				
10				

DRAFT - Do not use

Please attach as many sheets of paper as necessary to fully answer the question.

MERLO | DAVIDSON SETTLEMENT

14 **Did you ever report the gender or sexual orientation based discrimination and harassment?**

☐ Yes ☐ No If so, please include or send within 60 days of submitting this Claim form to the Office of the Independent Assessor a copy of any documents (emails, letters, etc.) related to your reporting the gender or sexual orientation based discrimination and harassment.

15 **If there was a legal proceeding as a result of you reporting the gender or sexual orientation based discrimination and harassment, did you make a victim impact statement?**

☐ Yes ☐ No If so, please include or send within 60 days of submitting this Claim form to the Office of the Independent Assessor a copy of the victim impact statement you made.

16 **Please tell us your story.**

For each incident of gender or sexual orientation based discrimination and harassment you listed in Question 13, please describe each in as much detail as you can:

- **Who** was the perpetrator of the gender or sexual orientation based discriminatory and harassing acts?
- **How** did it happen (circumstances leading up to the gender or sexual orientation based discrimination and harassment)?
- **What** happened (please describe the acts of gender or sexual orientation based discrimination and harassment)?
- **Was** anything said to you during the incident(s)? For example, were you threatened (if so, what was said to you)?
- **When** did the gender or sexual orientation based discrimination and harassment happen (please indicate the approximate date when the gender or sexual orientation based discrimination and harassment started)?
- **How often** did the gender or sexual orientation based discrimination and harassment happen?
- **When** did the gender or sexual orientation based discrimination and harassment stop?
- **Where** did the gender or sexual orientation based discrimination and harassment happen?
- **Did you speak with anyone** (for example, a parent, spouse, friend, etc.)?
- **Did anyone witness** the discriminatory and/or harassing acts?
- **Did you have any physical manifestations** (bruising, pregnancy, etc.)?

DRAFT - DO NOT USE

MERLO I DAVIDSON SETTLEMENT

DRAFT - DO NOT USE

Please attach as many sheets of paper as necessary to fully answer the question.

MERLO I DAVIDSON SETTLEMENT

17	**For each of the incidents of gender or sexual orientation based discrimination and harassment described at Question 16, please explain in your own words how the gender or sexual orientation based discrimination and harassment has affected your life. Give as much detail as possible. For example, what were the repercussions of the gender or sexual orientation based discrimination and harassment on your personal relationships, intimate relationships, and professional relationships?**

DRAFT - DO NOT USE

Please attach as many sheets of paper as necessary to fully answer the question.

18 Aggravating Factors

What other circumstances, if any, did you experience that worsened the effects of the harassment you suffered? Please check any aggravating factors that apply to your claim. These factors are simply examples, you can add any other aggravating factors you see as relevant in the space provided below.

- ☐ verbal abuse
- ☐ racist acts
- ☐ threats
- ☐ witnessing someone else being abused
- ☐ violence accompanying sexual harassment
- ☐ intimidation
- ☐ humiliation
- ☐ degradation
- ☐ vulnerability
- ☐ betrayal (that is, you were harassed by an individual working within the RCMP who had a relationship of trust with you or who was in a position of authority over you)

Please attach as many sheets of paper as necessary to fully answer the question.

Draft - Do not use

MERLO I DAVIDSON SETTLEMENT

19 **If you are still experiencing problems that you think are related to the gender or sexual orientation based discrimination and harassment by any individual working within the RCMP as described above, please describe the problems. If you are not still experiencing any such problems, please write "N/A" in the space provided below.**

DRAFT - DO NOT USE

Please attach as many sheets of paper as necessary to fully answer the question.

CLAIM FORM

MERLO I DAVIDSON SETTLEMENT

SECTION C TREATMENT

20 **Have you ever received treatment, counseling, or healing (including but not limited to counselling, hospitalization, visit to a family doctor, visit to a specialist, visit to a clinic, or non-traditional remedies) for emotional, physical or psychological effects that you think might be related to the gender or sexual orientation based discrimination and harassment committed by an individual working within the RCMP, as described above, that you suffered?**

☐ Yes ☐ No

If you answered "Yes"
i Please provide us with details in the chart below;
ii Please include any treatment you are still undergoing; and
iii Please provide us with a copy of all relevant medical and other documentation.

Describe the injury or condition requiring treatment	Describe the type of treatment received (please include the name and dosage of any medication prescribed)	When was the treatment provided (month and year)	Who provided the treatment?	Where did you receive the treatment (name and location of the facility or office)

Please attach as many sheets of paper as necessary to fully answer the question.

DRAFT - DO NOT USE

MERLO | DAVIDSON SETTLEMENT

21	Were you treated for a similar injury or condition before the gender or sexual orientation based discrimination and harassment by an individual as described above working within the RCMP?

☐ Yes ☐ No If you answered "Yes", please provide the name of the person who treated you, describe the injury and treatment, and provide the approximate date(s) when you received that treatment

DRAFT - DO NOT USE

Please attach as many sheets of paper as necessary to fully answer the question.

CLAIM FORM

MERLO | DAVIDSON SETTLEMENT

SECTION D OTHER INFORMATION ABOUT YOU

22 Were you ever physically, emotionally, or sexually harassed by any person other than an individual working within the RCMP?

☐ Yes ☐ No

A - If you answered "Yes" to question 22, please advise whether you reported such physical, emotional, sexual or sexual orientation harassment to the police and whether there were/are legal proceedings (whether civil or criminal) with regard to these events.

☐ Yes ☐ No

B - If you answered "Yes" to question 22, please answer the following questions to the best of your knowledge and ability:

- Who physically, emotionally, or sexually harassed you?
- How did it happen (circumstances leading up to the physical, emotional, sexual or sexual orientation harassment)?
- What happened (please describe the acts of physical, emotional, sexual or sexual orientation harassment)?
- Was anything said to you during the physical, emotional, sexual or sexual orientation harassment (For example, a threat? If so, please describe what was said)?
- When did it happen (please include the approximate date when the physical, emotional, sexual or sexual orientation harassment started)?
- How often did the physical, emotional, sexual or sexual orientation harassment happen?
- When did the physical, emotional, sexual or sexual orientation harassment stop?
- Where did the physical, emotional, sexual or sexual orientation harassment happen?
- Did you speak to anyone about the physical, emotional, sexual or sexual orientation harassment (for example, a parent, spouse, friend, health care professional, etc.)?

In your own words, please describe how this other physical, emotional, sexual or sexual orientation harassment affected your life, including you training and employment, in the space below:

Plain - pour info

CLAIM FORM

MERLO | DAVIDSON
SETTLEMENT

DRAFT - Do not use

Please attach as many sheets of paper as necessary to fully answer the question.

MERLO | DAVIDSON SETTLEMENT

SECTION E YOUR EDUCATION AND WORK HISTORY

23 **Please provide details about your education and training.**

School, college, university, or other faculty attended	Approximate dates		Grade/level reached and certificate, degree or diploma obtained
	From	To	

Please attach as many sheets of paper as necessary to fully answer the question.

DRAFT - DO NOT USE

MERLO | DAVIDSON SETTLEMENT

24 **Please provide details about your work history outside the RCMP, whether it was paid or volunteer.**

Name of your employer and job title[1]	Approximate dates		Reason(s) why you stopped working for the employer or were unemployed
	From	To	

DRAFT - DO NOT USE

Please attach as many sheets of paper as necessary to fully answer the question.

[1] For periods you were not employed, describe your activities during that time.

CLAIM FORM

MERLO | DAVIDSON SETTLEMENT

SECTION F — EFFECTS OF GENDER OR SEXUAL ORIENTATION BASED DISCRIMINATION AND HARASSMENT ON YOUR EMPLOYMENT AND CAREER

25 **Do you think the gender or sexual orientation based discrimination and harassment described at Question 16 affected your training, employment, or ability to work?**

☐ Yes ☐ No

If you answered "Yes" to question 26, please provide us with details and any information regarding how the gender or sexual orientation based discrimination and harassment has affected your training, employment, or ability to work.

DRAFT - DO NOT USE

Please attach as many sheets of paper as necessary to fully answer the question.

CLAIM FORM

MERLO | DAVIDSON SETTLEMENT

26	**A. Are you currently unemployed or under-employed?**	☐ Yes	☐ No
	B. Are you in financial difficulty?	☐ Yes	☐ No
	C. Have you ever declared bankruptcy?	☐ Yes	☐ No

If you answered "Yes" to questions 26-A, 26-B, or 26-C, please answer the following questions to the best of your ability and knowledge.

If you are currently unemployed, under-employed, experiencing financial difficulty, or bankrupt due to gender or sexual orientation based discrimination and harassment by an individual working within the RCMP, please describe how you believe the gender or sexual orientation based discrimination and harassment prevents you from working to your full capacity.

If the reason for which you are unemployed, under-employed, experiencing financial difficulty or have become bankrupt is not due to the gender or sexual orientation based discrimination and harassment described at question 16, please write "N/A" in the space provided below.

DRAFT - DO NOT USE

Please attach as many sheets of paper as necessary to fully answer the question.

CLAIM FORM

MERLO | DAVIDSON SETTLEMENT

27 **Please describe any other physical or psychological injuries or conditions not related to the gender or sexual orientation based discrimination or harassment by an individual as described above working within the RCMP that:**

A. Have affected your ability to work in the past;

B. Are currently affecting your ability to work; or

C. May affect your work in the future.

These injuries or condition may be the result of a major event in your life, such as an accident, an assault, a divorce, the death of a loved one, etc. Please provide a description of the relevant circumstances.

DRAFT - DO NOT USE

Please attach as many sheets of paper as necessary to fully answer the question.

MERLO | DAVIDSON SETTLEMENT

28 Please describe your future work and/or education plans.

A. **If you are unemployed**, do you plan to return to work or have educational pursuits (please describe your plans including approximate timing of a return to work or educational/training facility);

B. **If you are employed**, please describe whether you plan to continue at your present employment and, if not, please describe your future work/education plans (including the approximate timing of any future plans); and

C. **If you are retired**, please describe the circumstances surrounding your retirement (the date you retired, your employer, your job title, reasons for your retirement and whether your retirement was voluntary or involuntary).

DRAFT - DO NOT USE

Please attach as many sheets of paper as necessary to fully answer the question.

MERLO | DAVIDSON SETTLEMENT

29 Have you received payments in respect of loss of income from any source?

☐ Yes ☐ No

If you answered "Yes" to question 30, please provide us with details and any information regarding the dates concerning which you were compensated for loss of income, the amount, and the reason for compensation.

	Dates of income loss for which payments were received (month/year to month/year)[1]	Amount of payment (indicate whether the amount is for weekly, monthly, annual, or a lump sum payment)	Reason for payment (describe the injury or condition that resulted in the payments)
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			

Please attach as many sheets of paper as necessary to fully answer the question.

[1] If payments are still being received, please indicate that fact and list the start date of your benefits.

DRAFT - DO NOT USE

CLAIM FORM

MERLO I DAVIDSON SETTLEMENT

DECLARATION

I,_____, from the City of

_____, in the province of_____.

SOLEMNLY DECLARE:

Medical and Psychological Records and Assessments:

I confirm that I will give the Independent Assessor and his team (hereafter the "**Assessor**") access to my medical and psychological records, and I will authorize professionals who have provided or are presently providing services to provide information to the Assessor.

Information that may be communicated to the experts retained by the Independent Assessor

I understand that my personal information, including the details about any gender or sexual orientation based discrimination and sexual harassment I allege to have suffered may be communicated to experts retained by the Independent Assessor while preserving anonymity.

Financial Loss Claims

I will provide to the Assessor all employment records that are required.

Police Records

I will provide statements made to the police and impact statements presented to the court, if I have them, and will authorize those holding the same to provide them to the Assessor if that is not the case.

Disclosure to other experts

I understand that my personal information may be disclosed to other experts by the Assessor to assist in determining the amount of my claim.

Assessor may conduct investigations

I further understand that the Assessor can verify the truthfulness of my statements and allegations by seeking information necessary to properly determine the claim from third parties, including the RCMP. The Assessor shall put to the claimant any information which may be unfavorable to the claimant's allegations and give her the opportunity to respond.

DRAFT - NOT FOR USE

MERLO | DAVIDSON SETTLEMENT

Private and Confidential Process

I agree to respect the private nature of any meeting or interview that may be conducted in this process. I will not disclose the details or existence of any witness statement I receive or anything said at the meeting or interview by any participant, except what I say myself.

Independent Assessor

I recognize that the Assessor does not represent the RCMP and is not acting as legal counsel for any party, that the Assessor does not offer legal advice or have any duty to assert or protect legal rights of any party, or to raise an issue not raised by any party. I accept that the Assessor has no responsibility regarding the conduct of parties to these proceedings.

Non-Disclosure

I further accept that as a neutral person the Assessor has no duty to ensure the enforceability or validity of any agreement reached. Should an action be commenced, I accept that the Assessor may not be called as a witness and that no document in his possession, including his own records, notes and offers of compensation can be required for disclosure. The only disclosure that will be permitted is that required by law.

Independent Process

I confirm that I have been informed of the Claims Process and understand that the Assessor is not the agent of the RCMP, that he will choose his assistants, and hire experts accepted by the parties, that he will set schedules, establish claim forms and decide independently whether each claim falls within Levels 1, 2 or within Levels 3 to 6, as set out in the court approved Settlement. He will decide on the amount of compensation to be offered according to the agreed compensation levels and distribute the funds he himself will have received from the Government of Canada. I am aware that this process is meant to be non-confrontational and that there will be no formal hearings and cross-examinations or other forms of formal litigation.

Veracity of Information in Claim Form

I confirm that all of the information provided in this Claim Form is true, whether made by me or on my behalf. Where someone has helped me with this Claim Form that person has read to me everything they wrote and included with this Claim Form, if necessary to allow me to understand the content of this completed Claim Form and any attachments to it, and I confirm that this information is true.

MERLO I DAVIDSON
SETTLEMENT

I ACCEPT THAT SIGNING THIS CLAIM FORM HAS THE SAME EFFECT AS IF I HAD STATED THE INFORMATION CONTAINED IN THE CLAIM FORM AND ACCOMPANYING THE CLAIM FORM UNDER OATH (OR AFFIRMATION) IN COURT.

DRAFT – DO NOT USE

Witness Signature

(The witness must be a Commissioner for taking affidavits or someone you personally know. The witness must see you sign the form but is not required to read the form.)

Print name of the witness

Date (day/month/year)

Claimant (or guardian) Signature

Date (day/month/year)

CLAIM FORM

MERLO I DAVIDSON SETTLEMENT

AUTHORIZATION AND DIRECTION TO RELEASE INFORMATION

To: **Sir/Madam**

From: _____
(print your name)

Date of Birth: _____

Health Card Number: _____

THIS SHALL BE your good and sufficient authority to release, disclose, and/or discuss, which includes allowing access, review, inspection, the making of copies, with the Assessor and his team at their request, all record, reports, documentation, correspondence and/or information you have under your control, whether on paper, electronically or under a different format, pertaining to:

- **Medical information**: All medical reports, records and pre-existing medication information, tests, dates or information, diagnostics, prognostics, treatment plans, treatments/medication given and/or received, etc.
- **Employment information**: All my employment files, evaluations and notes to file, all information concerning my abilities to return to work and my professional status including permission to contact my past, current or potential employer.
- **Police reports / Incident reports**: All records, including the permission to contact the agent and/or professionals involved in _____.
- **Financial information/Insurance/Pensions**: All records, claims, documentation, correspondence, declarations, applications and forms including the permission to contact any agent, representative and broker.

A photocopy or transmission of this authorization by facsimile may be accepted with the same authority as the original.

I have read the above authorization and express my consent by affixing my signature.

_____ _____
Witness Signature **Claimant Signature**

_____
Date

* * * * *

SCHEDULE B -- APPENDIX 2

CONSENT TO DISCLOSURE OF INFORMATION

MERLO | DAVIDSON SETTLEMENT

THE HONOURABLE MICHEL BASTARACHE, C.C., Q.C.
INDEPENDENT ASSESSOR

CONSENT TO DISCLOSURE OF INFORMATION

I,_____,
(print full name)

of_____,
(address)

hereby consent to the disclosure of the following information:

_____
(description of the information to be disclosed)

which may be part of the records compiled in files of

_____
(name of organization)

in respect to_____,
(your name and date of birth)

I understand that this information will be released only to Michel Bastarache, C.C., Q.C. or members of his staff.

In signing this consent I am not authorizing any further disclosure of this information other than as specified above.

DRAFT - DO NOT USE

_____ _____
Signature **Witness Signature**

_____
Print Witness Name

Dated this_____day of_____, 20_____.

DATE OF EXPIRATION FOR CONSENT: _____

CONSENT TO DISCLOSURE OF INFORMATION

MERLO I DAVIDSON
SETTLEMENT

If convenient, this form can be completed online on the secure server managed by the Independent Assessor. If you choose to complete it by hand, please send it back by mail and **NOT** by email. If the form was sent to you by mail, please use the prepaid self-addressed envelope that was provided with it. If you do not have a prepaid self-addressed envelope, please place the form along with the rest of the required material in an envelope addressed to:

Confidential Letter
Office of the Independent Assessor
130, Albert Street, Suite 1103
Ottawa (Ontario) K1P 5G4

ALL CLAIMS ARE CONFIDENTIAL.

DRAFT -- DO NOT USE

* * * * *

SCHEDULE B -- APPENDIX 3

REQUEST FOR DEADLINE EXTENSION

MERLO | DAVIDSON SETTLEMENT

THE HONOURABLE MICHEL BASTARACHE, C.C., Q.C.
INDEPENDENT ASSESSOR

REQUEST FOR DEADLINE EXTENSION

NOTE TO CLAIMANTS

This *Request for Deadline Extension* Form is part of the out-of-court settlement.

The RCMP and Merlo/Davidson Class Action Parties agreed that potential claimants may be able to ask for an extension of time of up to 100 days after the Claim Deadline expires. The Claim Deadline is on XXXX (180 days after the first publication of the Notice of Settlement Approval).

You have only until DATE to ask for a deadline extension.

Potential claimants seeking extensions must be able to provide three things:
1. Exceptional reasons justifying an extension;
2. A completed Claim Form; and
3. Supporting documentation, which must be provided at the same time as this Request for Deadline Extension Form.

There will be no right to appeal or seek judicial review of the Independent Assessor's extension.

If you have any questions regarding this Claim Form or the Independent Claims Process, please call 1 844-348-0776 or email your questions to info@merlodavidson.ca.

AFTER FILLING THE EXTENSION FORM, ALSO REMEMBER TO:
- Review all of your answers to make sure they are as complete as possible.
- Make a copy of your Claim Form for your records.

If you need to make changes to any information in your Request for Deadline Extension Form after you have sent it to the Independent Assessor, please immediately advise the Office of the Independent Assessor in writing of these changes. Examples of important changes include a change of address and new information about your claim.

This form must be completed and sent to the Independent Assessor, along with any additional sheets of paper, as well as a photocopy of a government issued piece of identification. If convenient, this form can be completed online on the secure server managed by the Independent Assessor. If you choose to complete it by hand, please send it back by mail and **NOT** by email. If the form was sent to you by mail, please use the prepaid self-addressed envelope that was provided with it. If you do not have a prepaid self-addressed envelope, please place the form along with the rest of the required material in an envelope addressed to:

Confidential Letter
Office of the Independent Assessor
130, Albert Street, Suite 1103
Ottawa (Ontario) K1P 5G4

ALL CLAIMS ARE CONFIDENTIAL.

Preview - Do not use

MERLO | DAVIDSON SETTLEMENT

REQUEST FOR DEADLINE EXTENSION

SECTION A – PERSONAL INFORMATION

You may check all relevant boxes that apply to you:

- ☐ RCMP member
- ☐ Civilian member
- ☐ Auxiliary constable
- ☐ Special constable member
- ☐ Reserve member
- ☐ Cadet
- ☐ Public service employee
- ☐ Temporary civilian employee

1 NAME

First Name(s) _____ Last Name _____

Other names you are known by (for example, maiden name, nicknames) _____

Name while employed by the RCMP _____

Rank / Classification _____ Regimental Number/ Personal Record Identifier (PRI) _____

DRAFT – DO NOT USE

2 MAILING ADDRESS

Street name and number _____ Apartment number, P.O. Box or RR# _____

City/Village _____ Province/Territory _____ Postal Code _____

MERLO | DAVIDSON SETTLEMENT

3 CONTACT INFORMATION

( )
Home Phone Number

Can we leave a message at this number?
☐ Yes ☐ No

( )
Cellular Phone Number

Can we leave a message at this number?
☐ Yes ☐ No

Email address

Can we send you a message at this email address?
☐ Yes ☐ No

What is the best way to contact you? ☐ Home Phone ☐ Cell Phone ☐ Mail ☐ Email

4 DO YOU HAVE A PERSONAL REPRESENTATIVE OR A GUARDIAN?

☐ Yes ☐ No If you have a personal representative or a guardian, please provide the following information:

Name of personal representative or guardian

Street name and number | Apartment number, P.O. Box, RR#

City/Village | Province/Territory | Postal Code

( )
Phone Number | Email

5 ARE YOU REPRESENTED BY A LAWYER?

☐ Yes ☐ No If you have a lawyer, please provide the following information:

Name of lawyer

Street name and number | Office Number

City/Village | Province/Territory | Postal Code

( ) ( )
Phone Number | Fax Number | Email

Draft - Do not use

MERLO | DAVIDSON SETTLEMENT

SECTION B – EXCEPTIONAL CIRCUMSTANCES REQUIRING THE EXTENSION OF TIME

Please tell us why you need an extension.
Using the space provided below, please provide as much detail as possible to tell the Independent Assessor why you require an extension to participate in the claims process:

DRAFT - DO NOT USE

Please attach as many sheets of paper as necessary to fully answer the question.

MERLO | DAVIDSON SETTLEMENT

DECLARATION

I,_____, from the City of

_____, in the province of_____.

SOLEMNLY DECLARE:

I understand that the Assessor can verify the truthfulness of my statements and allegations by seeking information necessary to properly determine my request for a deadline extension from third parties, including the RCMP. The Assessor shall put to the claimant any information that may be unfavourable to the claimant's allegations and give her the opportunity to respond.

I confirm that all of the information provided in this Request for Deadline Extension Form is true, whether made by me or on my behalf. Where someone has helped me with this Request for Deadline Extension Form, that person has read to me everything they wrote and included with this Request for Deadline Extension Form, if necessary to allow me to understand the content of this completed Request for Deadline Extension Form and any attachments to it, and I confirm that this information is true.

I ACCEPT THAT SIGNING THIS REQUEST FOR DEADLINE EXTENSION FORM HAS THE SAME EFFECT AS IF I HAD STATED THE INFORMATION CONTAINED IN THE REQUEST FOR DEADLINE EXTENSION FORM AND ACCOMPANYING CLAIM FORM UNDER OATH (OR AFFIRMATION) IN COURT.

DRAFT - NOT FOR USE

_____ _____

Witness Signature **Claimant (or guardian) Signature**

(The witness must be a Commissioner for taking affidavits or someone you personally know. The witness must see you sign the form but is not required to read the form.)

_____

Print name of the witness

_____ _____

Date (day/month/year) **Date (day/month/year)**

* * * * *

SCHEDULE B -- APPENDIX 4

CLASS MEMBER LIST AND VERIFICATION OF CLASS MEMBERSHIP

CLASS MEMBER LIST

1. For the purposes of providing Notice to the Class and verifying class membership, the RCMP will prepare a list of female Regular Members, Civilian Members and Public Service Employees (who are appointed by the Commissioner under the delegated authority of the Public Service Commission and pursuant to the *Public Service Employment Act*, R.S.C., 1985, c. P-32; amended S.C. 2003, c. 22 , ss.12, 13) who have worked within the RCMP between September 16, 1974 and the Approval Date (the "List"). For clarity, for the purposes of this Agreement only, RCMP members include Regular Members, Civilian Members, Special Constables, Cadets, Auxiliary Constables, Special Constable Members, Reserve Members, and Public Service Employees includes Temporary Civilian Employees who, prior to 2014 were appointed under the now-repealed subsection 10(2) of the *RCMP Act*, R.S.C., 1985, c. R-10

2. The List will include the following information for each individual where available:

   (a) name while working within the RCMP;

   (b) current name (if known by the RCMP to be different from the name while working within the RCMP);

   (c) date of birth;

   (d) dates of service within the RCMP;

   (e) regimental number (if applicable);

   (f) whether the individual was a Regular Member, a Civilian Member or a Public Service Employee;

   (g) current address information.

3. The RCMP will make best efforts to ensure that the List is comprehensive. To produce as comprehensive a list as possible, the RCMP will use one or more sources of information including, but not limited to, the following:

   (a) Human Resources Information Management System (HRMIS);

   (b) Employee Management System;

   (c) Pension Data Repository;

   (d) Penfax Pension System

   (e) Member Pay System

   (f) Veteran's Affairs Canada

   (g) RCMP Veterans Association

   (h) National Library and Archives

   (i) Canada Revenue Agency

4. If the holder of any information sources set out in paragraph 3 is unwilling or is unable to lawfully provide any of the aforementioned information absent court order, the Parties shall seek an order from the Federal Court compelling the disclosure of the information from the holder of the information to the RCMP for inclusion in the List.

5. The RCMP will make best efforts to exclude from the List individuals who are known to the RCMP to be deceased.

6. Upon completion of the List the RCMP shall advise the Parties and, if required, shall advise the Court, of any groups of potential Class Members for which there is no reasonable and reliable existing source of this information and who, therefore, are not captured in the List.

7. The RCMP shall provide at Canada's expense Notices to the Class Members by direct mail, as set out in Schedule A -- Appendix 3 of the Agreement using the information contained in the List.

VERIFICATION OF CLASS MEMBERSHIP

8. Before determining whether a Claimant is entitled to compensation, the Assessor must be satisfied that the Claimant is a Primary Class Member as defined in the Agreement.

9. The Assessor will take the necessary steps to verify that a Claimant is a Primary Class Member, keeping in mind the importance of maintaining the Class Members' confidentiality to the extent possible.

10. To enable the Assessor to verify that Claimants are Primary Class Members, the RCMP will provide the aforementioned List to the Assessor. The Assessor shall verify whether the Claimant is a Primary Class Member by:

    (a) seeking information directly from the Claimant on the Claim Form included as Schedule B -- Appendix 1 to this Agreement;

    (b) checking the List provided by the RCMP, taking note in particular of groups of Claimants who may have been missed because of the lack of a source of information.

11. Where a Claimant's name does not appear in the List provided by the RCMP, the Assessor may request evidence of Class Membership from the Claimant sufficient to satisfy the Assessor.

12. Where the Assessor has doubt that the Claimant is a Primary Class Member, he may request additional evidence of Class Membership from the Claimant sufficient to satisfy the Assessor.

13. If the Assessor cannot verify that the Claimant is a Class Member, he shall deny the Claim and shall so notify the Claimant.

* * * * *

SCHEDULE B -- APPENDIX 5

IDENTIFICATION OF PREVIOUS CLAIMS

1. The Claimant will complete and submit to the Office of the Assessor the Claim Form in Schedule B -- Appendix 1 of this Agreement, including the answer to question 12 relating to prior court action or administrative proceeding for compensation for gender or sexual orientation based discrimination and/or harassment in the workplace by any Regular Member, Special Constable, Cadet, Auxiliary Constable, Special Constable Member, Reserve Member, Civilian Member, Public Service Employee, including Temporary Civilian Employee, working within the RCMP, male or female, that is directed at and offensive to another Regular Member, Special Constable, Cadet, Auxiliary Constable, Special Constable Member, Reserve Member, Civilian Member, Public Service Employee, including any Temporary Civilian Employee working within the RCMP.

2. The Claimant will complete and submit to the Assessor the Certification of No Prior Compensation form in Appendix 9 to Schedule B.

3. Canada will provide to the Assessor a list of individuals who have been paid compensation further to a civil claim, grievance or harassment complaint, including a complaint to the Canadian Human Rights Tribunal, or who have otherwise resolved a civil claim, grievance or harassment complaint, including a complaint to the Canadian Human Rights Tribunal. The list will include the name, date of birth and regimental number, if available, of the individual.

4. The Assessor will verify the truthfulness of the statements made by the Claimant, when, and in the manner in which he deems necessary, by, including, but not limited to:

    (a) checking the list provided by Canada further to paragraph 3 above;

    (b) seeking further information from the Claimant by telephone call;

(c) seeking further information from and discussing the response with the Claimant in the interview, where applicable;

(d) seeking information necessary to properly determine the attestation regarding no prior compensation from third parties, including the RCMP.

6. If the Assessor believes there may have been a prior civil claim, grievance or harassment complaint, including a complaint to the Canadian Human Rights Tribunal, made by a Claimant with respect to the same event(s) and injury(ies) as claimed in the Claim Form, he may in his discretion request information and documents from the RCMP regarding the previous claim and the outcome, including but not limited to any pleadings, complaint or application forms, statements, decisions rendered, settlement documents and releases.

7. If the Assessor determines that a previous civil claim, grievance or harassment complaint, including a complaint to the Canadian Human Rights Tribunal, has been resolved by a Claimant for compensation for gender or sexual orientation based discrimination and/or harassment with respect to the same event(s) and injury(ies) as claimed in the Claim Form, the Assessor will deny the Claim, state the reason for the denial in his Decision; confirm in his Decision that the Claimant attested to the Assessor that she has not already been paid, and advise the Claimant.

* * * * *

SCHEDULE B -- APPENDIX 6

COMPENSATION LEVELS

NOTE:

The composition of the following levels is meant to facilitate the preparation of the interview and to assist in determining the proper level of compensation. It is not meant to present a list of factors that must be found to exist in a given case to decide on the level of compensation.

The factors are indicators that are based on the analysis of human rights tribunal and court decisions, as well as professional comments on the impact of the type of conduct described.

The problem we face is one of systemic harassment, which suggests that there are common factors to be found with regard to culpable conduct and its effect on victims. Nevertheless, every individual has a different experience to present and we must be attentive to the fact that all want to be heard, understood and believed. We must also be alive to the fact that not all people react the same way to a traumatising event. The levels document will help provide a framework for achieving decisions that are consistent and fair.

Level 1 -- $10,000

Culpable conduct includes but is not limited to:

Sexualized comments

Sexualized jokes

Inappropriate questioning regarding the complainant's personal life

Exhibitionism

Bullying causing psychological harm, anxiety

Mockery by various means

Communication of a sexual or romantic nature

Effect on victim:

Anxiety, nightmares, occasional panic attacks

Rage, feeling of humiliation

Loss of self esteem

Feelings of degradation and discomfort

Note: No substance abuse or work interruption, no ongoing psychological damage

Level 2 -- $35,000

Culpable conduct includes but is not limited to:

Kissing

Touching with a sexual purpose or intention

Simulating sexual intercourse or masturbation

Physical aggression causing harm

Mockery by various means

Bullying causing psychological harm, anxiety

Persistent communication of a sexual or romantic nature

Exposure to pornography[1]

Effect on victim:

Physical wound

Temporary incapacity forcing medical attention

Post-traumatic stress, not severe

Auto condemnation, feeling culpable

Loss of confidence in others

Anxiety, nightmares, occasional panic attacks

Rage, feeling of humiliation

Mild depression

Minor work disruption

Note: NO PSYCHIATRIC CONDITION, no troubling substance abuse, no permanent psychiatric affliction

Level 3 -- $70,000

Culpable conduct includes but is not limited to:

Gender-based putdowns

Persistent kissing or touching with sexual intention

Exposure of genitals to complainant

Sexual advances

Constant intimidation in front of others

Intimidation by using rank

Mockery with intent to degrade

Incessant communications of a romantic or sexual nature

Persistent exposure to pornography[2]

Reprisals related to work environment

Effect on victim:

Severe stress affecting the complainant's health

Auto-condemnation

Loss of confidence in others

Severe anxiety

Frequent panic attacks

Severe nightmares

Sexual dysfunction

Mild drug or alcohol abuse

Wound making permanent mark

Temporary work disruption

Loss of self-esteem

Loss of desire to communicate feelings of love or desire

Level 4 -- $100,000

Culpable conduct includes but is not limited to:

Persistent or ongoing gender-based putdowns

Touching of complainant's genitalia

Forcing oneself on victim physically

Physical aggression causing wound

Exposure to violent pornography[3]

Harassment towards vulnerable complainant

Effect on victim:

Severe stress affecting the complainant's health

Post-traumatic stress

Diminished professional status or reputations

Drug or alcohol abuse

Absenteeism

Suicidial ideation

Diminished physical health or well-being

Level 5 -- $150,000

Culpable conduct includes but is not limited to :

Persistent intimidation, bullying, aggressions

Acts to denigrate and humiliate in front of others

Diminishing value of Member to the RCMP by assigning menial tasks below the Member's abilities

Acts meant to affect working conditions or career development

Acts causing interpersonal problems

Acts intended to cause emotional stress

Using rank to denigrate

Repeated Sexual advances

Harassment towards complainant with moderate vulnerability

Forcing complainant to perform non-penetrative sex acts

Effect on victim:

Severe stress affecting the complainant's health

Post-traumatic stress

Obsessional tendencies

Substance abuse

Problems with interpersonal relationships

Suicidal thoughts

Wound leaving a permanent mark

Feeling culpable, auto-condemnation

Loss of confidence and self-esteem

Loss of desire to communicate feelings of love or desire

Some work disruption

Level 6 -- $220,000

Culpable conduct includes but is not limited to :

Continuous intimidation, bullying, aggressions

Forcing complainant to engage in penetrative sex acts

Harassment towards complainant with heightened vulnerability

Acts to isolate from other members

Acts to denigrate and affect career development

Sexual advances

Using rank to denigrate

Acts meant to cause emotional stress

Effects on the victim:

Severe stress affecting the complainant's health

Severe post-traumatic stress

Disorganized behaviour

Personality problems

Suicidal thoughts or attempts

Sexual dysfunction

Chronic psychiatric condition

Substance abuse

Inability to work

* * * * *

SCHEDULE B -- APPENDIX 7

COMPENSATION AMOUNTS

LEVEL 1	Minimal Injury	$10,000
LEVEL 2	Mild Injury	$35,000
LEVEL 3	Low Moderate Injury	$70,000
LEVEL 4	Upper Moderate Injury	$100,000
LEVEL 5	Significant Injury	$150,000
LEVEL 6	Severe Injury	$220,000

* * * * *

SCHEDULE B -- APPENDIX 8

REQUEST FOR RECONSIDERATION OF A LEVEL 2 CLAIM

MERLO | DAVIDSON
SETTLEMENT

THE HONOURABLE MICHEL BASTARACHE, C.C., Q.C.
INDEPENDENT ASSESSOR

REQUEST FOR RECONSIDERATION OF A LEVEL 2 CLAIM

NOTE TO CLAIMANTS

This *Request for Reconsideration of a Level 2 Claim* Form is part of the out-of-court Settlement. At the Claim Form stage, the Independent Assessor considered the information that you provided in order to decide how much compensation to award you.

This settlement provided for compensation based on levels. For those claims where it was clear that the claim was a Level 1 claim or a Level 2 claim, the Independent Assessor dealt with the claim without an interview.

However, claimants whose claim is assessed as a Level 2 claim can ask the Independent Assessor to reconsider his decision. The Claimant must show two things:

1. There are reasonable grounds showing there should be an interview to decide the Claim;
2. There are more documents or information that was not available prior to getting the decision from the Independent Assessor.

You have only 30 days from the day you received the Independent Assessor's decision telling you you had a Level 2 claim to ask him to reconsider. Please provide any new documents when you provide this Reconsideration Form.

There will be no right to appeal or seek judicial review of the Independent Assessor's reconsideration

If you have any questions regarding this Claim Form or the Independent Claims Process, please call 1 44-348-0776 or email your request to info@merlodavidson.ca.

This form must be completed and sent to the Independent Assessor, along with any additional sheets of paper, as well as a photocopy of a government issued piece of identification. If convenient, this form can be completed online on the secure server managed by the Independent Assessor. If you choose to complete it by hand, please send it back by mail and **NOT** by email. If the form was sent to you by mail, please use the prepaid self-addressed envelope that was provided with it. If you do not have a prepaid self-addressed envelope, please place the form along with the rest of the required material in an envelope addressed to:

Confidential Letter
Office of the Independent Assessor
130, Albert Street, Suite 1103
Ottawa (Ontario) K1P 5G4

ALL CLAIMS ARE CONFIDENTIAL.

MERLO | DAVIDSON SETTLEMENT

REQUEST FOR RECONSIDERATION OF A LEVEL 2 CLAIM

SECTION A – PERSONAL INFORMATION

1 NAME

First Name(s) _____ Last Name _____

Other names you are known by (for example, maiden name, nicknames) _____

Name while in service _____

Rank _____ Regimental Number _____

2 MAILING ADDRESS

Street name and number _____ Apartment number, P.O. Box or RR# _____

City/Village _____ Province/Territory _____ Postal Code _____

MERLO | DAVIDSON SETTLEMENT

3 CONTACT INFORMATION

( ) ___
Home Phone Number

Can we leave a message at this number? ☐ Yes ☐ No

( ) ___
Cellular Phone Number

Can we leave a message at this number? ☐ Yes ☐ No

Email address

Can we send you a message at this email address? ☐ Yes ☐ No

What is the best way to contact you? ☐ Home Phone ☐ Cell Phone ☐ Mail ☐ Email

4 DO YOU HAVE A PERSONAL REPRESENTATIVE OR A GUARDIAN?

☐ Yes ☐ No If you have a personal representative or a guardian, please provide the following information:

Name of personal representative or guardian

Street name and number | Apartment number, P.O. Box RR#

City/Village | Province/Territory | Postal Code

( )
Phone Number | Email

5 ARE YOU REPRESENTED BY A LAWYER?

☐ Yes ☐ No If you have a lawyer, please provide the following information:

Name of lawyer

Street name and number | Office Number

City/Village | Province/Territory | Postal Code

( ) ( )
Phone Number | Fax Number | Email

MERLO | DAVIDSON SETTLEMENT

SECTION B – REASONABLE GROUNDS REQUIRING THE LEVEL 3 TO LEVEL 6 PROCEDURE

Please tell us why your claim should be reconsidered.
Using the space provided below, please provide as much detail as possible to tell the Independent Assessor why your claim should be considered in the Level 3 to Level 6 process:

Please attach as many sheets of paper as necessary to fully answer the question.

MERLO | DAVIDSON SETTLEMENT

SECTION C – ADDITIONAL DOCUMENTS OR INFORMATION

Please provide us with additional documents or information.
Using the space provided below, please tell us what additional documents or information you would like the Independent Assessor to consider. Please attach any additional documents to this reconsideration request:

Using the space below, please tell us why these documents or information were not available to you before the time you received the Independent Assessor's decision:

Please attach as many sheets of paper as necessary to fully answer the questions.

MERLO | DAVIDSON SETTLEMENT

DECLARATION

I,_____, from the City of

_____, in the province of_____.

SOLEMNLY DECLARE:

I understand that the Assessor can verify the truthfulness of my statements and allegations by seeking information necessary to properly determine my request for reconsideration from third parties, including the RCMP. The Assessor shall put to the claimant any information that may be unfavourable to the claimant's allegations and give her the opportunity to respond.

I confirm that all of the information provided in this Request for Reconsideration of a Level 2 Claim Form is true, whether made by me or on my behalf. Where someone has helped me with this Request for Reconsideration of a Level 2 Claim Form, that person has read to me everything they wrote and included with this Request for Reconsideration of a Level 2 Claim Form, if necessary to allow me to understand the content of this completed Request for Reconsideration of a Level 2 Claim Form and any attachments to it, and I confirm that this information is true.

I ACCEPT THAT SIGNING THIS REQUEST FOR RECONSIDERATION OF A LEVEL 2 CLAIM FORM HAS THE SAME EFFECT AS IF I HAD STATED THE INFORMATION CONTAINED IN THE REQUEST FOR RECONSIDERATION OF A LEVEL 2 CLAIM FORM AND ACCOMPANYING THE CLAIM FORM UNDER OATH (OR AFFIRMATION) IN COURT.

_____ _____

Witness Signature **Claimant (or guardian) Signature**

(The witness must be a Commissioner for taking affidavits or someone you personally know. The witness must see you sign the form but is not required to read the form.)

_____

Print name of the witness

_____ _____

Date (day/month/year) **Date** (day/month/year)

* * * * *

SCHEDULE B -- APPENDIX 9

CERTIFICATION OF NO PRIOR COMPENSATION

MERLO | DAVIDSON SETTLEMENT

THE HONOURABLE MICHEL BASTARACHE, C.C., Q.C.
INDEPENDENT ASSESSOR

CERTIFICATION OF NO PRIOR COMPENSATION

NOTE TO CLAIMANTS

This *Certification of No Prior Compensation* Form is part of the out-of-court settlement.

The RCMP and Merlo/Davidson Class Action Parties agreed that potential claimants who have already resolved a civil claim, grievance or harassment complaint for compensation for harassment, including a complaint to the Human Rights Tribunal against RCMP members and public services employees, as defined in the Settlement Agreement and who worked within the RCMP, will not be eligible to participate in this process. As such, you must certify that you have not been compensated from any source with respect to the same events and injuries for which you are making a claim under this Settlement.

VAC pension payments are not compensation for the purpose of this Settlement. Receipt of VAC pension payments does not preclude a Class Member from making a claim under this Settlement.

If you have any questions regarding this Form or the Independent Claims Process, please call 1 844-348-0776 or email your questions to info@merlodavidson.ca.

PROVIDING COMPLETED CERTIFICATION OF NO PRIOR COMPENSATION FORM

Your completed Certification of No Prior Compensation Form, along with a photocopy of a government issued piece of photo identification and all supporting documents, must be sent to the Independent Assessor within 180 days of the first publication of the Notice of Settlement Approval, that date being XXXX. You do not need to send the Certification of No Prior Compensation Form in right away, but you must send the claim form before XXXX in order to be eligible for compensation.

AFTER FILLING THE CERTIFICATION OF NO PRIOR COMPENSATION FORM, ALSO REMEMBER TO:

- Review all of your answers to make sure they are as complete as possible.
- Make a copy this form for your records.

This form must be completed and sent to the Independent Assessor, along with any additional sheets of paper, as well as a photocopy of a government issued piece of identification. If convenient, this form can be completed online on the secure server managed by the Independent Assessor. If you choose to complete it by hand, please send it back by mail and **NOT** by email. If the form was sent to you by mail, please use the prepaid self-addressed envelope that was provided with it. If you do not have a prepaid self-addressed envelope, please place the form along with the rest of the required material in an envelope addressed to:

Confidential Letter
Office of the Independent Assessor
130, Albert Street, Suite 1103
Ottawa (Ontario) K1P 5G4

ALL CLAIMS ARE CONFIDENTIAL.

MERLO | DAVIDSON SETTLEMENT

CERTIFICATION OF NO PRIOR COMPENSATION

DECLARATION

I,_____, from the City of

_____, in the province of_____,

SOLEMNLY DECLARE:

I HAVE NOT RESOLVED A CIVIL CLAIM, GRIEVANCE OR HARASSMENT COMPLAINT FOR COMPENSATION FOR HARASSMENT, INCLUDING A COMPLAINT TO THE HUMAN RIGHTS TRIBUNAL AGAINST RCMP MEMBERS AND PUBLIC SERVICE EMPLOYEES, AS DEFINED IN THE SETTLEMENT AGREEMENT AND WHO WORKED WITHIN THE RCMP, WITH RESPECT TO THE SAME EVENTS AND INJURIES FOR WHICH I AM MAKING A CLAIM UNDER THIS SETTLEMENT. (VAC PENSION PAYMENTS ARE NOT COMPENSATION FOR THE PURPOSE OF THIS SETTLEMENT. RECEIPT OF VAC PENSION PAYMENTS DOES NOT PRECLUDE A CLASS MEMBER FROM MAKING A CLAIM UNDER THIS SETTLEMENT.)

I understand that the Assessor can verify the truthfulness of my statements and allegations by seeking information necessary to properly determine my certification regarding no prior compensation from third parties, including the RCMP. The Assessor shall put to the claimant any information that may be unfavourable to the claimant's allegations and give her the opportunity to respond.

I confirm that all of the information provided in this No Prior Compensation Form is true, whether made by me or on my behalf. Where someone has helped me with this No Prior Compensation Form, that person has read to me everything they wrote and included with this *No Prior Compensation Form*, if necessary to allow me to understand the content of this completed No Prior Compensation Form and any attachments to it, and I confirm that this information is true.

I ACCEPT THAT SIGNING THIS CERTIFICATION OF NO PRIOR COMPENSATION FORM HAS THE SAME EFFECT AS IF I HAD STATED THE INFORMATION CONTAINED IN THE CERTIFICATION OF NO PRIOR COMPENSATION FORM AND ACCOMPANYING CLAIM FORM UNDER OATH (OR AFFIRMATION) IN COURT.

_____ _____

Witness Signature **Claimant (or guardian) Signature**

(The witness must be a Commissioner for taking affidavits or someone you personally know. The witness must see you sign the form but is not required to read the form.)

_____

Print name of the witness

_____ _____

Date (day/month/year) **Date (day/month/year)**

* * * * *

SCHEDULE B -- APPENDIX 10

TRAVEL CLAIM

RÈGLEMENT
MERLO | DAVIDSON
SETTLEMENT

Date

TRAVEL EXPENSE CLAIM
(Other than Government employees)

DEMANDE DE FRAIS DE VOYAGE
(A l'exception des employés du gouvernement)

Surname - Nom	Given Names - Prénoms	Telephone - Téléphone	
Address - Adresse	Province	Postal Code - Code postal	GST/HST/QST No. / N° de la TPS/TVH/TVQ

The following expenses were incurred in connection with - Les dépenses mentionnées ci-dessous ont été encourues à l'occasion de :

Date	Time of arrival / departure - Heure d'arrivée et de départ	DETAILS (including all transportation, travel to and from, and number of meals) - DÉTAILS (mode de transport, déplacement, et le cas échéant, nombre de repas)	Transportation - Transport	Accommodation - Logement	Meals - Repas	Other expenses - Autres dépenses
		SUB-TOTAL ▶ SOUS-TOTAL				

REQUISITION FOR CHEQUE - DEMANDE DE CHÈQUE

I certify that the amounts included in this claim were incurred on authorized government business only.
Je certifie que les montants réclamé dans la présente réclamation constituent des dépenses engagées par des voyages pour affaires officielles.

Signature (Claimant - Demandeur) Date

TOTAL EXPENSES
TOTAL DES DÉPENSES ▶

TOTAL CLAIMED
TOTAL DEMANDE ▶

Certified pursuant to section 34 of the Financial Administration Act.
Certifié en vertu de l'article 34 de la Loi sur l'administration financière

Signature

Requisitioned for payment pursuant to section 33 of the Financial Administration Act and certified in accordance with section 7 of the Payment Requisitioning Regulations.
Demandé pour paiement conformément à l'article 33 de la Loi sur l'administration financière et certifié aux termes de l'article 7 du Règlement sur les requisitions de paiements

Signature

Verified correct - Vérifié conforme

Signature

Service Officer - Agent des services

Signature

DISTRIBUTION: Signed original to OCHR / Original signé aux IRSC

MERLO | DAVIDSON SETTLEMENT

TRAVEL EXPENSE CLAIM

Claimants who are required to travel more than 50 kilometres from their residence to attend a personal interview with the Independent Assessor will be reimbursed for travel expenses in accordance with applicable government travel directives.

AIR

For air travel, economy class will be used. Airfare receipts, or a copy of the electronic ticket must be returned to the Independent Assessor's office.

RAIL

For travel by rail, the next highest class after the full economy class will be used. Travel receipts, or a copy of the ticket issued by Via Rail, must be returned to the Independent Assessor's office.

PRIVATELY OWNED VEHICLES

The kilometric rate payable shall be the rate applicable to the province or territory of registration of the vehicle, in accordance with the rates specified in Appendix B of the National Joint Council (NJC) Travel Directive at:
http://njc-cnm.gc.ca/directive/index.php?lang=eng&mege=2&sid=97.

In the interest of safe driving, claimants shall not be expected to drive more than 250 kilometres after having worked a full day, 350 kilometres after having worked one half-day, 500 kilometres on any day when the claimant has not worked.

In any case, the maximum for all expenses while travelling by car, including accommodation and meals, should not exceed the equivalent of economy class air travel plus normal ground transportation costs (e.g. bus or taxi from the airport to final destination).

ACCOMMODATION

Accommodation will be made on behalf of the claimant. In these cases, the Independent Assessor's office will pay the basic room charges plus taxes directly to the hotel and other expenses will be charged directly to the traveller.

Private non-commercial accommodation is encouraged. A traveller who makes arrangements for private non-commercial sleeping accommodation will be reimbursed $50.00 per night, plus the incidental allowance described below.

MEALS AND INCIDENTAL ALLOWANCES

Meals allowances shall be reimbursed in accordance with the rates specified in Appendix C of the NJC Travel Directive at: https://www.njc-cnm.gc.ca/directive/index.php?sid=98&lang=eng.

In addition to the applicable meals, an allowance may be claimed to cover incidental expenses for trips of two days or more (i.e. overnight, with accommodation), such as dry cleaning, tips, and long distance calls.

RÈGLEMENT MERLO | DAVIDSON

DEMANDE DE FRAIS DE VOYAGE

Les réclamantes ayant à se déplacer à plus de 50 kilomètres de leur résidence pour une entrevue avec l'évaluateur indépendant pourront réclamer le remboursement de leurs frais de voyage, conformément aux directives gouvernementales applicables.

PAR AVION

Pour le transport aérien, seule la classe économique sera remboursée. Les billets d'avion ou une copie du billet électronique doivent être envoyés au bureau de l'évaluateur indépendant.

PAR TRAIN

Pour le transport par train, la classe juste au-dessus de la classe économique sera remboursée. Les reçus ou une copie du billet émis par Via Rail doivent être retournés au Bureau de l'évaluateur indépendant.

VÉHICULE PERSONNEL

Le tarif de remboursement par kilomètre est celui qui est applicable dans la province ou le territoire ou le véhicule est immatriculé, aux taux indiqués à l'annexe B de la Directive sur les voyages du CNM à l'adresse suivante :
http://www.njc-cnm.gc.ca/directive/index.php?sid=97&lang=fra.

Afin d'assurer une conduite en toute sécurité, les réclamantes n'auront pas à conduire plus de 250 kilomètres après une journée de travail, plus de 350 kilomètres après une demi-journée de travail, et plus de 500 kilomètres une journée ou elle n'aura pas travaillé.

Le maximum des dépenses encourues pour un déplacement en automobile, incluant l'hébergement et les repas, ne doit pas excéder l'équivalent du coût par transport aérien en classe économique, incluant le coût normal du transport terrestre (par exemple, le coût de l'autobus ou du taxi entre l'aeroport et la destinaton finale).

HÉBERGEMENT

L'hébergement sera pris en charge par le Bureau de l'évaluateur indépendant. Il paiera directement à l'hôtel le coût de base de la chambre plus les taxes. Les frais accessoires seront facturés directement a la reclamante.

L'hébergement privé non commercial est encouragé. Une réclamante prenant des dispositions pour un hebergement privé non commercial pourra réclamer 50 $ par nuit, plus l'indemnité quotidienne décrite plus loin.

REPAS ET INDEMNITES

Les indemnités de repas seront remboursées conformément aux taux indiqués à l'annexe C de la Directive sur les voyages du CNM à l'adresse suivante :
http://njc-cnm.gc.ca/directive/index.php?lang=fra&mege=2&sid=98.

En plus des indemnités applicables aux repas, pour les déplacements de deux jours et plus une allocation quotidienne peut etre reclamee pour couvrir certains frais tels le nettoyage à sec, les pourboires, les appels interurbains. Les taux applicables sont aussi indiqués à l'annexe C.

* * * * *

SCHEDULE B -- Appendix 11

RELEASE OF DOCUMENTS AND INFORMATION

HELD BY THE RCMP TO THE ASSESSOR

1. The Office of the Assessor (in this Appendix "Office of the Assessor" includes the "Assessor") will ensure that all relevant information and documents have been gathered from the Claimant, the RCMP, and third parties, keeping in mind principles of proportionality based on the nature and severity of the claim.
2. In accordance with this Settlement Agreement a Claimant will provide consent to the release of documents and information in the possession of the RCMP and third parties to the Assessor in the form attached as Appendix 2 to Schedule B of this Agreement.
3. The Office of the Assessor shall make all requests for records and information relating to the Claimant or third parties and held by the RCMP by contacting the RCMP Designated Contact in the manner set out in this Schedule.
4. The Assessor will provide to the RCMP a copy of the Consent to release of the information executed by the Claimant.
5. The Designated Contact shall not make photo copies or otherwise duplicate the Consent or create or maintain any internal RCMP records about which files are accessed.
6. The Designated Contact shall respond to all such requests for records and information made by the Office of the Assessor in the manner set out in this Appendix.

Records to Verify Posting Locations

7. Where the Office of the Assessor requests information and records from the RCMP to verify where and/or when a Claimant or a relevant third party who worked or works within the RCMP was posted, the responsible Designated Contact shall print out a copy of the Claimant's or third party's HRMIS entry and send the records in a sealed package by Registered Mail to the Office of the Assessor.
8. Multiple HRMIS entries may be sent to the Assessor's office in a single package and may be sent in combination with other types of records.
9. When mailing HRMIS entries, the Designated Contact will not create a cover sheet or any other record identifying which entries are being sent to the Assessor.
10. The Designated Contact shall not print multiple copies, make photocopies or otherwise duplicate the entries or create or maintain any internal RCMP records about which entries were accessed.

Personnel File

11. RCMP personnel records, and personnel records of Public Service Employees working within the RCMP may be maintained locally within Division Headquarters. There is no single, centralized data system from which such records and information can be retrieved. Records must be individually retrieved from RCMP Division Headquarters throughout Canada, or from Library and Archives Canada.
12. Where the Office of the Assessor requests a personnel file, the assigned Designated Contact(s) shall contact the central records repository in the Division Headquarters, or archives, by telephone and ask for the file to be sent to the Designated Contact, identifying the subject individual by name at the time the worked within the RCMP, and birthdate.
13. The Designated Contact shall make a photocopy of the Claimant's personnel file and mail the records in a sealed package by Registered Mail or courier service in a sealed envelope marked CONFIDENTIAL-TO BE OPENED BY ADDRESSEE ONLY.
14. Multiple personnel files maybe sent to the Assessor's office in a single package and may be sent in combination with other types of records.

15. When mailing personnel files, the Designated Contact will not create a cover sheet or any other record identifying which files are being sent to the Assessor.

16. Except for the photocopy to be sent to the Assessor, the Designated Contact shall not make photocopies or otherwise duplicate the files or create or maintain any internal RCMP records about which files are accessed.

17. The Designated Contact may review the file and redact unrelated personal information and any information protected by the *Canada Evidence Act*, R.S.O., 1985, c. C-5 ("*CEA*") or common law public interest privilege.

Harassment Complaints, Grievance Records, Conduct Files and Medical Files

18. RCMP records and information relating to harassment complaints, grievances, conduct matters and medical matters may be maintained locally within Division Headquarters. There is no single, centralized data system from which such records and information can be retrieved. Records must be individually retrieved from RCMP Divisions throughout Canada, or from Library and Archives Canada.

19. Where the Office of the Assessor requests information and records related to a harassment complaint, grievance record, conduct or medical file, the assigned Designated Contact(s) shall contact, in the case of Regular and Civilian Members, the Division Headquarters medical office, and in the case of Public Service Employees (whose medical records are kept in their personnel file), the central records repository in the Division Headquarters, or the archives, by telephone and ask for the file to be sent to the Designated Contact, identifying the subject individual by name at the time she or he worked within the RCMP, and birthdate.

20. The Designated Contact shall not disclose the reason for requesting the records.

21. The Designated Contact will comply, and will ensure that the persons who are contacted for files will also comply, with the following:

    (a) no record of the request be created and retained;

    (b) no cover sheet or any other record identifying which files are being requested and sent will be created and retained;

    (c) a print copy of the data, or in the case of a paper file, a photocopy of the original, will be made and sent directly to the Designated Contact by Registered Mail or courier service in a sealed envelope marked CONFIDENTIAL-TO BE OPENED BY ADDRESSEE ONLY;

    (d) at no time will files be sent using the general RCMP mailroom;

    (e) multiple files maybe sent to the Designated Contact in a single package;

    (f) a slip sheet maybe placed in the original file identifying only that a copy of the file has been requested and by whom.

22. In the case of harassment complaints, grievance records and conduct files, the Designated Contact will be sent the Claimant's statements, any investigation reports and any documents indicating the outcome.

23. The Designated Contact may review the file and redact unrelated personal information and any information protected by the *CEA* or common law public interest privilege.

24. The Designated Contact shall send the records in a sealed package marked CONFIDENTIAL-TO BE OPENED BY ADDRESSEEF ONLY to the Office of the Assessor by Registered Mail or courier service.

25. Multiple files maybe sent to the Assessor's office in a single package and may be sent in combination with other types of records.

26. The Designated Contact will not create a cover sheet or any other record identifying which files are being sent to the Assessor.

27. Except for the photocopy to be sent to the Assessor, the Designated Contact shall not, make photocopies or otherwise duplicate the files or create or maintain any internal RCMP records about which files are accessed.

* * * * *

SCHEDULE C

SECONDARY CLASS MEMBER CLAIMS

1. Secondary Class Members eligible for compensation under this Agreement and this Schedule are the current Spouse and current or former Child(ren) of the Primary Class Member as defined in this Agreement:

"Spouse" means:

(a) either of two persons who are currently married to each other or who have together, in good faith on the part of a person relying on this clause to assert any right, entered into a marriage that is voidable or void; and are living together; OR

(b) either of two persons who are not married to each other and have co-habited for a period of not less than three years, or are in a relationship of some permanence, if they are the natural or adoptive parents of a Child.

"Child" means a natural or legally adopted child of the Primary Class Member, or a person for whom the Primary Class Member has custody under a court order or domestic contract, or a person toward whom the Primary Class Member has demonstrated a settled intention to treat as a child of her family, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody

2. The Assessor will decide, on a balance of probabilities, whether the designated Secondary Class Member is a current Spouse or a current or former Child for the purpose of this Agreement.

3. Each Primary Class Member assessed at levels 5 or 6 will be provided, together with the Assessor's Decision, with a Secondary Class Member Claim Form on which she may designate Secondary Class Members who may be eligible for compensation under this Agreement. No more than one current Spouse may be designated.

4. The Secondary Class Members designated on the Secondary Class Member Claim Form must sign the Form and provide proof of relationship. A parent or legal guardian must sign the Form on behalf of minor children. A legal representative must sign the Form on behalf of persons under disability other than minor children. A parent, legal guardian or legal representative signing on behalf of a Secondary Class Member must include documentary proof that he or she is the parent, legal guardian or legal representative as the case may be.

5. To be eligible for compensation under this Agreement, the signed Secondary Class Member Claim Form together with the supporting documentation must be submitted within 60 days of the date on which the Primary Class Member is sent the Secondary Class Member Claim Form. The deadline for submitting the Secondary Class Member claim will be stipulated in a cover letter sent to the Primary Class Member with the Secondary Class Member Claim Form.

7. Subject to paragraph 8 of this Schedule, the designated eligible Spouse and Child(ren) will each be awarded 5% of the amount awarded in accordance with Appendix 7 to Schedule B of this Agreement to the Primary Class Member.

8. The total amount awarded to the Spouse and Children of a Primary Class Member may not exceed 10% of the amount awarded to the Primary Class Member. If there are more than two designated eligible Secondary Class Members, Secondary Class Members will share the 10% maximum award on an equal pro rata basis.

9. Payment of compensation to the Spouse and Children of a Primary Class Member will be made in accordance with paragraphs 33 to 52 of Schedule B to this Agreement with necessary modifications. All references to "Claimant" in paragraphs 33 to 52 of Schedule B will include Secondary Class Member claimants.

* * * * *

SCHEDULE C -- APPENDIX 1

SECONDARY CLASS MEMBER CLAIM FORM

MERLO | DAVIDSON SETTLEMENT

THE HONOURABLE MICHEL BASTARACHE, C.C., Q.C.
INDEPENDENT ASSESSOR

SECONDARY CLASS MEMBER CLAIM FORM

I, _____,
Print full name

of _____,
Street name and number Apartment number, P.O. Box or RR#

_____,
Province/Territory City/Village Postal Code

being a Primary Class Member under the Settlement Agreement, hereby request that

_____,
(Print full name)

be awarded compensation as a Secondary Class Member.

I hereby affirm that _____

is my _____, and append to the present proof of the relationship
spouse, child, adoptive child

or

I hereby affirm that I am the legal representative of _____

and have signed this form for _____, a person under disability,

and append to the present proof that I am the _____.
parent, legal guardian, legal representative

I understand that eligibility for Secondary Class Member compensation to the Spouse and Children of a Primary Class Member will be determined in accordance with schedule C to the Settlement Agreement, and that payment of compensation for Secondary Class Members will be made in accordance with paragraphs 33 to 52 of Schedule B to the Settlement Agreement, with necessary modifications.

DRAFT - DO NOT USE

SECONDARY CLASS MEMBER CLAIM FORM

MERLO | DAVIDSON SETTLEMENT

Witness Signature*

Primary Class Member Signature

Print name of the witness

Date (day/month/year)

Date (day/month/year)

Witness Signature*

Secondary Class Member (or guardian) Signature

Print name of the witness

Date (day/month/year)

Date (day/month/year)

* The witness must be a Commissioner for taking affidavits or someone you personally know. The witness must see you sign the form but is not required to read the form.)

DRAFT – DO NOT USE

SCHEDULE D

RCMP DESIGNATED CONTACT and CLAIMS SUPPORT PROCESS

1. The RCMP will establish a confidential Designated Contact and Claims Support Process in accordance with this Schedule in order to respond to requests for information and records from the Office of the

Assessor and to provide relevant information to the Assessor as required under this Settlement Agreement and as approved by the Court. In this Schedule "Office of the Assessor" includes both the individuals working with the Assessor and/or the Assessor.

2. The RCMP will designate the Director, Claims Response, an individual from the RCMP Professional Responsibility Sector and an individual from the RCMP Human Resources, each as a point of contact (the "Designated Contact") for the Office of the Assessor to request the release of information and records in the possession of the RCMP relating to a Claimant or third party as provided for in the Approval Order.

3. The Designated Contact will be responsible for:

   (a) the operations and administration of the Claims Support Process;

   (b) ensuring the confidentiality of all requests received and responses provided and, in particular, taking all necessary steps to ensure the confidentiality of the Claimants identity and other information;

   (c) accepting requests for information and documents from the Office of the Assessor;

   (d) retrieving the requested information and documents; and

   (e) providing the information and documents to the Office of the Assessor in accordance with this Schedule.

4. The Designated Contact will be located at RCMP National Headquarters located at 73 Leikin Drive, Ottawa, Ontario.

5. The office of the Designated Contact will be a stand-alone office located in a secure area of RCMP Headquarters with no interior windows or glass doors. No sign or other information identifying the purpose of the office will be posted on the door or elsewhere.

6. Access to the door will require a security card reader and a personal RCMP Chip Identification will be required to access the door.

7. All cabinets, desks and other storage items will be locked.

8. An alarm system will be installed for the office and each Designated Contact will have a unique personal access code for the alarm.

9. The RCMP will inform the Parties of the names of the individuals selected as the Designated Contacts and will provide their contact information to the Assessor. If a replacement Designated Contact must be selected before the Claims Process is complete, the RCMP will notify the Parties and provide the replacement Designated Contact's contact information to the Assessor.

10. The Designated Contact shall keep confidential any information provided or obtained in the settlement Claims Process, except where provided by law, and will not use the information for any purpose other than the settlement Claims Process unless otherwise agreed by the Parties.

11. The Office of the Assessor may communicate with the Designated Contact by telephone, registered mail, postal mail, courier service or email as is convenient for them However, no information that may identify a Claimant or third party shall be sent by postal mail or email to the Designated Contact. At no time will correspondence be sent by and to the general RCMP mailroom.

12. Information that may identify a Claimant or third party shall be communicated between the Office of the Assessor and the Designated Contact verbally or in a sealed envelope marked CONFIDENTIAL-TO BE OPENED BY ADDRESSEE ONLY by registered mail or confidential courier service. The Assessor or his designate shall identify himself to the satisfaction of the Designated Contact.

13. For all information and records requested, the Office of the Assessor shall provide the Designated Contact with the Claimant's name while working within the RCMP, date of birth, and any other information which may be required criteria for a search. The Office of the Assessor will specify the

nature of the information and records that are required with as much particularity as possible with respect to type of record (for e.g. harassment, medical, grievance, personnel), date, time range, relevant detachment or geographic allocation, targeted portions or similar identifying descriptors.

14. Where information and records requested may have existed but no longer exist or cannot be located, the Designated Contact will verbally inform the Office of the Assessor of this fact.

15. The Assessor, and any one within the Office of the Assessor who will handle any of the information and records release by the RCMP under this Schedule, will hold the appropriate level of government security clearance, and will safeguard the information and records in compliance with any security requirements associated with the handling of the information and records as provided by the RCMP. The workplace of the Office of the Assessor, and the storage facilities will be in compliance with any security requirements as determined to be applicable by the RCMP.

* * * * *

SCHEDULE E

CHANGE INITIATIVES

Accountability and Enforcement of Anti-Harassment Policies

1. Treasury Board Directives and the RCMP Commissioner's Standing Orders include provisions that prohibit harassment, require supervisors and managers to enforce those directives and orders, and provide for sanctions and other consequences for breaches of the expected standard of behavior, failure to enforce, or for any retaliatory conduct against any person working within the RCMP who has reported harassment.

2. The RCMP will establish support resources to assist supervisors in resolving harassment problems within their units.

3. The RCMP will continue to review its harassment policy in line with Treasury Board Policy and Directives, and applicable legislation and jurisprudence.

4. The RCMP has set a goal to make the proportion of women in Regular Member positions equal to at least 30% by 2025. In addition, the RCMP will set a goal to make the proportion of women in officer and executive positions at all levels equal to at least 30% by 2025. If these goals are met, the RCMP will continue to set reasonably attainable goals to reach gender parity (including parity of meaningful workplace opportunities). If goals are not met, the RCMP will continue to strive to meet these goals, and will receive advice from the Gender and Harassment Advisory Committees, to be established in accordance with this Agreement as set out below, on recommended changes, including further appropriate goals and parity of meaningful workplace opportunities.

5. The RCMP will take steps to improve the design and content of its recruitment materials to include more women, as well as more broadly inclusive language. The RCMP will solicit from all persons working within the RCMP input on all of its recruitment resources on a regular basis.

Communication of Harassment and other Policies

6. The RCMP will continue to communicate and publicize a) a clear, written harassment policy to all persons working within the RCMP, and make this policy readily available and accessible at all times; and b) that input from persons working within the RCMP on the effectiveness of the harassment policy is encouraged.

7. The RCMP will regularly communicate updates, news, and decisions affecting the organization and its membership to all persons currently working within the RCMP.

8. The RCMP will post its policies, including those concerning recruitment, hiring, transfers, promotions, qualifications, evaluations, leaves of absence, mentoring, collegiality, and harassment on its internal website, Infoweb.

9. Subject to Government of Canada and Treasury Board requirements, the RCMP will make ongoing efforts to improve the design of its website. The RCMP will continue to receive feedback and suggestions in writing directly from persons working within the RCMP.

Promotion Policies and Materials

10. The RCMP will continue to update promotion policies and materials, and will consider, among other things, whether they:

    (a) make clear the RCMP and its leadership believe people of all genders and sexual orientation are equally capable of working in the RCMP and having leadership positions and should therefore expect to be promoted at proportional rates;

    (b) use language that reflects the belief that women are equally capable and meritorious of promotion as men;

    (c) make clear that promotions will be based on objective and relevant measures of merit, taking into account the operational needs and requirements of the RCMP;

    (d) communicate that persons working within the RCMP will also be evaluated, in part, based on how respectfully and fairly they treat others in their workplace; and

    (e) continue to provide that the RCMP will evaluate and nominate individuals for awards and recognition using its established committee process.

Anti-Harassment Training

11. The RCMP will take steps to strengthen and support anti-harassment training during Cadet Training Program.

12. The RCMP will provide mandatory training on harassment for all persons working within the RCMP in accordance with the current views on best practices. The RCMP is committed to enforcing the mandatory completion of the course. Completion of the course will be a consideration for any potential promotion or advancement in the RCMP.

13. The RCMP commits to further developing the respectful workplace component in the supervisor and management development program, including training on inclusive leadership, accountability, and bias awareness training.

14. The RCMP will regularly review its harassment training in accordance with Treasury Board Policy and Directives, and applicable legislation and jurisprudence.

Gender and Harassment Advisory Committees

15. The RCMP will establish and maintain, subject to the *Public Service Labour Relations Act, SC 2003, c 22, s 2*, including but not limited to the unfair labour practice provisions, and any applicable collective agreements:

    (a) a National Gender and Harassment Advisory Committee that will serve as an advice giving forum to the Commissioner or his or her delegate on matters involving issues of gender, sexual orientation, harassment, equity, and inclusivity;

(b) in each Division, a local Gender and Harassment Advisory Committee that will serve as an advice giving forum to the Commanding Officer of the Division or his or her delegate on matters described in (a); the relevant content of the advice received will be reported annually to the National Gender and Harassment Advisory Committee.

16. The National Gender and Harassment Advisory Committee will be named by the Commissioner and will be composed of 8 to 12 individuals who will be 75% persons currently working within the RCMP who are reflective of the diverse composition of the RCMP and 25% RCMP managers. There will be a process established whereby persons currently working within the RCMP can put their name forward and be selected by the Commissioner to serve on the committee. The National Gender and Harassment Advisory Committee will meet at least annually, and whenever deemed necessary by the Committee, with the consent of the Commissioner or his or her delegate, and together with all other items for discussion, will receive and consider the reports of the Divisional Committees. The National Gender and Harassment Advisory Committee will issue a written Annual Report which will be publicly available. Minutes of meetings will not be made public subject to applicable laws which may require disclosure. The RCMP will provide a written Response to the Annual Report, which Response will be publicly available.

17. The Divisional Gender and Harassment Advisory Committees will be named by the Commanding Officer for the Divisions and will be composed of 8 individuals who will be 75% persons currently working within the RCMP who are reflective of the diverse composition of the Division, and 25% RCMP managers. There will be a process established whereby persons currently working within the RCMP can put their name forward and be selected by the Commissioner to serve on the committee. Meetings will be chaired by the Commanding Officer for the Division and will take place bi-annually. Division Gender and Harassment Advisory Committees will prepare a written Annual Report which will be publicly available and which will be provided, prior to its annual meeting, to the National Gender and Harassment Advisory Committee for its consideration. Minutes of meetings will not be made public subject to applicable laws which may require disclosure.

18. For further clarity, the National and Divisional Gender and Harassment Advisory Committees do not have authority to issue directives to the RCMP, but may give advice in the development of policy and practices on matters involving harassment, gender, sexual orientation, equity, and inclusivity. The Commissioner or his or her delegate will consider this advice; final decisions with respect to policy development and content lie with the RCMP. The Gender and Harassment Advisory Committees will not take on a public advocacy role. The RCMP will give written reasons for not adopting advice given by the Gender and Harassment Advisory Committees.

19. The role of the Gender and Harassment Advisory Committees is to act as vehicles through which the Commissioner and Commanding Officers are advised of developments with respect to workplace harassment.

20. The National Gender and Harassment Advisory Committee will have access to and obtain advice from one or more external experts on human resources and inclusive workplaces on an as needed basis within an annual budget set by the RCMP.

* * * * *

SCHEDULE F

JOINT COMMUNICATIONS PLAN

Issue:

This document contains a proposed approach, tactics and recommended products to support a **joint announcement** and communication of a settlement agreement between the RCMP and the plaintiffs.

Objectives:

* Demonstrate the RCMP's and plaintiffs ("the Parties") shared commitment to resolving claims, common desire to eliminate sexual discrimination and harassment and dedication to re-build confidence in the RCMP.
* Acknowledge the RCMP's organizational responsibility for the sexual discrimination and harassment in the RCMP during the class period with a public apology by the Commissioner of the RCMP.
* Demonstrate the RCMP's commitment to preventing and stopping further harassment by providing information on accomplishments to date and change initiatives as outlined in settlement agreement
* Provide appropriate information for class members and/or derivative class members to make a claim or opt-out of the class (includes claim forms, timeframe, timelines: eligibility amounts, etc.)

Strategic Considerations:

* The announcement will be made jointly. The Plaintiffs' claim will be filed in the Federal Court on either the same day as the announcement or within days immediately following the announcement, which is the first step in the court process to obtain approval of the settlement.
* The RCMP's apology will be made at the same time as the announcement. The commitment to change initiatives will strengthen the RCMP's apology and show faith in the restorative process.
* The RCMP will provide context as to how the change initiatives and other commitments will complement and/or supplement already implemented initiatives.
* Until all parties are available for a joint announcement, each will maintain a reactive posture and will not comment on the specifics of the settlement.
* Given the nature of the announcement, a face-to-face/in person announcement will reinforce the parties' sincerity in resolving the claims and moving forward.
* Working together, the parties should ensure consistency in message delivery and message ownership.

Target Audiences:

* Current and former female regular and civilian members and public service employees who allege to have been subjected to gender based discrimination and harassment in the RCMP.
* RCMP employees -- regular, civilian and public service employees.
* Young women and men who may be interested in joining the RCMP.

Approach:

A high profile, proactive approach, including **news conference** and **subject matter expert availability** (for a pre-determined time, if applicable) following the news conference is recommended.

Participants will include: appropriate Ministers, RCMP Commissioner and defendants, the plaintiffs, their representatives and the assessor, who will assess claims by eligible class members.

* * * * *

SCHEDULE G

NO RETALIATION DIRECTIVE

The Federal Court has approved a settlement between the RCMP and female RCMP members and public service employees who worked within the RCMP and who were subject to gender and sexual orientation based discrimination, bullying and/or harassment by other persons who worked within the RCMP. Details of the settlement can be found at XXX. The settlement provides for change initiatives within the RCMP to eliminate discrimination, bullying and/or harassment in the workplace. It also provides for a claims process and payment of compensation to class members with meritorious claims as determined by an independent assessor. Any class member has the right to make a claim under the settlement without fear of retaliation for doing so. To be clear, there is to be no relation against anyone for making a claim under the settlement. Any act of retaliation will be treated seriously and sanctions may be imposed commensurate with the circumstances and seriousness of any retaliatory action.

* * * * *

SCHEDULE H

OPT OUT FORM

OPT OUT FORM

Merlo and Davidson v. Her Majesty the Queen, Court File No: T-1685-16

RCMP Gender Harassment and Discrimination Class Action

*This is not a Claim Form. Submitting this form **excludes you** from the class action and the proposed settlement of the class action. **Do not use this form if you wish to receive compensation under the proposed settlement**.*

Name:

Current Address:

Date of Birth:

Dates and locations worked within the RCMP:

Reason for Opting Out:

_____

Date

_____

Signature

To Opt Out of the Class Action, you must sign and deliver this form to Class Counsel at either of the addresses below received or postmarked no later than **March 29, 2017**:

KLEIN LAWYERS LLP
Attn: Whitney Santos
Suite 400-1385 West 8th Avenue

Vancouver, BC V6H 3V9
Website: www.callkleinlawyers.com
Phone: (604) 874-7171
Fax: (604) 874-7180

KIM ORR BARRISTERS P.C.
Attn: Megan B. McPhee 19
Mercer Street, Suite 400
Toronto, ON M5V 1H2
Website: www.kimorr.ca
Phone: (416) 349-6574
Fax: (416) 598-0601

* * * * *

SCHEDULE B TO ORDER

SCHEDULE A -- APPENDIX 2

NOTICE OF SETTLEMENT

RCMP Gender Harassment and Discrimination Class Action

If you are a female or identify as a female and were an RCMP Member (for purposes only of this Settlement includes Regular Members, Special Constables, Cadets, Auxiliary Constables, Special Constable Members, and Reserve Members), Civilian Member or Public Service Employee (for purposes only of this Settlement includes Temporary Civilian Employees) working within the RCMP, this notice may affect your legal rights. Please read it carefully.

On ***, the Federal Court (Canada) approved a settlement of the class action *Merlo and Davidson v. Canada*. The class action concerns allegations of gender based harassment and discrimination within the RCMP.

Who is Eligible for the Settlement?

To be eligible to participate in the settlement, you must be a member of the class. The class is defined as:

> Primary Class Members: All female current and former living Regular Members, Civilian Members, and Public Service Employees (who are appointed by the Commissioner of the RCMP under the delegated authority of the Public Service Commission pursuant to the *Public Service Employment Act*, R.S.C., 1985, c. P-32; amended S.C. 2003, c. 22, ss. 12, 13) who worked within the RCMP at any time during the Class Period. The Class Period is September 16, 1974 to the date the settlement receives court approval.
>
> > For the purposes of this Settlement **"Regular Members"** includes Regular Members, Special Constables, Cadets, Auxiliary Constables, Special Constable Members, and Reserve Members
> >
> > For the purposes of this Settlement **"Public Service Employees"** includes Temporary Civilian Employees who, prior to 2014 were appointed under the now-repealed subsection 10(2) of the *RCMP Act*, R.S.C., 1985, c. R-10;
>
> Secondary Class Members: All persons who have a derivative Claim in accordance with applicable family law legislation arising from a family relationship with a Primary Class Member.

Anyone who has who has opted out of the class action is not eligible for compensation under the settlement.

What are the Terms of the Settlement?

The settlement contains numerous change initiatives directed at eliminating workplace harassment and discrimination in the RCMP. The settlement also provides compensation for Primary Class Members who experienced gender or sexual orientation based harassment or discrimination while working in the RCMP during the Class Period. Compensation is available for Secondary Class Members where the Primary Class Member's claim is assessed at either of the two highest severity levels.

You can obtain a copy of the settlement agreement and the applicable forms and protocols by contacting Class Counsel at the addresses below. These documents are also available on Class Counsel's websites.

How Do I Make a Claim?

Primary Class Members must submit a claim form together with all supporting documentation to the Claims Administrator on or before ****. Primary Class Members whose claims are approved at either of the two highest levels will be provided with a Secondary Class Member Claim Form.

For More Information and to Obtain a Claim Form

For more information about the settlement or to obtain a Claim Form, contact Class Counsel:

KLEIN LAWYERS LLP
Attn: Whitney Santos
Suite 400-1385 West 8th Avenue
Vancouver, BC V6H 3V9
Phone: (604) 714-6159
Fax: (604-) 874-7180
wsantos@callkleinlayers.com
www.callkleinlawyers.com

KIM ORR BARRISTERS P.C.
Attn: Megan B. McPhee
19 Mercer Street, Suite 400
Toronto, ON M5V 1H2
Phone: (416) 349-6574
Fax: (416) 598-0601
mbm@kimorr.ca
www.kimorr.ca

Or contact the Office of the Independent Assessor:

130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4
Phone: 1-844-348-0776
info@merlodavidson.ca
www.merlodavidson.ca

NOTICE PLAN

Prepared for the Office of the Independent Assessor

Merlo Davidson Settlement

by

Versailles communication

December 30, 2016

INTRODUCTION

The Government of Canada has agreed to an out-of-court settlement between the RCMP and the plaintiffs («parties») in two provincial class-action lawsuits concerning discrimination and harassment in the RCMP based on gender and/ or sexual orientation.

As part of the settlement the parties agreed to certify the action as a class action in the Federal Court and name an Independent Assessor, the Honourable Michel Bastarache, C.C., Q.C., to conduct the claims assessment process. The parties also agreed that the Independent Assessor would be responsible for notifying potential class members of the certification of the action and that a settlement approval hearing would be held on a specified date as required by the *Federal Courts Rules*. Accordingly, the Independent Assessor has prepared this Notice Plan for the Court's approval consistent with the *Federal Courts Rules* and the underlying principle of proportionality.

BACKGROUND TO THE NOTICE PLAN

There has already been a significant amount of publicity concerning the Merlo Davidson class action and its proposed settlement. On October 6, 2016, the parties held a press conference to announce their intention to settle these class actions which was widely attended by national and local media outlets and reported widely in various media including print and television. There were also approximately 367 social media posts on the subject, in the first 24 hours only.

The Independent Assessor's website (www.merlodavidson.ca) was launched on October 7, 2016. All the information relevant to the proposed settlement and to the Independent Assessor's mandate can be found there, as well as all official documents. The website is updated on an ongoing basis.

The RCMP has created messages to redirect inquiries related to the claim process to the Independent Assessor's Office and website. Class counsel's websites also carry information related to the proposed Class Action.

Statistics indicate sustained interest for the Independent Assessor's website. Available data collected from Google Analytics indicate that the Independent Assessor's website is an effective source of information. See Schedule B.

The Independent Assessor has also created a Facebook page and posts notices on Twitter.

SUMMARY OF THE NOTICE PLAN

This Notice Plan proposes that the following measures be taken to inform potential class members of the certification and upcoming settlement approval hearing:

1. The Notice of Certification and Settlement Approval Hearing and the Notice of Settlement Approval (the Notices) will be mailed directly to potential class members whose names and addresses will be provided to the Assessor by the RCMP.

2. Publishing the Notices on the Merlo Davidson website, class counsel websites, RCMP website and intranet. Posting links to the Notices on social media.

3. Publishing the Notices in major Canadian newspapers. Simultaneously, an advertising campaign on Facebook will also create awareness of the Notices and provide access to them as well as to more detailed information about the settlement.

4. Posting the Notices in all RCMP physical premises.

5. Any other methods stipulated by the Court.

The measures outlined in this Notice Plan will be implemented in concert and will likely be complemented by informal communication between potential class members, their friends and family.

1. DIRECT MAIL TO POTENTIAL CLASS MEMBERS

Following an order of this Court, the RCMP will forward to the Independent Assessor a list of past and present female members and employees from September 16, 1974 to the present. This list will be used to determine to whom the Notices will be mailed and to which address.

The RCMP will make best efforts to ensure that the list is complete and comprehensive by using all the sources of information available to it. The RCMP will also make best efforts to exclude from the list individuals who it knows to be deceased.

The Independent Assessor will send all potential class members, identified by the RCMP, a copy of the Notices.

2. POSTINGS ON WEBSITES AND SOCIAL MEDIA

The Notices will also be posted on the following websites:

- Office of the Independent Assessor;
- RCMP internal and external websites; and,
- Class counsel websites.

In addition, the Independent Assessor will publish a link to the Notices on his Facebook page and on his Twitter account.

Advertisements on Facebook will also be purchased linking to the Notices. This has been shown to be a highly effective way of reaching women, especially younger age groups (see Schedule D).

3. PRINT MEDIA

The Notices will also be publicized in major Canadian newspapers.

A media agency specialized in managing media investments has prepared a plan to reach out to our target audience. The media plan is based on an analysis of the information provided by the RCMP relating to the geographical and age distribution of Class Members (see Schedule D).

The Independent Assessor will place the Notices found at Appendices 1 and 2 of Schedule A to the Settlement Agreement in 32 newspapers selected for the campaign. These Notices will provide the essential information, while referring class members to the merlodavidson.ca website, or to our toll-free telephone number, to obtain other related information.

The newspaper advertising will be combined with a social media campaign on Facebook. This represents a proportional approach to the utilization of print media.

4. POSTING OF THE NOTICES IN RCMP OFFICES

The RCMP will post, for X days, a paper copy of the Notices in all detachments and other RCMP premises in a location that it considers to be visible and accessible to potential class members.

5. OTHER MEASURES

The Court may, in its discretion, require the Independent Assessor to give notice to potential claimants in any manner that is not set out in this Notice Plan.

6. EVALUATION MEASURES

Several indicators will be closely monitored to evaluate the efficiency of the Independent Assessor's Notices and Communication Plan. These include:

Media coverage
- Number of media present at the October 6th press conference
- Coverage
- Follow-up requests

Website and Social Media
- Number of visits to the different pages of the website and social media
- Number of downloads of forms, once they become available

Direct requests to the Independent Assessor
- 1-800 information line (number of calls and topics)
- info@merlodavidson e-mail (number of incoming requests for information and topics)

Direct mail
- Number of envelopes mailed vs. approximate number of women that are or have been in the employ of the RCMP since 1974. See Target Audience in Schedule D.
- Number of delivered/returned envelopes
- Number of requests for forms, either by telephone or email

Advertising program (traditional and social media)
- Reach and frequency are calculated beforehand using recognized statistical tools. Numerous other measures (outlined in Schedule C) will be used such as shares, likes, engagement rate, etc.

CONCLUSION

This Notice Plan has been prepared in line with best communications practices, in a manner consistent with the *Federal Courts Rules* and with the principle of proportionality in mind.

The combination of targeted mailings, media, Internet, social media campaigns and physical posting in RCMP premises are designed to ensure that almost all class members will receive Notices of the certification of the class action, their right to opt-out, the date of the upcoming settlement approval hearing, and the approval of the settlement.

The measures outlined in this Notice Plan will be implemented in concert and be complemented by informal communications, notably word of mouth between potential class members, their friends and family.

SCHEDULE A

October 6th Press Conference / Media who attended the event :

Global News	La Presse	CTV
Ottawa Citizen	CBC	Globe and Mail
IPolitics	CTV	The Tyee
City TV - Rogers Radio	Agence QMI	TVA
City News	CBC	CPAC
Radio-Canada	Toronto Star	CBC
Radio-Canada	Canadian Press	CBC Vancouver

Overview of the press coverage:

Major television and radio networks featured live coverage of the press conference held October 6, 2016 in the morning. The coverage continued both in print and electronic media on October 7, garnering "*... extensive national media coverage, specifically in print. Articles by the Canadian Press and Postmedia were featured in multiple dailies across Canada. Overall, media coverage tended to focus on the statements made yesterday by Commissioner Paulson, Public Safety Minister Ralph Goodale and former RCMP members Janet Merlo and Linda Gillis Davidson, who were also a part of yesterday's press conference, as well as going into details about how the settlement process will work, how claims will be processed, amounts that will be owed, etc. Majority of articles, editorials/opinion pieces and comments/statements from stakeholders noted how yesterday's announcement was a positive step forward.*"[1]

[Editor's Note: Note[4] is included in the image above]

SCHEDULE B

Google Analytics for www.merlodavidson.ca

October 7 to November 23, 2016

Available data collected from Google Analytics indicate that the Independent Assessor's website is an effective source of information. A Google Adwords campaign was conducted between October 14 and November 14, 2016 to position the website with our target audience (see also Schedule C). Promotion of the website will be ramped up as we near the operational stage.

Here are the main statistics pertaining to the website:

Number of visits(October 8 to November 23, 2016)	5 127
Number of pages viewed	18 580
Number of pages per visit	3.62
New visitors	3 382
Returning visitors	1 745
Average number of visits per day	40
Visit average (minutes)	3.2

October 12-14: When the RCMP posted a notice on its website redirecting traffic to our own website, the number of visits increased to 600 visits per day.

Most read pages: English home page (4 483 visits)
Assert your rights (1 767 visits)

The number of returning visitors indicates their interest in following the updates to the website.

By far, most visits originate from Ottawa (1 680 visits, one out of every three visits). The other cities of origin, by decreasing order: Montreal (226), Vancouver (184), Calgary (141), Toronto (115), Surrey (111), Winnipeg (104).

SCHEDULE C

Google Adwords Campaign

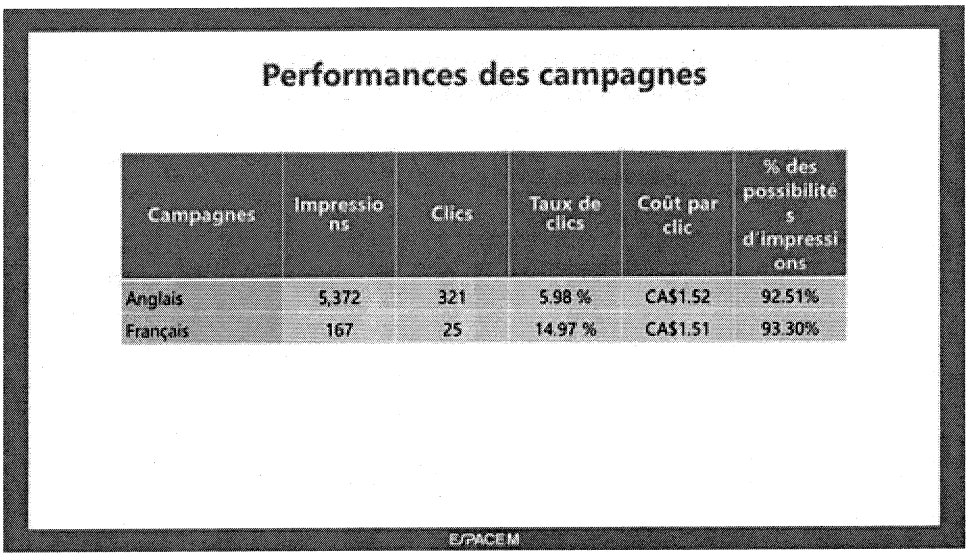
A Google Adwords campaign was conducted between October 14 and November 14 to position the website with our target audience.

Predictably, activity is significantly larger in English than in French, as were the statistics collected through Google Analytics.

This campaign increased the number of visitors. It was also very useful in identifying the most effective key words that we will introduce throughout the website for search engine optimization purposes.

The campaign will be re-activated before the Federal Court hearing.

Performance Report – SEM
Campaign period: October 14 to November 14



Performances des campagnes

Campagnes	Impressions	Clics	Taux de clics	Coût par clic	% des possibilités d'impressions
Anglais	5,372	321	5.98 %	CA$1.52	92.51%
Français	167	25	14.97 %	CA$1.51	93.30%

E/PACE M

Annonces les plus performantes - EN

Annonces textes	Impressions	Clics vers le site web	Taux de clic	Coût par clic
RCMP Class Action Are you a woman? www.merlocanada.ca Are you working or have you worked in the RCMP? Call toll free today.	3,547	199	5.61 %	CA$1.41
Class Action women RCMP Are you a member of the RCMP? www.merlocanada.ca Are you working or have you worked there? Call toll free today.	1,080	74	6.85 %	CA$1.91
Class Action women RCMP Do you work at the RCMP? www.merlocanada.ca Have you worked there? Call our toll free number today.	745	48	6.44 %	CA$1.33

ESPACE M

Annonces les plus performantes - FR

Annonces textes	Impressions	Clics vers le site web	Taux de clic	Coût par clic
Recours collectif femmes GRC Vous êtes membre de la GRC ? www.merlocanada.ca Vous y travaillez ou y avez déjà travaillé ? Appelez sans frais maintenant.	108	16	14.81 %	CA$1.52
Recours collectif femmes GRC Vous travaillez à la GRC ? www.merlocanada.ca Vous y avez déjà travaillé ? Informez-vous. Appelez sans frais dès aujourd'hui.	45	8	17.78 %	CA$1.49
Recours collectif GRC Vous êtes une femme ? www.merlocanada.ca Vous travaillez à la GRC ou y avez déjà travaillé ? Appelez-nous sans frais	14	1	7.14 %	CA$1.49

ESPACE M

Mots-clés les plus performants (Top10) - EN

Mots-clés	Clics	Impressions	CTR	Coût par clic moyen
class action lawsuit rcmp	61	985	6.19%	CA$1.89
rcmp class action lawsuit	32	267	11.99%	CA$0.98
rcmp harassment	28	1,350	2.07%	CA$1.37
RCMP Class Action	22	203	10.84%	CA$0.95
class action rcmp	21	269	7.81%	CA$1.92
law suit rcmp	17	225	7.56%	CA$1.01
rcmp harassment suit	16	485	3.30%	CA$2.05
merlo davidson	14	49	28.57%	CA$1.20
rcmp class action	13	96	13.54%	CA$2.29
Class Action RCMP	11	60	18.33%	CA$2.02

E/PACE M

Mots-clés les plus performants (Top10) - FR

Mots-clés	Clics	Impressions	CTR	Coût par clic moyen
Harcèlement GRC	13	103	12.62%	CA$2.25
merlo davidson	6	11	54.55%	CA$0.53
Recours collectif GRC	5	40	12.50%	CA$0.73
harcelement grc	1	5	20.00%	CA$1.61
Discrimination femmes GRC	0	0	0.00%	CA$0.00
Entente compensation financière femmes membres GRC	0	0	0.00%	CA$0.00
Femmes membres GRC indemnisation	0	0	0.00%	CA$0.00
Intimidation femmes membres GRC	0	0	0.00%	CA$0.00
Poursuite GRC	0	8	0.00%	CA$0.00

SCHEDULE D

Media Plan

A media plan was prepared by a specialized agency. This agency follows recognized, state-of-the-art best practices.

The advertising will be carried in major Canadian newspapers throughout the country and on Facebook.

Target audience

The approximate total number of RCMP female members or public service employees who presently work for or have in the past worked for the RCMP is 17 552:

- Between April 1, 1974 and 2015, the RCMP "newly hired" 7 940 female members.
- Between April 1, 1998 and 2015, the RCMP appointed 9 612 public service employees.

The number of female RCMP members or public service employees who were working for the RCMP as of November 1, 2015 is 11 691.

Why Newspapers?

- Well-suited to information-driven advertising.
- The ad can be cut out and retained by the Class Member or by a family member or friend and passed on to her.
- Major newspapers are credible and this credibility reinforces the credibility of the ad.
- Newspapers allow good market penetration, as well as good geographical selectivity.

According to Vividata, regular newspaper readers consume less social media than average.

Selection criteria

A total of 32 Canadian newspapers have been included in our campaign. They were selected according to the following criteria:

- Present in the major cities of all provinces.
- Circulation and number of readers are quantifiable and verifiable.
- Choice of media according to our targets :

- Globe & Mail and National Post – national coverage.
- Paid daily newspapers – wide reach and concentration in a given market.
- Free dailies (e.g. Metro) – reach a younger audience.

Facebook advertising

According to Vividata, 60 % of Canadian women aged between 18 and 65 are active users of Facebook[2]. Facebook will be particularly useful with the younger demographic:

18 - 34	**75%**
35 - 41	**68%**
45 - 54	63%
55 - 64	47%
55 +	32%
Total Canadian women on Facebook :	**60%**

Why Facebook ?

- Proven efficiency

The initial advertising is amplified by the distribution mechanisms that are specific to social media (i.e. " likes " and " shares "). The campaign's reach is therefore greatly amplified and optimized.

- Well targeted

The targeting capacity of social media ensures that our advertising will reach the intended audience. Our advertising will be specifically aimed at women.

[Editor's Note: Note[5] is included in the image above]

1 This does not concern showing pornography in the context of a criminal investigation.

2 This does not concern showing pornography in the context of a criminal investigation.

3 This does not concern showing pornography in the context of a criminal investigation.

4 Media snapshot, PSP Media Centre. Detailed analyses of the coverage is also available.

5 Compared to 25% of Canadian women on Linked-In, 22% on Twitter and 13% on Instagram.

End of Document

Parsons et al. v. Canadian Red Cross Society et al.

Kreppner et al. v. Canadian Red Cross Society et al.

[Indexed as: Parsons v. Canadian Red Cross Society]

2000 CanLII 22386 (ON SC)

49 O.R. (3d) 281
[2000] O.J. No. 2374
Court File Nos. 98-CV-141369 and 98-CV-146405

Ontario Superior Court of Justice
Winkler J.
June 22, 2000

Civil procedure -- Class proceedings -- Counsel fee -- Premium fee -- Lump sum counsel fee -- Whether fee fair and reasonable -- Criteria for determining whether court should approve counsel fee in class proceedings -- Class counsel applying for court approval of counsel fees after settlement of two class proceedings on behalf of individuals infected with Hepatitis C from Canadian blood supply -- Lump sum counsel fees of $15 million and $5 million respectively approved -- Class Proceedings Act, 1992, S.O. 1992, c. 6., ss. 32, 33.

Two class proceedings, the "transfused action" and the "hemophiliac action", under the Class Proceedings Act, 1992 ("CPA") were brought on behalf on all individuals in Canada, except for those in Quebec and British Columbia, who were infected with Hepatitis C from the Canadian blood supply during the period January 1, 1986 to July 1, 1990. There were concurrent class proceedings in Quebec and British Columbia. All the actions were settled by a pan-Canadian settlement agreement that was approved by the courts in Ontario, Quebec and British Columbia and that involved the federal government, which was a defendant, and the provinces and territories, which intervened for the purposes of joining the settlement. The

settlement provided for benefits to class members in a global amount of around $1.5 billion and for total class counsel fees of $52.5 million. Over 60 lawyers and legal staff were involved in bringing the proceedings to a conclusion. The class counsel groups in the transfused action applied for approval of a $15 million fee, and the class counsel groups in the hemophiliac action applied for approval of a $5 million fee respectively.

Held, the motion for approval should be granted.

The fixing of fees in a class proceeding is governed by ss. 32 and 33 of the CPA, under which the court may, amongst other things, approve a fee agreement or determine the fees. The CPA permits agreements for the payment of fees and disbursements only in the event of success in a class proceeding. Premium fees in a variety of forms, including a multiplier of a base fee or a lump sum fee, may be awarded to achieve the CPA objective of providing enhanced access to justice. The fairness and reasonableness of any fee awarded is to be determined by the degree of success achieved in light of the risk undertaken by the counsel in conducting the litigation.

In the instant litigation, class counsel produced the best possible result short of a trial. The features of the settlement that provided for individual claim administration and that provided for payments more advantageous to class members than the payment approach commonly applied to personal injury tort litigation enhanced the result and demonstrated the thoroughness of class counsel in fashioning a satisfactory settlement.

As for the risk factor, in the context of the CPA, the fees for undertaking risk in litigation means that there should be a reward for taking on meritorious but difficult matters, and the instant case fell within this category. Although there were political overtones to the litigation because of the involvement of the governments, the risks attendant to litigation generally were present. More to the point, the evidence established that the settlement was driven by the threat of litigation and not by political considerations. The settlement negotiations were litigious as evidenced by the

2000 CanLII 22386 (ON SC)

length of time and effort taken to reach a binding agreement. The negotiations were logistically difficult, intense, time-consuming, adversarial, and hard fought. The logistical complexity was overwhelming. The insistence of the government that there be one pan-Canadian settlement of all of the actions meant that any settlement attained required approval of 14 governments, each with differing political agendas and policies, and the class counsel groups in the various actions had their own internal disputes and were by no means speaking in a unified voice at all times. At various times "deal breaking" issues surfaced and the success of the negotiations hung in the balance. And there was no merit in the argument that the risks diminished with time as the negotiations progressed. The expert report filed to support the argument of diminished risks was fundamentally flawed. The probability of success in any litigation cannot be fixed with mathematical precision at any stage of a proceeding. Class proceedings by their nature introduce several features that bear on counsel's risk and that distinguish class proceedings from ordinary litigation. There is the risk that the court will not approve the settlement. There is the risk that the defendant may extend the negotiations and exhaust the resources of class counsel before a settlement can be approved. In the instant case, the evidence was that the risk was increasing as the negotiations continued up until the final judgment was entered. The risk in the instant case was at the high end of the scale of risk.

The fees sought in the two actions were fair and reasonable, and the defendants and intervenors did not put forward any principled or evidentiary basis for reducing the fees. While the fees being sought were substantial, the quantum, in and of itself, does not provide a basis for attacking the fee. The test is whether the fees are fair and reasonable in the circumstances. The policy of the CPA was not to limit the amount of fees but to provide an incentive to counsel to pursue class proceedings where absent such an incentive the rights of victims would not be pursued.

The fairness and reasonableness of the fee can be assessed by a variety of corroborating tests. These involve, variously, testing the fee as a percentage against recovery, as a multiple

2000 CanLII 22386 (ON SC)

of base fees, as against the retainer agreements and whether, in the circumstances, the fee will provide sufficient incentive for counsel to take on difficult cases in the future. On the basis of these tests, the fees, although large, were reasonable. Additionally, the fees compared favourably with the fees awarded in other major class proceedings in Canada and the fees would not impair the sufficiency of the trust fund established to provide benefits for class members. Given the risk undertaken and result achieved by class counsel in this litigation, the lump sum contemplated in the retainer agreements were fair and reasonable and accordingly should be approved.

2000 CanLII 22386 (ON SC)

Cases referred to

Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998), 40 O.R. (3d) 83, 160 D.L.R. (4th) 186, 21 C.P.C. (4th) 272 (Gen. Div.); Doyer v. Dow Corning Corp., Que. S.C., Tingley J.S.C., September 1, 1999 (unreported); Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417, 167 D.L.R. (4th) 325, 39 C.C.E.L. (2d) 253, 27 C.P.C. (4th) 114 (C.A.); Harrington v. Dow Corning Corp., [1999] B.C.J. No. 320 (S.C.); Maxwell v. MLG Ventures Ltd. (1996), 30 O.R. (3d) 304, 3 C.P.C. (4th) 360 (Gen. Div.); Nantais v. Telectronics Proprietary (Canada) Ltd. (1996), 28 O.R. (3d) 523, 134 D.L.R. (4th) 470, 7 C.P.C. (4th) 189 (Gen. Div.); Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572 (S.C.J.); Pelletier v. Baxter Health Care Corp., [1999] Q.J. No. 3038 (S.C.); Serwaczek v. Medical Engineering Corp. (1996), 3 C.P.C. (4th) 386 (Ont. Gen. Div.); Windisman v. Toronto College Park Ltd. (1996), 3 C.P.C. (4th) 369 (Ont. Gen. Div.)

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 32, 33
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Authorities referred to

Ontario, Report on Class Actions (Ontario Law Reform

Commission, 1982), pp. 135-38
Ontario, Report of the Attorney General's Advisory Committee on Class Action Reform (February, 1990), p. 20

MOTION for the approval of counsel fees in class proceedings under the Class Proceedings, 1992, S.O. 1992, c. 6.

Harvey T. Strosberg, Q.C., Heather Rumble Peterson and Patricia A. Speight, for plaintiffs, Diana Louise Parsons et al.
Terrence J. O'Sullivan and Vanessa Jolles, for plaintiffs, James Kreppner et al.
Richard F. Horak and M. Michle Smith, for defendant, The Queen in Right of Ontario.
Michel R. Lapierre, for defendant, Attorney General of Canada.
Beth Symes, for Thalassemia Foundation of Canada, friend of the court.
William P. Dermody, for intervenors, Hubert Fullarton and Tracey Goegan.
Janice E. Blackburn, for Canadian Hemophilia Society, friend of the court.

[1] WINKLER J.: -- This is a motion for approval of the counsel fees in two companion class proceedings, Parsons et al. v. The Canadian Red Cross Society et al. (the "transfused action") and Kreppner et al. v. The Canadian Red Cross Society et al. (the "hemophiliac action") commenced under the Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA"). These actions were brought on behalf of all individuals in Canada, except for those in the provinces of Quebec and British Columbia, who were infected with Hepatitis C from the Canadian blood supply during the period of January 1, 1986 to July 1, 1990. There are concurrent class proceedings before the courts of Quebec and British Columbia for individuals in those provinces. The parties in all of the class proceedings across Canada have entered into a pan-Canadian settlement of the litigation. In reasons released on September 22, 1999, I approved the

2000 CanLII 22386 (ON SC)

settlement as it applied to the national classes in the transfused action and the hemophiliac action. The settlement has also been approved by the courts in Quebec and British Columbia as it relates to the actions in those provinces.

[2] The settlement agreement was presented to the courts for approval by all of the parties to the litigation. It contemplated payment of total class counsel fees for all of the actions in the amount of $52.5 million. That figure was used in the actuarial calculations in order to permit the courts to assess the settlement and the sufficiency of the trust fund established for the payment of claims to the class members in the litigation. The Ontario class counsel groups in the transfused action and in the hemophiliac action now bring this motion for the approval of their fees specifically.

2000 CanLII 22386 (ON SC)

Background

[3] The defendants in the Ontario class actions are the Canadian Red Cross Society ("CRCS"), Her Majesty the Queen in Right of Ontario and the Attorney General of Canada. In addition, all other provinces and territories of Canada, with the exception of British Columbia and Quebec, intervened for the purposes of joining the settlement. Only the governments participated in the settlement, the proceedings against the CRCS having been stayed as a result of an order of Mr. Justice Blair in respect of ongoing proceedings concerning the CRCS under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA").

[4] The transfused action and the hemophiliac action were commenced as a result of the contamination of the Canadian blood supply with the Hepatitis C virus ("HCV") during the 1980s. The classes in the actions, however, are described more narrowly as those persons infected by HCV from the blood supply between January 1, 1986 and July 1, 1990.

[5] The classes are confined to the 1986-90 time period because of the basis of the claims asserted in the actions. During the class periods, the CRCS was the sole supplier and distributor of whole blood and blood products in Canada. The

federal, provincial and territorial governments ("FPT governments") provided funding to the CRCS and staffed an overseer committee known as the Canadian Blood Committee ("CBC") which was composed of their representatives. The claims in these actions are founded on the decision by the CRCS, and its overseers the CBC, not to conduct testing of blood donations to the Canadian blood supply after "surrogate" testing for HCV became available and had been put into widespread use in the United States. It was alleged by the plaintiffs in both actions that had the defendants taken steps to implement the surrogate testing, the incidents of HCV infection from contaminated blood and blood products would have been reduced by as much as 75 per cent during the class period. Consequently, the plaintiffs brought actions on behalf of the classes described above in which claims were asserted in negligence, breach of fiduciary duty and strict liability as against all of the defendants.

[6] As a result of the pan-Canadian settlement agreement, these claims have been settled, although without any admission of liability on the part of any of the defendants. Pursuant to the terms of the settlement agreement, the class counsel in each of the actions now seek court approval of their fees. This motion is in respect of the fees in the class actions commenced in Ontario on behalf of the national classes. Similar motions have been brought in the actions in British Columbia and Quebec.

[7] The motion was heard over a three-day period during which submissions were made by or on behalf of the class counsel in both actions, by counsel for the federal and Ontario governments and by counsel for certain intervenors and friends of the court. In addition, the parties filed affidavit evidence, transcripts of the cross-examinations on the affidavits and, in the case of the federal and Ontario governments, a document which was purported to be an expert's report in respect of fees. The author of this report was cross-examined and a transcript of the cross-examinations was included in the record.

[8] It was apparent at the conclusion of this extensive

2000 CanLII 22386 (ON SC)

hearing that there is agreement among all of the participants with respect to certain facts. These are as follows:

1. The settlement agreement contemplates that total lawyers fees in the Ontario, Quebec and British Columbia actions may amount to $52.5 million. There will be no impact on the sufficiency of the fund to provide the benefits to the claimants set out in the agreement so long as the counsel fees do not exceed this amount.

2. All participants are of the view that class counsel conducted the litigation in a skilful and effective manner and achieved an excellent result for the class members through the negotiated settlement.

3. There is no issue with the total number of hours docketed by class counsel during the proceedings, nor is there any issue with respect to the number of law firms or lawyers engaged in negotiating this settlement on the part of the plaintiffs.

4. The factual account of the conduct of the negotiations as set out in the affidavits of the class counsel group are accepted as being accurate.

5. All participants acknowledge that the class counsel are entitled to a fair and reasonable fee.

[9] Where the defendants and the intervenors part company with class counsel is in respect of the characterization of what, in principle and quantum, constitutes a "fair and reasonable fee".

Law

[10] The fixing of fees in a class proceeding is governed by ss. 32 and 33 of the CPA. These sections provide in pertinent part:

32(1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in

2000 CanLII 22386 (ON SC)

writing and shall,

(a) state the terms under which fees and disbursements shall be paid;

(b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

(c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

. . . . .

(4) If an agreement is not approved by the court, the court may,

(a) determine the amount owing to the solicitor in respect of the fees and disbursements;

(b) direct a reference under the rules of court to determine the amount owing; or

(c) direct that the amount owing be determined in any other manner.

33(1) Despite the Solicitors Act and An Act Respecting Champerty, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.

(2) For the purpose of subsection (1), success in a class proceeding includes,

(a) a judgment on common issues in favour of some or

2000 CanLII 22386 (ON SC)

all class members; and

(b) a settlement that benefits one or more class members.

[11] The leading Ontario case on the quantification of appropriate fees in class proceedings is Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417, 167 D.L.R. (4th) 325 (C.A.). Goudge J.A., writing for the court, addressed the purpose of awarding premium fees in respect of successful class proceedings. He stated at pp. 422-23:

> [A] fundamental objective [of the CPA] is to provide enhanced access to justice to those with claims that would not otherwise be brought because to do so would be prohibitively uneconomic or inefficient. The provision of contingency fees where a multiplier is applied to the base fee is an important means to achieve this objective. The opportunity to achieve a multiple of the base fee if the class action succeeds gives the lawyer the necessary economic incentive to take the case in the first place and to do it well. However, if the Act is to fulfill its promise, that opportunity must not be a false hope.

(Emphasis added)

[12] Although the issue before the Court of Appeal in Gagne involved a premium fee in the form of a multiplier of a base fee, it has been held that this is not the only acceptable form of premium fee arrangement in class proceedings conducted under the CPA: see Nantais v. Telectronics Proprietary (Canada) Ltd. (1996), 28 O.R. (3d) 523, 134 D.L.R. (4th) 470 (Gen. Div.); Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998), 40 O.R. (3d) 83, 160 D.L.R. (4th) 186 (Gen. Div.).

[13] Notwithstanding the different forms that a premium fee arrangement may take, the principle enunciated by Goudge J.A. regarding the purpose of awarding premium fees in a class proceeding has a general application. If the CPA is to achieve the legislative objective of providing enhanced access to

2000 CanLII 22386 (ON SC)

justice then in large part it will be dependent upon the willingness of counsel to undertake litigation on the understanding that there is a risk that the expenses incurred in time and disbursements may never be recovered. It is in this context that a court, in approving a fee arrangement or in the exercise of fixing fees, must determine the fairness and reasonableness of the counsel fee. Accordingly, the case law that has developed in Ontario holds that the fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the solicitor in conducting the litigation and the degree of success or result achieved: see Maxwell v. MLG Ventures Ltd. (1996), 30 O.R. (3d) 304, 3 C.P.C. (4th) 360 (Gen. Div.); Windisman v. Toronto College Park Ltd. (1996), 3 C.P.C. (4th) 369 (Ont. Gen. Div.); Serwaczek v. Medical Engineering Corp. (1996), 3 C.P.C. (4th) 386 (Ont. Gen. Div.). This approach was approved by Goudge J.A. in Gagne where he stated at p. 423:

> In my view, [it is correct to focus] on these two considerations. Section 33(7)(b) makes clear the relevance of "the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success". Section 33(9) invites a consideration of the manner in which the solicitor conducted the proceedings.

Analysis

[14] In my view, there are a variety of methods that may be utilized under the CPA to determine an acceptable premium on fees. It is appropriate to utilize this flexibility in fixing the fees in class proceedings where necessary. Here, class counsel seek to have their fees fixed on a lump sum basis pursuant to the retainer agreements with the representative plaintiffs and the provision in the settlement agreement. While this is acceptable in form, in my view, the court must still adhere to the principles discussed in Gagne in assessing the fairness and reasonableness of the counsel fee, whether that fee is calculated on a lump sum basis or otherwise.

A. Result achieved in the litigation

2000 CanLII 22386 (ON SC)

[15] I will deal first with the success or result achieved in the instant litigation. I note in passing that one of the most striking aspects of the fee hearing was the number of issues upon which all participants expressed agreement. As stated above, it was common ground that an excellent result was obtained for the class members through the negotiated settlement of the litigation.

[16] Nonetheless, the court, in fulfilling its role in the approval of fees, must form its own view of the success achieved. The characterization of the result by the parties and other participants is but one factor to be considered. The court's analysis must be objective. In this regard, I concluded in approving the settlement that class counsel have produced the best possible result short of trial: see Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572 at para. 91. Moreover, the settlement provides for payments according to the degree of harm suffered by the class members, as well as for progressive increases in those payments to class members should their condition worsen. This avoidance of the "once and for all" lump sum payment approach commonly applied in personal injury tort litigation entails an overriding advantage for class members and consequently must augur favourably for class counsel in any considered analysis of the result.

[17] From the perspective of the class members, however, the total compensation or nature of payment cannot be the only criterion on which to judge the result obtained through settlement. Significant weight must also be given to the relative ease or difficulty of access to the benefits achieved through the settlement by a class member: see also Gagne at p. 425. In this case, a procedure for claims administration has been wrought into the settlement that will see most class members able to obtain compensation without the need for further legal assistance or proceedings. This contrasts favourably with many class proceedings where, despite a global settlement, class members are still required to engage in extensive legal proceedings to obtain the benefits. The relative ease of access to compensation is an important feature. It provides some certainty as to the quantum of compensation that class members will receive at each level, but

2000 CanLII 22386 (ON SC)

more so, it demonstrates the thoroughness of class counsel in fashi oning a satisfactory settlement.

B. Risk undertaken by class counsel

[18] I turn now to the risk factor. In the context of the CPA, the premium on fees for undertaking risk in litigation means that there should be a reward for taking on meritorious but difficult matters. Conversely, this does not mean that there should be a reward for bringing forward speculative cases of dubious merit. In my view, the instant matter falls squarely into the first category. Nonetheless, it was strongly contended by the defendants and intervenors that the extra-legal considerations at play in these actions mitigated the risk. The underlying premise for this submission was that this was not litigation in the ordinary sense because the government defendants were inclined to settle for policy and political reasons that had little or nothing to do with the merits of the litigation or the vigorous manner in which it was being pursued. Accordingly, the defendants and intervenors took the position that the risks attendant to litigation generally were not present here. I disagree.

[19] It was common ground among the parties that there were political overtones to the litigation. Nonetheless, to accept the proposition that any extra-legal influence reduced the risk of the litigation would be to engage in a purely speculative, after the fact interpretation of the events that transpired during the course of this litigation. But, more to the point, this proposition is contradicted by the evidence. It is clear that this settlement was driven by the threat of litigation and not by political considerations. This is demonstrated by the chronology of the events, set out in the chart below, leading up to the announcement by the federal, provincial and territorial governments ("FPT governments") on March 27, 1998 that a fund of $1.1 billion would be set aside to satisfy the claims of those persons infected by HCV from the blood supply:

	DATE	EVENT
1.	June 21, 1996	Quebec transfused class action is filed.

2000 CanLII 22386 (ON SC)

2.	September 9 to 11, 1996	The FPT governments announced their decision declining compensation to blood victims.
3.	December 19, 1996	The British Columbia transfused class action is commenced.
4.	October 24, 1996	The FPT Health Ministers announce that they have decided against compensation.
5.	May 22, 1997	The British Columbia transfused class action is certified.
6.	July 7, 1997	There is an agreement on lead counsel for the Ontario HCV class action.
7.	September 16, 1997	Notice of the Ontario transfused class action is given to Ontario and the other provincial governments.
8.	November 26, 1997	The final report of the Krever Inquiry is released.
9.	February 10, 1998	The statement of claim in the Ontario transfused class action is issued on behalf of a national class.
10.	February 23, 1998	The Quebec transfused class action is certified.
11.	March 27, 1998	On behalf of the FPT Ministers of Health the Honourable Allan Rock announces a financial assistance package to persons infected with HCV between 1986 to 1990 of up to $1.1 billion.

[20] It can be seen from this sequence of events that the FPT governments did not make any overtures toward compensating defendants until class proceedings had been certified in British Columbia and Quebec and there was a potential for

2000 CanLII 22386 (ON SC)

certification of a national class encompassing all those persons in the rest of Canada in the Ontario proceedings. It must also be noted that even though the announcement of March 27, 1998 could hardly be considered a formal binding offer of settlement, it was only intended to apply to those persons included in the class proceedings. The litigious nature of the settlement negotiations is further evidenced by the length of time and effort taken to reach a binding agreement. Even then, there were still numerous conditions attached because of the desire of the FPT governments to have one pan-Canadian settlement for all of the actions. Furthermore, there has never been any admission of liability by the defendants. Indeed the final settlement agreement contains a specific disclaimer of liability.

[21] The evidence of Douglas Elliot, a member of the class counsel group, is instructive. Mr. Elliot is a highly experienced lawyer in blood litigation in Canada. As a result of his involvement with the issues surrounding the Hepatitis C litigation and his participation at the Krever Commission inquiry, he attempted to assemble a counsel group to prosecute a class proceeding on behalf of those infected with HCV from the blood supply.

[22] In his affidavit, Mr. Elliot chronicles three years of unsuccessful attempts to find counsel in Ontario willing to lead and participate in a class proceeding related to the HCV problems stemming from the contamination of the Canadian blood supply. He deposed that it was difficult to find any law firm, large or small, willing to take on the litigation, especially in the role of lead counsel. It is his evidence that none of the counsel he approached regarded the potential political considerations as altering the fundamentally litigious nature of these proceedings. Their rejections were based strictly on the legal problems which the case presented. He states in para. 41 of his affidavit:

> 41. I believe that there were few lawyers who were knowledgeable about the operation of the blood system in Canada to begin with, and many regarded tainted-blood cases on behalf of plaintiffs as unattractive owing to their

2000 CanLII 22386 (ON SC)

> complexity and their prohibitive costs. The trial in Pittman, which was by this time completed, had lasted almost one year. To put the matter simply and directly, the lawyers to whom I spoke well understood that, in relation to this class action and the complex issues of liability, there were simply much easier ways to earn a living. And so they declined to become involved.

His evidence in this respect was not challenged by the defendants or intervenors. In the result, I must conclude that any suggestion that the political implications of the issues made the litigation less risky, apart from being inaccurate, was not apparent to most of the lawyers in Ontario at the outset of the litigation.

[23] In consideration of the chronology of the events in this litigation and the uncontested evidence of Mr. Elliot, I am unable to accept the contention that political considerations operated to either transform this litigation or diminish the risk associated with it in any material way.

[24] This leads in turn to another argument that was advanced by the government defendants. They contended that, even if the proceedings were considered to be litigation in the ordinary sense, the inherent risks diminished with time as the negotiations progressed. In consequence, they submit that any premium on the fee should reflect this diminishing risk. In support of this proposition, these defendants filed the report of Michael Ross, a vice-president of the accounting film KPMG. Mr. Ross, in accordance with his instructions, attempted in his report to apply mathematical parameters, including a factor for changing risk, to the determination of an appropriate counsel fee in a class proceeding. However, this report was less than helpful, in part because of the flaws in the underlying premise that the risk factor in litigation can be ascertained with mathematical precision, and in part because of his fundamental misconception of the nature of a class proceeding and the CPA.

[25] That said, I realize that Mr. Ross was given an impossible task. His assignment was, in reality, to attempt to define a subject with more precision than the subject would

2000 CanLII 22386 (ON SC)

bear. As Goudge J.A. stated in Gagne, the fixing of an appropriate fee in a class proceeding is "an art, not a science". As such, the court must be wary of attempts to measure appropriate fees by the application of pseudo-scientific or mathematical methods. Such an approach is inherently unreliable when a subject with as many variables as this litigation is considered.

[26] Mr. Ross based his evidence on the premise that the premium on a fee should be reflective of the "judgmental probability of success" in the litigation. In his opinion, the amount of the premium over the ordinary fees should be a reciprocal of the risk of the litigation. As a theoretical example, this would ensure that counsel taking on litigation with an estimated 50 per cent probability of success would not suffer any economic prejudice if the fee earned in the successful actions was multiplied by a factor of two. For every two actions, one unsuccessful, one successful, that counsel undertake, the fees would balance out and there would be no loss.

[27] This mathematical approach is fundamentally flawed. The probability of success in any litigation cannot be fixed with mathematical precision at any stage of the proceeding. The vagaries of litigation simply do not permit it.

[28] Mr. Ross also propounded the theory that the risk of the litigation changed as it progressed and that, therefore, the premium should reflect the changing risk. While there may be some truth to the assertion that the risk of litigation changes over the course of the proceeding, it must be considered that changes can occur which both diminish and exacerbate risk at different points in the litigation. There is no more prospect of assigning a precise mathematical value to the risk on a segmented, progressive basis than there is at the outset of the litigation.

[29] Moreover, class action litigation introduces additional complications. Complex class actions subsume the productive time of counsel. The risk undertaken by counsel is not merely a function of the probability of winning or losing. Some

2000 CanLII 22386 (ON SC)

consideration must also be given to the commitment of resources made by the class counsel and the impact that this will have in the event the litigation is unsuccessful. Winning one of two class actions may be a reasonable hallmark of success. However, for the lawyer who's first action turns out to be a loser, the complete exhaustion of resources may leave him or her unable to conduct another action. Thus the real risk undertaken by class counsel is not merely a simple reciprocal of the "judgmental probability of success" in the action, even if that calculation could be made with any degree of certitude. There is a point in complex class action litigation where, degree of risk notwithstanding, class counsel may truly be, as Mr. Strosberg put it in his submissions, "betting his or her law firm". This must be considered in assessing the "risk" factor in regard of the appropriate fee for counsel.

[30] Equally troubling is the fact that Mr. Ross did not consider the unique features of the CPA in formulating his theory regarding the "judgmental probability of success". This was apparent from the transcript of his cross-examination. For example, it was clear that Mr. Ross did not appreciate the risk induced into class action litigation by the additional element of the requirement to attain certification. In the result, the probability of success or failure on the certification motion was not a factor that Mr. Ross considered. This is a significant omission if his fee theory is to be applied to class proceedings. More importantly, it is illustrative of the inherent unreliability of this evidence and, further, is indicative that Mr. Ross is offering an opinion to the court that is clearly outside his area of expertise.

[31] In the result, I conclude that the report of Mr. Ross is of no value in determining either the risk assumed by class counsel or the reasonableness of the fee in these actions.

[32] The government defendants chose to rely heavily on this report and did not offer any other evidence on the assessment of the risk involved in the litigation. They did not file affidavits from any member of the counsel group that were involved in the negotiations on behalf of the governments, nor did they provide any evidence from any person at a senior

2000 CanLII 22386 (ON SC)

administrative level in the governmental departments responsible for the litigation. Instead, the government defendants conceded that the accounts of the negotiations proffered by the affiants deposed on behalf of the class counsel group were accurate. Interestingly in this regard, the government defendants chose to file as part of their evidence the affidavits of class counsel in the British Columbia and Quebec actions.

[33] A picture emerges from the affidavits proferred by class counsel and the government defendants of negotiations that were logistically difficult, intense and time-consuming, adversarial and hard fought. There were obvious points at which potential "deal-breaking" issues surfaced and the success of the negotiations hung in the balance. The various affiants cite examples.

[34] Bonnie Tough, the lead counsel for the hemophiliac action, states in her affidavit:

> 107. There was throughout the negotiations and even following the Framework Agreement in December of 1998 the risk that one or more governments would not approve the settlement. It was never clear to me the extent to which the various provinces and territories were represented at the negotiating table. It was clear that to the extent they were represented by one or more lawyers, those lawyers were without authority to conclude a deal.
>
> 108. Even within the governments, it was not clear who was instructing the lawyers, i.e. Attorneys' General, Department of Justice, Ministries of Health, Cabinet, Treasury Boards, etc. I was concerned that the successful conclusion of any deal depended upon the attitudes and conduct of a phantom group with whom I was not directly speaking. I did not know the extent to which political differences might influence the acceptance or rejection of any settlement. Changes in governments throughout the time only exacerbated this concern.

[35] Heather Peterson, a member of the class counsel group in

2000 CanLII 22386 (ON SC)

the transfused action, states in her affidavit:

> 78. During [the] last stages of negotiations additional issues arose, some of which also threatened to undermine the negotiations. Two of the most serious examples come to mind:
>
> (a) The Framework Agreement provides . . . that the [Settlement] Fund would generate interest as if the amount had been notionally invested at the interest rate paid "from time to time on Long Term Government of Canada Bonds from April 1, 1998 for the duration of the Plan." However during negotiations, the federal government took the position that only the T-bill rate should be paid. Class Action Counsel took the position that maintenance of this position by the FPT governments would be a "deal breaker".
>
> (b) On or about May 9 and 10, 1999, at a negotiation meeting in Vancouver, the FPT Governments raised the prospect of including in the settlement persons who had contracted HCV from immune globulins. The Framework Agreement and all of the ensuing negotiations until that date had not included any reference at all to this group.
>
> . . . [the Ontario government] took the position that [it] wished to be finished with all HCV blood litigation and thus wanted persons who contracted HCV from immune globulins in the Class Period included in the settlement. Strosberg's response was that there was simply no basis to include these persons in the plaintiffs' class. The end of these discussions came on May 13, 1999 at the Toronto offices of McCarthy Tetrault . . . [when] Strosberg told counsel to the FPT Governments that their insistence upon including recipients of immune globulins in the class was a "deal breaker," that it was their choice, but under no circumstances would he accept this group in the class. Strosberg intended to break off negotiations if the FPT Governments did not yield on the issue. Strosberg and I left that session uncertain as to whether negotiations had broken down. Thankfully, the FPT Governments eventually relented.

[36] It is apparent from the record that even though this

2000 CanLII 22386 (ON SC)

litigation was conducted from the middle of 1998 forward as a negotiation toward a settlement, the risks assumed by class counsel were no less real at any point than if that time had been devoted to a disposition through a trial process.

[37] In addition, the legislation enabling class proceedings introduces several features that distinguish these actions from ordinary litigation. One aspect that bears on the risk inherent in class actions is the requirement of court approval of any settlement reached. Protracted negotiations involve a commitment of the time and resources of counsel and the litigants. However, in a class proceeding, a court will not approve a settlement that it does not regard as being in the best interests of the class, regardless of whether class counsel take a different view. Thus, class counsel may find themselves in the position of having committed time and resources to the negotiation of a settlement, that they believe is in the best interests of the class, only to find that the court will not approve the settlement achieved. While this creates a risk simpliciter, it also creates an advantage for a defendant who can successfully extend the negotiations to the point that class counsel's resources are exhauste d before making a "final settlement offer" that may not ultimately receive court approval. In those cases, class counsel may have exhausted their resources attempting to obtain a reasonable settlement only to find themselves, as a consequence, unable to pursue the litigation. Accordingly, the risk in a class proceeding is not merely a function of whether or not litigation is anticipated and whether or not that litigation will be successful. Rather, there are risks inherent in the adoption of, and commitment to, any particular strategy for achieving a resolution.

[38] In view of the foregoing, I am unable to accept the contention that there was less risk in this proceeding merely because the parties chose to proceed down a negotiation route. Moreover, contrary to the submissions made by certain of the intervenors, it is apparent that the time and resources committed to the negotiations by the class counsel meant that the risk was increasing rather than decreasing as the negotiations continued. As the parties moved toward a

2000 CanLII 22386 (ON SC)

settlement, the negotiations became more difficult as the issues narrowed with the result that the risk of an insurmountable impasse increased rather than diminished. This made the negotiations more perilous as they progressed. In that respect, one need look no further than to the actual settlement approval process which required a review of the settlement by this court. In order to obtain the approval of this court, modifications were required to the settlement agreement. Although the court took the view that these modifications were "non-material" as that term was set out in the agreement, the federal government took a different view, as related in the affidavit of Ms. Peterson. She deposed as follows:

> 92. After Mr. Justice Winkler's [sic] delivered his reasons on December 22, 1999 counsel for the federal government and counsel for Ontario asserted orally that the modifications he had suggested and the reasons were indeed "material differences".
>
> 93. After delivery of Mr. Justice Winkler's reasons, counsel for the federal government urged class action counsel to join with him in attempting to persuade Mr. Justice Winkler that his suggested modification relating to the surplus should be abandoned. He told us that if we did not agree he would recommend to the federal government to take issue at Mr. Justice Winkler's suggested modification. He said that, in his opinion, the modification was a "material difference" and that, therefore, there was not court approval of the settlement agreement. He urged class action counsel to make those fundamental choices before the telephone conference he was having with the FPT Deputy Ministers of Health to be held on October 14, 1999. Strosberg believed strongly that the FPT governments would ultimately accept the three modifications proposed by Mr. Justice Winkler. Class action counsel deferred to Strosberg's political judgement and did not agree with counsel for the federal government, and ultimately the FPT govern ments consented to the three modifications. Even after the delivery of Mr. Justice Winkler's reasons, then, fundamental tactical decisions were required and considerable uncertainty remained over whether or not there was actually a settlement.

2000 CanLII 22386 (ON SC)

(Emphasis added)

Clearly the risk continued up until the final judgment was entered.

[39] There was an additional submission by one of the intervenors that despite the fact that there may have been risk associated with the negotiations, there was a general cooperative tenor to the negotiations that lessened the risk. I cannot accede to this submission for several reasons. First, it is contrary to the evidence. J.J. Camp, lead counsel for the class in the British Columbia action, whose affidavit was filed on this motion by the federal government, deposed:

> 95. On July 9, 1998 I had an extensive telephone conference with [government counsel] during which they proposed a new counter offer. The tenor of the discussion at times became quite acrimonious with both sides alleging how disappointed they were with the position of the other . . .

This is echoed in the affidavit of Bonnie Tough, lead counsel for the class in the hemophiliac action. She states:

> 79. Finally, in November of 1998, there was a meeting in Ottawa with Transfused Class Counsel, Hemophilia Class Counsel and counsel for the governments. The meeting was acrimonious and ended with all parties walking from the table in frustration.

[40] But, in any event, risk is not synonymous with acrimony in a negotiation process. Even if the tenor of the negotiations changed somewhat for the better after certain points of contention were resolved, there is nothing in the record which would indicate that these negotiations were anything less than hard fought to the end. As such, they were capable of being derailed at any point, regardless of the level of acrimony between the participants. Indeed, the federal government chose to characterize the negotiations in exactly this manner in its submissions to the court on the settlement approval motion. As stated in the factum filed on that motion by counsel for the

2000 CanLII 22386 (ON SC)

federal government:

106. It is common ground between the parties that the agreement was reached only after an excess of a year of hard fought negotiations between the Parties.

. . . . .

108. The March 1998 announcement expressly contemplated that:

"details of assistance will be determined through a negotiation process submitted to the courts for approval. This should ensure fairness. Victims and their legal representatives will be part of this process."

Apart from this direction, however, Ministers [sic] merely outlined certain "principles" and "suggestions" for what the final negotiated arrangement would look like . . .

. . . . .

111. Further negotiations and an extensive drafting exercise took place subsequent to the Agreement in Principle which resulted in the Agreement before the court today. There can be no dispute but that the Agreement is the product of intense negotiations between counsel for the plaintiffs and FPT governments.

(Emphasis added)

[41] Further evidence of the tone of the negotiations, or at least the position taken by the parties, can be found in the affidavit of Ms. Peterson. She stated:

79. During the negotiations, counsel for the federal government occasionally observed that the option always remained for the FPT governments, or one or some of them, to legislate a program in place of a court-approved negotiation settlement within the framework of the class actions. This option was always a real and substantial risk for class action counsel and our counsel group.

2000 CanLII 22386 (ON SC)

. . . . .

81. Settlement was always dependant upon formal cabinet approval by all 14 FPT governments. During the negotiations, tensions were palpable among the FPT governments. Counsel for the various FPT governments at times asserted differing, disconsolate positions; so also did class action counsel. Through it all, it became clear to me that, from the FPT government side of the negotiating table, political considerations were as important as legal issues. The concerns about political ramifications was a constant risk, because there were numerous provincial elections and changes in provincial governments (including the creation of a new territory) in the course of the negotiations from April 1998 to October 1999.

[42] While I do not equate acrimony with risk, complexity, on the other hand, breeds risk in any proceeding. In this case, the logistical complexity was overwhelming. The insistence of governments that there be one pan-Canadian settlement of all of the actions meant that any settlement attained required approval of 14 FPT governments, each with differing political agendas and policies. Although obtaining approval from this group alone was daunting enough, the class counsel groups in the various actions on the other side of the bargaining table were by no means speaking in a unified voice at all times. In the transfused and hemophiliac actions in Ontario, the combined class counsel groups were comprised of over 60 lawyers and supporting legal personnel. In addition, the negotiations were played out against the backdrop of changes in the provincial and territorial governments, changes in the Ministers of Health for all of the governments, and political activism directed at attaining a universal settlement for all persons infected with HCV by blood in Canada, regardless of the date of infection. The expenditures of class counsel in terms of time and money were at risk of loss if any politician in authority decided as a matter of expediency or policy not to settle the class proceedings or decided to unilaterally institute a no-fault compensation program and thereby bypass class counsel and the litigation. There was always the inherent danger that the pan-

2000 CanLII 22386 (ON SC)

Canadian settlement would be impossible to achieve, either because of a reluctance on the part of a particular government or a class in a particular action to approve an agreement.

[43] The evidence is compelling. This litigation, notwithstanding the fact that it was conducted as a protracted negotiation, was redolent with risk. Moreover, in so far as it is appropriate to assess the risk assumed by class counsel on a sliding scale or range depending on the nature of the action in comparison to other actions, I am satisfied that the risk enuring to class counsel in these actions should be considered to be at the high end of any such scale.

C. Fair and reasonable fee

[44] A fair and reasonable fee must be reflective of the risk undertaken by class counsel and the result attained for the class in the action. My analysis of those factors is set out in the foregoing. The next step is to determine, through their application, whether the fees being sought by the class counsel groups, $15 million in the transfused action and $5 million in the hemophiliac action, constitute fair and reasonable fees in the circumstances.

[45] In considering this, I cannot accede to the submissions of the various intervenors with respect to the fees. Taking their submissions as a group, the intervenors submitted that fees ranging between approximately $6 million and $11 million should be awarded in the transfused action. In the hemophiliac action, the range of the intervenors' submissions was from approximately $2 million and $3 million. Although the intervenors did not seriously question the allocation of lawyers and legal staff, they did attack the hourly rates of certain counsel. This attack lacked any evidentiary basis, however, and thus must be rejected. The second, and main, submission of the intervenors was that there was a diminution of risk either because of the political considerations or the fact that these proceedings were conducted as a negotiation rather than as a completely adversarial trial process. Since I have rejected these underlying propositions as being unsupported by the evidence, it follows that the submission

2000 CanLII 22386 (ON SC)

founded on them must be rejected as well.

[46] I have considerable difficulty with the submission of the government defendants on different grounds. While I have rejected the intervenors' submissions as founded on erroneous assumptions, there was, to their credit, an implicit acknowledgement, and application, within those submissions of the dual factors of result and risk to be considered in determining a fair and reasonable fee. In contrast, the government defendants submitted figures in respect of the fees that represented less than the monetary value of the docketed time of the class counsel groups. This submission was made despite the acknowledgement by the government defendants of the "high degree of competence of the class counsel" and the recognition of the satisfactory result attained for the classes. Further they took no issue with the hours expended by the class counsel groups, the number of counsel within those groups, or the class counsel evidence with respect to the difficulty of the negotiations. The fee proposed by the governments wa s arrived at by combining an arbitrary reduction of the hourly rates of the class counsel group and an addition of a premium of approximately 10 per cent of the reduced amount. If accepted, the net effect of the governments' submission would be to deprive class counsel of any premium, multiplier or reward of any nature reflecting risk or result.

[47] The position taken by the government defendants is untenable. Considered in the context of these proceedings, the fees they propose are not reflective of either the result obtained or the risk undertaken even if just one of those factors were to be considered in isolation. More so however, the fees proposed by the government defendants are at variance with the apparent underlying policy of the CPA and the interpretation of that policy by the Court of Appeal in Gagne.

[48] It was suggested by Mr. O'Sullivan, who appeared on behalf of the class counsel group in the hemophiliac action, that it was obvious that the government defendants' position was driven by political expediency rather than by a sincere effort to assist the court in determining an appropriate fee. In support of this analysis, he provided several press

2000 CanLII 22386 (ON SC)

clippings, including some culled from newspaper editions published during the three days of this hearing, that were critical of the fees being sought by the class counsel group. He suggested that the government position, when compared to the positions taken by class counsel and the intervenors, was so far outside the range of reasonableness that it could only be inferred that political, rather than legal considerations must be at play.

[49] Notwithstanding these submissions, it is not within the purview of the court's role on this motion to impute ulterior motives to any party and I make no finding in respect of the submissions of Mr. O'Sullivan. As I stated in my reasons regarding the settlement approval, "extra-legal concerns, even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review . . .".

[50] Nonetheless, the concern expressed over extra-legal considerations may well be symptomatic of a general lack of understanding of the legal framework in which these proceedings evolved. The court was invited to address this issue in these reasons by Mr. Dermody, counsel for the intervenors. He expressed a concern that there was a general misunderstanding regarding the nature of these proceedings that had the potential to create animosity between the class members, their counsel and the FPT governments which might, in turn, erode the salutary benefits of the settlement and reflect negatively on the fair compensation of counsel. This point is well taken.

[51] In addressing the issue, the starting point must be an understanding that the proceedings were litigious in nature and that the settlement offered by the FPT governments was driven by the prospect of an unfavourable determination, however probable or improbable, if the litigation proceeded to a conclusion. There is no evidence to support any assertion to the contrary. In the result, there was nothing untoward in the way that the government defendants or the class counsel groups conducted themselves in resolving the litigation. Hard bargaining is a fact of life in any high stakes negotiation. Outright capitulation from either side of the table is not a

2000 CanLII 22386 (ON SC)

realistic expectation. There were arguable defences and a legitimate question as to the ultimate liability of the governments. While recognizing that the victims had suffered a tragedy, the governments, as litigants, always had to bear in mind that they were the representatives of all of the people and the keeper of the public purse. The tension created b y these two concerns obviously complicated matters for the FPT governments and for the class counsel groups. Despite these complexities, the parties persevered through arduous negotiations and reached an agreement to settle the outstanding litigation within a legal framework.

[52] In recognition of the legal framework within which the settlement was negotiated, the agreement crafted speaks directly to the question of class counsel fees in that it stipulates a limit on those fees. All counsel agreed that the fees sought would not exceed $52.5 million in total. The details of the background negotiations that led to this provision are contained in the affidavits of the British Columbia and Quebec class counsel. The government elicited an agreement from the class counsel groups that they would not seek fees on the basis of a percentage of the total settlement and further, that the counsel group would agree to a cap on the total mount of fees. In addition to the other concessions extracted by the governments, counsel were required to surrender any fee agreements that they may have executed with individual class members. Mr. Camp deposes to this at para. 148:

> 148. Under my fee agreement, [the class counsel group] were entitled to charge up to one-third of the settlement amount attributed to the British Columbia class action. Quebec class counsel also had a percentage contingency fee agreement with their representative plaintiff. Class Counsel in both the Framework Agreement and the Settlement Agreement have waived their rights to seek recovery of class counsel fees based on a percentage of the settlement amount. Without doubt, in my opinion, the compromise by class counsel of their right to claim class counsel fees on the basis of percentage of any settlement or judgment, which in my case amounted to up to one-third, was a significant concession which assisted the

2000 CanLII 22386 (ON SC)

parties in coming to an agreement.

Mr. Lavigne similarly stated in his affidavit:

> 145. It should be noted that 166 of the 450 victims who are on the M.M.M.F. lists have agreed, by giving a written mandate, a copy of which is attached hereto, to pay a sum amounting to 20% of any amount that was obtained by a judicial process or negotiation process or by government compensation;
>
> 146. The client's expectations in this respect have been clearly established since 1995 and have always comprised a clear, plain and precise working basis for all of the people who came into contact with our firm;
>
> 147. This percentage agreement, which is entirely proper and legal in Quebec, has been set aside as regards a claim of 20% in the total amount of the settlement;
>
> 148. In the final quibbling during the negotiations that led to the Agreement of June 15, 1999, the applicant solicitors agreed to this additional concession, which was demanded by the governments, and particularly by the federal government, so that the Agreement could be concluded;
>
> 149. However, consideration for this was provided: that an agreement would be negotiated and concluded after the Agreement was signed to avoid any question of conflict of interest. Those negotiations have never taken place, and so it is impossible for us to take a position jointly with the respondents regarding the amount of the fees;

[53] A final agreement regarding fees was never negotiated. Nevertheless, in consideration of the negotiated surrender of the individual contingency fee agreements, the undertaking by class counsel not to seek a fee on a percentage basis and the express cap of $52.5 million on total fees, there is no other reasonable conclusion than that there was a tacit understanding between class counsel and the governments that this amount represented a fair and reasonable fee for counsel in the

2000 CanLII 22386 (ON SC)

circumstances.

[54] To put this in its proper context, it must be remembered that over 400 of the then identified class members in British Columbia and Quebec had negotiated individual contingency fee arrangements whereby they would have paid between 20 per cent and 33 per cent of any compensation received. This arrangement would produce a counsel fee of over $220 million, at a minimum, if extrapolated against the total settlement and the estimated class size as a whole. In comparison, the cap on fees negotiated by the governments is very favourable indeed.

[55] However, while this tacit agreement between the parties regarding fees is instructive, it is not in itself determinative. In order to arrive at the appropriate premium fee, "all the relevant factors must be weighed".

[56] The fees being sought are substantial. However, the quantum of a counsel fee, in and of itself, does not provide a valid basis for attacking the fee. The test in law, as set out in Gagne, is whether the fees are fair and reasonable in the circumstances. The legislature has not seen fit to limit the amount of fees awarded in a class proceeding incorporating a restrictive provision in the CPA. On the contrary, the policy of the CPA, as stated in Gagne, is to provide an incentive to counsel to pursue class proceedings where absent such an incentive the rights of victims would not be pursued. It has long been recognized that substantial counsel fees may accompany a class proceeding. To this effect, the authors of the Ontario Law Reform Commission's Report on Class Actions (1982) stated at pp. 135-38:

> Critics of class actions often compare the total amount of administrative costs and lawyer's fees with the amount of each class member's claim, and then suggest that these costs and fees have the effect of depriving class members of any significant recovery. However, a comparison of total costs and fees with an individual class member's claim gives a rather myopic view of the issue. A better sense of whether the costs and fees of a class action are reasonable can be achieved by determining the percentage of the class recovery

2000 CanLII 22386 (ON SC)

consumed by such costs and fees.

Empirical data also has been collected concerning the percentage of class recoveries consumed by lawyers' fees alone. [In the United States] the data collected . . . indicates that, in slightly more than fifty percent of the cases for which such information was available, lawyers' fees represented twenty-five percent or less of the recovery, while in only 10.7 percent of the cases did such costs exceed fifty percent of the recovery.

These percentages of class action awards consumed by lawyers' fees and administrative costs do not appear particularly unreasonable, given the complexity of class suits. Moreover, the figures revealed by the empirical studies do not appear to be out of line with the proportion of individual recoveries consumed by lawyers fees and disbursements in individual litigation in Ontario, if the Law Society of Upper Canada was correct in suggesting that Ontario clients tend to receive a "net recovery" reduced by fifteen to twenty-five percent.

In evaluating the fairness of lawyers' fees documented by the empirical studies, it is important to remember that, at least in the case of individually non-recoverable claims, any attempt to assert the claim through an individual suit would, by definition, consume 100 percent of the claim. Measured by this standard, the proportion of an individual class member's recovery consumed by class lawyers' fees in the United States does not appear inherently unreasonable. Moreover, in some cases, the costs of individual litigation may consume a substantial proportion of even those claims that are individually recoverable and, in such situations, the class action will also result in cost savings, even if the share consumed by lawyers fees remains substantial.

[57] The OLRC Report has been widely acknowledged to be the most sophisticated and extensive analysis of class actions undertaken in the world: see the Report of the Attorney General's Advisory Committee on Class Action Reform (Ontario, February 1990) at p. 20. The pragmatic approach it displays

2000 CanLII 22386 (ON SC)

towards counsel fees in class actions was based on careful study and analysis. It is significant that the authors of the report did not consider counsel fees representing 25 per cent of the total recovery "inherently unreasonable".

[58] However, the appropriateness of a premium fee, whether as a lump sum, as a percentage of the recovery or as a multiplier of a base fee must be assessed against the facts of each case. The adoption of any standard multiplier or percentage fee would undoubtedly result in fee awards that have little relation to the risk undertaken or the result achieved. This was recognized by Goudge J.A. in Gagne. To use these proceedings as an example, notwithstanding the OLRC Report and the typical awards in class proceedings, a fee based on 20 per cent or more of the recovery would be clearly excessive and represent a windfall for the counsel groups.

Disposition

[59] Class counsel in the transfused action and the hemophiliac action seek court approval of "lump sum fees" in the amounts of $15 million and $5 million respectively, and ask that the fees be fixed in those amounts, pursuant to written retainer agreements with the representative plaintiffs. This lump sum method of payment is expressly contemplated by s. 32(1)(c) of the CPA and by the settlement agreement, which provides at para. 13.03:

> The fees, disbursements, costs GST and other applicable taxes of Class Action Counsel will be paid out of the Trust. Fees will be fixed by the Court in each Class Action on the basis of a lump sum, hourly rate, hourly rate increased by a multiplier or otherwise, but not on the basis of a percentage of the settlement amount.

(Emphasis added)

[60] Moreover, it has been held that the contingency fee provisions of the CPA are not limited to a base fee and multiplier arrangement, but instead permit of fee arrangements of various types, including lump sums and as percentages of

2000 CanLII 22386 (ON SC)

recovery. In Nantais v. Telectronics Proprietary (Canada) Ltd., supra, Brockenshire J., in approving a lump sum fee, stated at p. 528:

> . . . the special provisions relating to "multipliers" for hourly rates [do not prevent], in any way, other arrangements as specifically authorized under s. 32(1)(c). I view s. 33(1) and (2) as permitting, despite other statutes, all kinds of fee arrangements contingent upon success, and not just hourly rate multipliers.

[61] In Crown Bay Hotel v. Zurich Indemnity Co. of Canada, supra, this court stated at p. 88:

> A contingency fee arrangement limited to the notion of a multiple of the time spent may, depending upon the circumstances, have the effect of encouraging counsel to prolong the proceeding unnecessarily and of hindering settlement, especially in those cases where the chance of some recovery at trial seems fairly certain. On the other hand, where a percentage fee, or some other arrangement such as that in Nantais, is in place, such a fee arrangement encourages rather than discourages settlement. . . . Fee arrangements which reward efficiency and results should not be discouraged.

[62] However, regardless of the manner in which a premium fee is awarded in a class proceeding, whether by lump sum or otherwise, to adopt the words of Goudge J.A. in Gagne, the premium must be one that "results in fair and reasonable compensation to the solicitors" having regard for the risk undertaken and the result achieved.

[63] In Gagne, Goudge J.A. set out a series of useful corroborating tests for analyzing the fairness and reasonableness of the fee. These involve, variously, testing the fee as a percentage against recovery, as a multiple of base fees, as against the retainer agreement and whether, in the circumstances, the fee will provide sufficient incentive for counsel to take on difficult cases in the future. As he stated at p. 425:

2000 CanLII 22386 (ON SC)

> In the end, [these considerations must result] in fair and reasonable compensation to the solicitors. One yardstick by which this can be tested is the percentage of gross recovery that would be represented by the multiplied base fee. If the base fee as multiplied constitutes an excessive proportion of the total recovery, the multiplier might will be too high. A second way of testing whether the ultimate compensation is fair and reasonable is to see whether the multiplier is appropriately placed in a range that might run from slightly greater than one to three or four in the most deserving case. Thirdly, regard can be had to the retainer agreement in determining what is fair and reasonable. Finally, fair and reasonable compensation must be sufficient to provide a real economic incentive to solicitors in the future to take on this sort of case and to do it well.

[64] The first of the corroborating factors is a test of the fee as a percentage of the class recovery. I note that the settlement agreement expressly prohibits class counsel from asking that their fees be fixed as a percentage of the settlement amount. Nevertheless, it remains a valid basis for comparison purposes. The fees sought in the transfused action represent 2.36 per cent of the portion of the settlement apportionable to the Ontario national class victims. The work in the hemophiliac action was for the benefit of all hemophiliacs. The fees sought in the hemophiliac action equate to 3.33 per cent of the total amount of the settlement apportionable to the hemophiliac class members. On this basis, the fees, although large, are more than reasonable.

[65] Second, the fee should be tested as a multiple of the base fees docketed by class counsel. On this basis, the fees sought are consistent with the suggested range set out in Gagne for "the most deserving case". I note that the calculation is made more complex by the fact that class counsel continued to do work necessary to ensure the implementation of the settlement after the date of the expiry of the period for appeal of the approval. The settlement agreement contemplates that additional fees will be paid to counsel for certain administrative work, over and above the class counsel fee, at

2000 CanLII 22386 (ON SC)

an hourly rate. However, as stated above, an important consideration in measuring the result achieved is whether or not the job is complete. Accordingly, it is my view that the work that has been performed to date was properly required of class counsel to ensure that the settlement was implemented. Counsel have valued the additional work at approximately $675,000 for counsel in the transfused action and $148,000 for counsel in the hemophiliac action from the end of the appeal period on January 22, 2000 to May 14, 2000. They have made a written submission to the court that their work as class counsel was completed on May 14, 2000. I cannot accede to this submission. While the administration is functional and claims are now being received, processed and paid, some details must still be completed. Thus, there will be no further compensation to counsel for any additional time spent in attending to these matters. The premium fee being sought in these actions is being sought on the basis of a "job well done". The court will not approve an additional fee for this work, or any additional work remaining to be done in order to complete the implementation of the settlement and its administration.

[66] Without considering the value of the "additional work", the lump sum fees constitute a multiplier of 3.57 in the transfused action and 4.29 in the hemophiliac action. When the fees for this additional work are included however, the multipliers are 3.07 and 3.80 respectively. For the hemophiliac action, the base fee and multiplier approach yields a figure at the high end of the range set out in Gagne, but the result obtained for the Hemophiliac class members justifies such an award. The qualifying threshold negotiated by class counsel eliminates a potentially insurmountable burden of proof that those class members would otherwise have faced.

[67] Third, the fees may also be measured by the expectation of the representative plaintiff as evidenced by the retainer agreement. Here, unlike the usual case, the specific amount of the fees were agreed to by reasonably informed representative plaintiffs. Moreover, the retainer agreements executed by the representative plaintiffs are a marked improvement over the individual fee agreements signed by the class members in Quebec and British Columbia.

2000 CanLII 22386 (ON SC)

[68] The fee must also provide a sufficient economic incentive to attract counsel to cases of a similar nature in the future. The words of Goudge J.A. bear repeating. As he stated in Gagne at pp. 422-23:

> The opportunity to achieve a multiple of the base fee if the class action succeeds gives the lawyer the necessary economic incentive to take the case in the first place and to do it well. However, if the Act is to fulfill its promise, that opportunity must not be a false hope.

(Emphasis added)

In the present circumstances, given the difficulty in securing counsel for the classes, let alone the experienced counsel that were ultimately retained, the incentive of a reasonable premium was necessary to ensure that these victims had counsel of the highest calibre without the benefit of whom this settlement could not have been achieved. The lump sum fees set out in the retainer agreements meet this test.

[69] Additionally, the fees compare favourably with the fees awarded in other major class proceedings in Canada as shown by the following chart:

Action	Total Class Recovery	Class Counsel Fees	Percentage of Recovery	Further Legal Fees Anticipated to be Incurred by Class Members
Harrington v. Dow Corning Corp. [1999] B.C.J. No. 320 (S.C.)	$40,000,000	$6,000,000	15%	Yes

2000 CanLII 22386 (ON SC)

(Quicklaw)				
Doyer v. Dow Corning Corp. (Sept. 1, 1999), 500-06-000013-384 Sup. Ct. of Que. Tingley J.S.C.	$52,000,000	$10,4000,000	20%	Yes
Nantais v. Teletroncis Proprietary (Canada) Ltd. (1996) 28 O.R. (3d) 523 (Gen. Div.)	$23,140,000	$6,000,000	26%	Yes
Pelletier v. Baxter Health Care Corp.,* [1999] Q.J. No. 3038 (S.C.) (Quicklaw)	$21,525,000	$3,648,000	16.9%	Yes

*combined with Jones v. Baxter Health Care Corp. in Ontario

[70] Finally, the fees, as set out in the retainer agreements, if approved, will not impair the sufficiency of the trust fund established to provide the benefits to the class members. The actuarial report prepared by Eckler and Partners

2000 CanLII 22386 (ON SC)

specifically addresses this issue.

[71] These class proceedings have been described throughout as the largest personal injury case in Canadian legal history. The global settlement amounts to over $1.5 billion dollars when all benefits are included. The settlement is pan-Canadian in scope. The defendants include all of the federal, provincial and territorial governments in Canada. The prime defendant, CRCS, is under court protection pursuant to the CCAA. The benefits are to be paid out of a trust fund established for the class members rather than out of the general revenue accounts of the governments. The nature of the benefits provided through the settlement is imaginative and incorporates some of the innovative measures regarding compensation in personal injury lawsuits that courts have been advocating for over 20 years.

[72] The logistics of the litigation must also be considered. It took almost three years to find lawyers willing to undertake the case because of the size and complexity. The investment required of class counsel, and the inherent risk of non-recovery, were daunting. Over 60 lawyers and legal staff were involved in bringing this litigation to a successful conclusion. Neither the governments nor the intervenors challenged the number of people or the hours required of those people to finalize the settlement.

[73] The evidence of class counsel regarding the negotiations was accepted. Indeed, the government defendants echoed the evidence of class counsel in their own submissions on the earlier motion for settlement approval. It common ground that class counsel did an excellent job. There was unanimity as to the quality of the settlement. Further, in so far as there were arbitrary points of contention raised on this motion, the evidence of class counsel on those points stands unchallenged and uncontradicted. Simply put, neither the intervenors nor the government defendants have put forward any principled or evidentiary basis for reducing the proposed counsel fees. Accordingly, I cannot accept their submissions that the fees specified in the retainer agreements should be reduced.

[74] To look back with the clarity of hindsight and re-

2000 CanLII 22386 (ON SC)

evaluate the relevant factors in light of subsequent events when fixing fees is unfair. A court must, as best as it is able, consider the elements of the litigation as they would have appeared to the parties at the material times. To do otherwise would be inconsistent with the underlying policy of the CPA. Here, the fees sought as agreed to by the representative plaintiffs are large but so were the lawsuits and the settlement. The settlement agreement evidences that the size of the fee was anticipated by the governments who now object. As Goudge J.A. stated, the opportunity for class counsel to receive a premium for taking on difficult litigation and doing it well must not be "a false hope". It is an essential ingredient of the CPA that counsel be provided with a significant incentive to take on meritorious class proceedings. This means that premium fee awards must reflect the reality of the risk and the success of the efforts of class counsel in a meaningful way. Without this, injured parties will be denied the services of the most experienced counsel.

[75] This litigation was of the most difficult kind on a number of fronts. It epitomized risk as that term is used in the context of fee awards under the CPA. It is questionable whether any single member of the class would have had the financial resources to prosecute a lawsuit to a successful conclusion in consideration of the scope, the factual complexity of such a case, the myriad of legal issues that would have arisen and the countless years that such litigation would consume. In contrast, this settlement provides class members with access to immediate benefits without any further legal impediments to their claims. Given the risk undertaken and result achieved by class counsel in this litigation, the lump sum fees contemplated in the retainer agreements are "fair and reasonable".

[76] Accordingly, the retainer agreements in the transfused and the hemophiliac actions are approved. The lump sum fees set out therein are also approved and fixed. Counsel may attend before me to address the matter of disbursements. The final order will address the outstanding work to be done by class counsel.

2000 CanLII 22386 (ON SC)

[77] In light of the magnitude of these actions, and the issues involved, the court permitted and, indeed, encouraged submissions from persons with a stake, in one form or another, in the litigation. The fees submitted by counsel for these stakeholders, identified variously as intervenors and friends of the court, are also approved.

Order accordingly.

□

2000 CanLII 22386 (ON SC)

Newfoundland and Labrador Supreme Court Trial Division

Citation: Rideout v. Health Labrador Corp., 2007 NLTD 150
Date: 2007-08-16
Docket: 200301T4242CP

Between:
Brenda Rideout (Plaintiff)
and
Health Labrador Corporation (Defendant)

Russell, J.

Counsel:
Chesley F. Crosbie, Q.C., and Pamela L. Taylor, for the plaintiff;
Daniel M. Boone and Kimberley A. Walsh, for the defendant.

2007 NLTD 150 (CanLII)

INTRODUCTION

[1] Russell, J.: The Plaintiff seeks approval of a proposed settlement agreement ("Settlement Agreement") in this certified class action proceeding pursuant to s. 35(1) of the *Class Actions Act,* S.N.L. 2001, c. C-18.1, (the "*Act*"). In particular the Plaintiff applies pursuant to Rules 7A.03(5)(d) and 7A.10 of the *Rules of the Supreme Court, 1986,* for:

> (a) an Order, pursuant to section 35(1) of the *Act* approving the proposed settlement in the form outlined in the Settlement Agreement.
>
> (b) an Order, pursuant to sections 20 and 35(5) of the *Act* approving the notice of settlement to Class members; and
>
> (c) an Order, pursuant to section 38(2) of the *Act* approving a fee for Class counsel.

[2] For clarification purposes the parties made certain amendments to the Settlement Agreement. The amendments included the insertion of an apology by the Defendant; extended the Claim Deadline to 90 days from 60 days; made it clear that section 6.1 (Claims of Infection and Opting Out) does

not apply to Infected Patients or Cross-Infected Persons who had not been diagnosed with one of the Diseases prior to the commencement of the Claim Period; and reworded the definition of Settled Claims and section 9.1 (Releases) to ensure the release does not release claims outside the scope of this action as it was certified, and that it does not apply to Infected Persons or Cross-Infected Persons who have not been diagnosed with one of the Diseases prior to the expiry of the Claim Deadline.

[3] Section 35 of the *Act* requires court approval of a class action settlement and states in part:

> "35.(1) A class action may be settled, discontinued or abandoned only with the approval of the court on terms the court considers appropriate.
>
> ...
>
> (3) A settlement under this section is not binding unless approved by the court.
>
> (4) A settlement of a class action or of common issues affecting a subclass that is approved by the court binds every member of the class or subclass who has not opted out of the class action, but only to the extent provided by the court. "

[4] Section 35(5) of the *Act* deals with notice of settlement to class members and states:

> "35(5) In dismissing a class action or in approving a settlement, discontinuance or abandonment, the court may consider whether notice should be given under section 20 and whether the notice should include
>
> (a) an account of the conduct of the action;
>
> (b) a statement of the result of the action; and
>
> (c) a description of a plan for distributing settlement funds."

[5] Section 38(2) of the *Act* deals with the approval of fees for class

2007 NLTD 150 (CanLII)

counsel and states:

> "38(2) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court, on the application of the solicitor."

BACKGROUND.

[6] This action was certified by this Court on July 7, 2005. The certification decision noted the allegations in this case as follows

> "1. The Plaintiff, a patient at the Defendant's gynecological clinic, claims the Defendant's failure to properly sterilize medical instruments put the health of her and other patients of the clinic, as well as the health of their matrimonial partners, at risk. She claims the way in which the Defendant communicated notice of this problem also breached a duty of care and violated the privacy of the patients. The Plaintiff now applies for certification of this action as a class proceeding.
>
> ...
>
> 3. The Defendant is the hospital board responsible for the management, control and operation of the Captain William Jackman Memorial Hospital, at Labrador City, Newfoundland and Labrador.
>
> 4. Between October 2001 and March 2003, various medical instruments used at the Defendant's gynecological clinic were not properly sterilized and at least 333 patients (including the Plaintiff) were treated with these instruments, putting them at risk of exposure to infections.
>
> 5. The problem was discovered and corrected in March 2003. On November 10, 2003 the Defendant issued a press release advising that un-sterilized instruments may have been used at its clinic between October 2001 and March 2003 and that because of the risk of contracting infections, letters had been mailed to patients who were at the clinic during that period asking that they undergo medical testing.
>
> 6. Also on November 10, 2003 the Defendant sent a registered letter to

2007 NLTD 150 (CanLII)

the patients (including the Plaintiff) advising that due to its failure to properly sterilize the instruments, the plaintiff and the other patients were at minimal risk of contracting an infection. The letter advised them of a need for medical testing of blood and urine to determine whether they had contracted Hepatitis B, Hepatitis C, HIV, Chlamydia, and Gonorrhea and that they were to go directly to the defendant's hospital laboratory to have the tests done.

7. The Plaintiff heard about the press release prior to getting her registered letter and alleges the news left her distraught, horrified and in a state of nervous shock and that she feared for her health and the health of her family. She also alleges her matrimonial partner was shocked and horrified by the news of the potential infection of his partner and that the relationship, including intimate relationship of the partners, has been interfered with and shaken, and that the partners have each suffered loss of physical and emotional consortium.

2007 NLTD 150 (CanLII)

8. The Plaintiff also alleges that the Defendant conducted the medical testing in such a manner as to make the identities of the infected and uninfected patients obvious to other patients, and thereby their identities became known in their small community. This, the Plaintiff alleges, was an invasion of personal privacy; made known confidential medical information resulting in embarrassment; and exposed them to insulting commentary from other patients.

9. The Plaintiff submits the Defendant should have first informed the patients' physicians of the problem and allowed them to manage the issues within the confidentiality of the physician-patient relationship."

[7] In the certification the Class ("Class") was defined as follows:

"(a) All persons who were patients at the gynaecological clinic at the Captain William Jackman Memorial Hospital (the 'Clinic') between October 2001 and March 2003 and who contracted HIV, Hepatitis B, Hepatitis C, Chlamydia and/or Gonorrhea (the 'Diseases') following treatment at the Clinic, or where such person is deceased, the personal representative of the estate of the deceased person (persons in paragraph (a) are hereinafter referred to as 'Infected Patients');

(b) All persons who contracted the Diseases from an Infected Patient, or from another Cross-Infected Person, or where such person is deceased, the personal representative of the estate of the deceased person (persons in paragraph (b) are hereinafter referred to as 'Cross-Infected Persons');

(c) All persons who were patients at the Clinic between October 2001 and March 2003, who

(i) did not contract the Diseases following treatment at the Clinic;

(ii) received a notice from the Health Labrador Corporation advising that they may have contracted the Diseases and advising of the need for medical testing;

(iii) attended at a hospital or medical clinic for testing for the Diseases;

or where such person is deceased, the personal representative of the estate of the deceased person (persons in paragraph (c) are hereinafter referred to as 'Uninfected Patients'); and

(d) The matrimonial and common law partners of Infected Patients, Cross-Infected Persons, and Uninfected Patients ('Spouses')."

[8] Counsel are not aware of there being any Infected Patients or Cross-Infected Persons.

[9] The Plaintiff, Brenda Rideout, was appointed as a Representative Plaintiff and the common issues certified were:

"(a) Did the Defendant breach a duty or duties of care owed to class members;

(i) in respect of its provision of medical services to class members between October 2001 and March 2003; and

(ii) in respect of its subsequent conduct?

2007 NLTD 150 (CanLII)

(b) Whether class members are entitled to damages under the *Privacy Act,* and if so, whether such damages may be determined on a global basis?

(c) Whether class members are entitled to punitive damages, and if so, whether such damages may be determined on a global basis?"

[10] The Notice of Certification was issued February 2006 and the opt-out period provided in the Notice expired March 31, 2006. The Defendant has filed a defence to the action.

[11] Class counsel and the Representative Plaintiff have filed affidavits in support of this application. Those affidavits disclose that 13 Class members elected to opt out; that the Plaintiff obtained documentary discovery of the Defendant and also obtained further relevant documentation through *Access to Information Act* requests; that the Plaintiff conducted oral examinations for discovery of two representatives of the Defendant (the CEO Boyd Rowe and Patient Safety/Quality Coordinator Emma Stirling) on March 29, 2006; that following discoveries, the parties held a mediation on October 20, 2006 before an experienced mediator, Peter J. Mackeigan, Q.C., C.Med., C.Arb.; the mediation was held in Labrador City to facilitate the participation of the court-appointed Representative Plaintiff; that the Representative Plaintiff formed a negotiating advisory group consisting of two other Class members from the Labrador City community (the "Advisory Group"), and she and that group attended and participated in the mediation; that the Representative Plaintiff found the Advisory Group helpful in providing her with a range of views from Class members regarding the goals, purposes and direction of the litigation; that she found the consensus of these views to be that the primary goal for Class members was receiving assurances that the conduct complained of at the clinic will not be repeated in the future, and the secondary goal was receiving compensation for what they had been through; and although an agreement was not reached at the mediation, it was of assistance in developing the framework that led to the subsequent proposed settlement.

[12] Class counsel in this matter is the law firm of Ches Crosbie Barristers who retained the experienced class action firm of Klein Lyons in British Columbia to assist in the litigation. Both firms recommend the Settlement

2007 NLTD 150 (CanLII)

Agreement as fair and reasonable and in the best interests of the Class as a whole.

[13] The Representative Plaintiff supports the proposed settlement, stating it meets both the primary and secondary goals, which goals she found to be the consensus of the views of the Class.

[14] The Representative Plaintiff also stated she retained the law firm of Ches Crosbie Barristers in or about November 2003, on a written contingency fee basis; that she is pleased with the work that their firm and their co-counsel, Klein Lyons, did; and that she supports their fee application as reasonable.

2007 NLTD 150 (CanLII)

THE SETTLEMENT AGREEMENT

[15] The Settlement Agreement provides both monetary and non-monetary benefits to the Class. Non-compensatory relief is set forth in s. 7 of the Agreement as follows:

> "7.1 Within sixty (60) days of the Final Order Date, the Defendant shall publish in The Aurora and 53 North magazine a notice outlining changes in policy and procedure which have been implemented in response to the sterilization breach, and will include in the notice an apology to the Plaintiff and members of the Class. The Defendant shall also, within sixty (60) days of the Final Order Date, place on its corporate website a copy of the same notice which is to be published.
>
> "7.2 The Defendant's Chief Executive Officer, Boyd Rowe, shall be available to the media to discuss and publicize the changes in sterilization procedures implemented by the Defendant and shall apologize to the Plaintiff and members of the Class.
>
> "7.3 The Defendant shall appoint a community representative, approved by the Representative Plaintiff, to the Environmental Services Team responsible for developing infection control processes.
>
> "7.4 The Defendant's insurer shall, within six months conduct an educational seminar on the topic of infection control."

[16] The compensation to Class members who were Uninfected Patients or Uninfected Spouses is set forth in s. 5 of the Settlement Agreement which provides as follows:

> "5.1 A Class Member, by submitting a completed Claim Form verified by the Class Member's solemn declaration and supported by the requisite Supporting documentation, on or before the Claim Deadline, is entitled to compensation in one of the following amounts:
>
> (a) for Uninfected Patients: $450.00;
>
> (b) for Uninfected Spouses: $100.00."

[17] As noted, neither the Representative Plaintiff, the Defendant, nor Plaintiff's counsel have become aware of the existence of any Infected Patients, or Cross-Infected persons as described in the Certification Order. If however there is a member of the Class who has knowledge that he or she has contracted the Diseases or one of them following treatment at the Defendant's clinic, or who has knowledge that he or she is a Cross-Infected Person, they may give notice in writing of the claim prior to the Claim Deadline, and shall have a further 60 days after the expiry of the Claim Deadline within which to commence an action for damages with respect to the claim of infection, in a court of law, failing which any such claim is and shall be forever barred (Section 6 of Settlement Agreement). This section does not apply to Infected Patients or Cross-Infected Persons who have not been diagnosed with one of the Diseases prior to the commencement of the Claim Period.

[18] The settlement also makes it clear that the release section does not apply to Infected Persons or Cross-Infected Persons who have not been diagnosed with one of the Diseases prior to the expiry of the Claim Deadline, and that any release relates only to claims of Class members for which the action was certified as a class action. These claims specifically relate to the Diseases (HIV, Hepatitis B, Hepatitis C, Chlamydia and/or Gonorrhea) and the testing for the same on which basis this action was certified as a class action.

[19] The settlement provides that the compensation shall be paid from a

2007 NLTD 150 (CanLII)

settlement fund of $179,850.00 deposited by the Defendant within 10 days of the settlement approval.

[20] In the claim process Class members need only fill out the claim forms (verified by the Class member's solemn declaration) and submit it to the Claims Administrator. The Defendant will be responsible for the administration of the settlement, with Class counsel monitoring this administration. The Defendant will also be responsible for the administration and notice costs.

[21] In addition to the Defendant providing $450.00 compensation to Uninfected Patients and $100.00 compensation to Uninfected Spouses, as part of the settlement the Defendant has agreed to pay Class counsel's fees and disbursements, if approved by the Court, of up to $93,571.50 in fees; $12,500.00 in disbursements and $13,100.00 in HST for a total of $119.171.50. This is an all inclusive fee for Class counsel's past and future services in this action.

2007 NLTD 150 (CanLII)

[22] The settlement therefore provides for the Defendant paying approved class counsel fees and disbursements, and the administration and notice costs of the settlement, in addition to the compensation of $450.00 to Uninfected Patients and $100.00 to Uninfected Spouses. Class members will therefore receive their settlement cheques without any deduction for these expenses.

[23] The Court will also have ongoing exclusive jurisdiction to supervise, construe and enforce the Settlement Agreement in accordance with its terms.

NOTICE OF SETTLEMENT

[24] After reaching a settlement and having obtained the date for the settlement approval hearing, Class counsel wrote to or e-mailed every Class member between April 24 - 16, 2007 who had previously contacted them about the case (167 Class members). That correspondence referred to the non-compensatory relief; the monetary settlement; advised of the Court date for the settlement approval hearing; advised Class members of their right to object to the settlement and to come to the hearing; advised of the legal fees; attached a copy of the Settlement Agreement; and recommended

acceptance. Of this number seven were returned as undelivered but subsequently some of these contacted Class counsel and received the information.

[25] In addition, on May 14th and 15th, 2007, the Defendant sent notice of the approval hearing to 164 Class members who had not previously made contact with Class counsel. That notice was a letter sent by registered mail, enclosing a copy of the letter sent by Class counsel and a copy of the Settlement Agreement. Of this number, 21 were returned as undelivered but it appears that some of these contacted Class counsel and received the settlement information.

[26] There was therefore a high number of the Class who should have directly received notice of the settlement.

[27] A copy of the Settlement Agreement and the letter was also posted to Class counsel's website.

[28] The Defendant advises that of the women who were treated at the clinic 305 currently reside in Labrador West.

[29] In addition to the direct notice, there were interviews conducted by the Representative Plaintiff and Class counsel with local media.

[30] I am satisfied that adequate notice was given of the terms of the settlement and of the hearing approval date.

LAW - SETTLEMENT APPROVAL

[31] Section 35 of the Act states that a class action may be settled only with the approval of the court.

[32] The test to be applied by the court is whether the settlement is fair and reasonable and in the best interests of the class as a whole (see *Dabbs v. Sun Life Assurance Co. of Canada,* [1998] O.T.C. Uned. 269; 40 O.R.(3d) 429 (Gen. Div.), affd. (1998), 113 O.A.C. 307; 41 O.R.(3d) 97 (C.A.), leave to appeal dismissed (1998), 235 N.R. 390; 118 O.A.C. 399 (S.C.C.); *Parsons et al. v. Canadian Red Cross Society et al.* (1999), 103 O.T.C. 161; 40 C.P.C.(4th) 151 (Sup. Ct.); *Fakhri et al. v. Alfalfa's Canada Inc.,* [2005]

2007 NLTD 150 (CanLII)

B.C.T.C. 1123; [2005] B.C.J. No. 1723 (S.C.)).

[33] In *Sawatzky v. Societe Chirurgicale Instrumentarium Inc.,* [1999] B.C.J. No. 1814; 19 B.C.T.C. 220, Brenner J. of the British Columbia Supreme Court stated at paras. 21 and 22:

> "21 A settlement must fall within a zone or range of reasonableness. The range of reasonableness has been described as follows:
>
> > 'All settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interest of those affected by it when compared to the alternative of the risks and costs of litigation.'
>
> *Dabbs v. Sun Life* (1998), 40 O.R.(3d) 429 (Gen. Div.). See also *Hanley* para. 25.
>
> "22. In making its decision on the reasonableness of a settlement, the court must consider the litigation risk to the plaintiffs *(Haney* para. 16, *Dabbs* pg. 400)."

2007 NLTD 150 (CanLII)

[34] The court's power to approve or reject a settlement does not permit it to modify the terms of a negotiated settlement (see *Sawatzky* and *Dabbs).* The court may therefore only reject or approve a settlement. It cannot substitute its own terms into a settlement.

[35] Generally in determining whether a settlement is fair and reasonable and in the best interests of the class as a whole, the courts have reviewed proposed class proceeding settlements on the basis of the following factors:

(a) Likelihood of recovery, or likelihood of success;

(b) Amount and nature of discovery evidence;

(c) Settlement terms and conditions;

(d) Recommendation and experience of counsel;

(e) Future expense and likely duration of litigation;

(f) Recommendation of neutral parties, if any;

(g) Presence of good faith and absence of collusion;

(h) Degree and nature of communications by counsel and Representative Plaintiff with Class members during the litigation; and

(i) Information conveying to the court the dynamics of and the positions taken by the parties during the negotiation.

(j) Number of objectors and nature of objections;

(See *Dabbs; Parsons.)*

2007 NLTD 150 (CanLII)

[36] However one must keep in mind the comments of Winkler J. in *Parsons* where he said at para. 73:

> "73. However, the settlement approval exercise is not merely a mechanical seriatim application of each of the factors listed above. These factors are, and should be, a guide in the process and no more. Indeed, in a particular case, it is likely that one or more of the factors will have greater significance than others and should accordingly be attributed greater weight in the overall approval process."

ANALYSIS

(a) Likelihood of recovery, or likelihood of success.

[37] In the Certification Decision in this matter, the requirement that the Plaintiff have a cause of action was to be determined solely on the pleadings, and the allegations in the Statement of Claim were to be accepted as true. In the certification hearing the Plaintiff will satisfy that test unless it is shown that it is "plain and obvious" from the pleadings that the action must fail.

[38] At the certification stage there is therefore a low threshold for certification of a cause of action. Contentious, factual and legal issues between the parties cannot be resolved on a class certification motion but at the trial itself.

[39] On the certification hearing the Defendant took issue with the Plaintiff's causes of action, the main thrust of its argument being that the pleadings failed to disclose a cause of action.

[40] The causes of action certified in this proceeding were negligence; breach of contract; breach of fiduciary duty; breach of privacy; loss of guidance, care and companionship; and loss of consortium.

[41] The Certification Decision in this matter sets forth the position of the parties with respect to each cause of action.

2007 NLTD 150 (CanLII)

[42] With respect to the cause of action in negligence, the Defendant while admitting it breached a duty of care to the patients with respect to the instruments being improperly sterilized, denied any negligence as a result of the manner or timing of the disclosure and also denied it owed a duty of care to the matrimonial partners of the patients. In addition to this, the Defendant denied liability on the basis that in law the Plaintiffs have not proved they suffered damage which was caused by the Defendant's negligence.

[43] On the certification hearing the Court concluded:

> "Given the above authorities, I am unable to conclude, at this early stage, that it is plain and obvious that this claim will fail."

[44] That cause of action was therefore certified but should the matter proceed to trial the Defendant certainly would have an arguable case on this cause of action, and it referred to case authorities in support of its position that a claim for nervous shock requires that the nervous shock was a foreseeable consequence of the Defendant's negligence and that there is a recognizable psychiatric or psychosomatic illness resulting from the Defendant's negligence. Based on this the Defendant denied damages and submitted that if its position is successful at trial it would be a complete defence to the action. There is some uncertainty in the state of the law on tort relief in this area.

[45] With respect to the cause of action for breach of contract, the Defendant denied it owed a contractual duty to Class members, and in the alternative submitted that if there was a contract it cannot be characterized as a "peace of mind" contract, and therefore, any breach cannot in law give rise to a contractual claim for mental distress. Again this is an arguable position based on the authorities cited by the Defendant in support of its position.

[46] With respect to the cause of action for breach of privacy, the Plaintiff claims that the release of information outside the physician-patient relationship invaded the confidentiality of their medical information and invaded their privacy. The Defendant submits a breach of privacy cannot be created negligently but has to be intentional and that there is no evidence of intention in this action. The Defendant also submits there was no statutory breach. While meeting the test for certification of this cause of action, the Defendant's submission in this area is not without some merit.

2007 NLTD 150 (CanLII)

[47] With respect to the cause of action for breach of fiduciary duty, the Defendant denies any fiduciary duty to the Class, and in the alternative denies any breach of duty by reason of taking time to notify and by the manner in which it issued notification. There is an issue here as to whether there was a fiduciary duty and whether the Defendant breached that duty by failing to notify in a timely fashion and by the manner used for the notification.

[48] With respect to the cause of action for loss of consortium, the Defendant denies that there is such a cause of action in this jurisdiction. This is an arguable position based on the authorities cited by the Defendant in support of its position.

[49] With respect to loss of guidance, care and companionship, the Defendant submits the case law in this jurisdiction does not support awards for the loss in these circumstances. The Plaintiff admits that to date, in this jurisdiction, an award under this claim has only been given in fatal accident cases but submits that based on a recent Supreme Court of Canada decision, it has an arguable case.

[50] This is another area where the state of the law in this jurisdiction is uncertain. For settlement purposes one has to recognize the strength of the Defendant's position in this area.

[51] The Defendant then denies liability and denies damages. Class action counsel state the legal issues raised in this case are potentially novel in this jurisdiction; that it is therefore difficult to predict the outcome of a trial; and while it is possible that Class members might obtain higher damage awards if the matter proceeded to trial, it is also possible that they could receive nothing if their claims were unsuccessful. I conclude this is a reasonable assessment of the likelihood of recovery, or likelihood of success based upon the strengths and weaknesses of the respective positions of the parties on each of the causes of action discussed earlier.

[52] Liability was therefore contested strongly and, while there was merit in the Plaintiff's claim, success in the action was not assured.

[53] I accept Class counsel's assessment that proceeding to trial involves significant risk, especially with regard to the proof of damages and the amount of damages. Under the proposed settlement there is no requirement for Class members to provide medical documentation in support of their claims.

2007 NLTD 150 (CanLII)

(b) Amount and nature of discovery evidence.

[54] Class counsel advises they obtained documentary discovery of the Defendant, and also obtained further relevant documentation through *Access of Information Act* requests. Also, oral examination for discovery was conducted of two representatives of the Defendant, CEO Boyd Rowe and Patient Safety/Quality Coordinator Emma Stirling, on March 29, 2006.

[55] In addition to this, the parties held a mediation (October 20, 2006). It was held in Labrador City to facilitate the participation of the court-appointed Representative Plaintiff and other Class members in this process of negotiation. To further encourage such participation, the Representative Plaintiff formed a negotiating advisory group so that she might receive the input and perspectives of other Class members when considering whether to recommend a possible settlement on behalf of the Class.

[56] With this amount of discovery I accept Class counsel's submission that the Representative Plaintiff was properly positioned to assess the strengths and weaknesses of this case when negotiating the proposed settlement.

(c) Settlement terms and conditions.

[57] Earlier I reviewed the terms and conditions of the settlement. Uninfected Patients are to receive $450.00, and Uninfected Spouses $100.00. These amounts are to be received by Class members without any deductions for counsel fees, administration costs and notice costs as these expenses are to be paid by the Defendant in addition to the payments made to Class members.

[58] Both Class counsel and defence counsel submit the amounts proposed to be paid to Class members fall within a reasonable range when compared to court-approved settlements in similar cases. Class counsel submitted a number of cases in support of that submission.

[59] In *Vezina v. Loblaw Companies Ltd.,* [2006] O.J. No. 2509 (S.C.), the claim was that as a result of the defendant's alleged breaches of duty, class members were exposed to the possibility of being infected with Hepatitis A. They were immunized at hospitals in the area and those who were not infected received $150.00 each in a court-approved settlement. The Court there noted that liability was contested strongly and while there was merit to the Plaintiff's claims, success of the action was not assured, and that the overwhelming majority of the class were unlikely to be able to prove they suffered extensive damage and could only expect to receive relatively small awards if the action was pressed to a successful conclusion.

[60] In *Fakhri,* supra, the plaintiff sought damages for injuries and losses as a result of a Hepatitis A outbreak at the defendant's market in 2002. The class was comprised of individuals who either contacted or where exposed to the virus as a result of consuming food products sold by the defendant. For class members who did not contact the virus and who received ISG infections during the outbreak, the court-approved settlement was $150.00 cash or in-store credits of $250.00 together with any out-of-pocket expenses.

[61] In *Cardozo v. Becton, Dickinson and Co.,* [2005] B.C.T.C. 1612; [2005] B.C.J. No. 2683 (S.C.), the action was for negligence in relation to the defendant's medical testing device, the BD ProbeTec ET Instrument, which the plaintiffs claimed was defective. That device was used to test for the presence of Chlamydia and Gonorrhea, sexually transmitted diseases, in men and women. For those members of the class who had to be re-tested

2007 NLTD 150 (CanLII)

the court-approved settlement was $400.00, based on $350.00 as general damages for the discomfort of the re-testing procedure and $50.00 for special damages, averaged across the class.

[62] In *Anderson v. Wilson,* Settlement Approval Order, Mackinnon J., Ontario Superior Court of Justice, January 2, 2002, the concern was that patients of the defendant doctor may have contracted Hepatitis B after having tests done in his clinic. Those in the class that did not contract Hepatitis B and were sent written notice advising them that they may have contracted Hepatitis B and/or other diseases and should be tested and attended at a hospital for testing for Hepatitis B received a court-approved settlement of $1,000.00.

[63] These cases then support the submission of Class counsel and defence counsel that the proposed settlement in this matter falls within a reasonable range when compared to court-approved settlements in similar cases.

[64] Class counsel therefore had to consider the possibility that even if successful at trial (which would involve more expense and time) the court-ordered amount might not be more than the settlement amount.

[65] As noted, the representative plaintiff, with the help of an advisory group, said the consensus of the views of Class members was that the primary goal was receiving assurances that the conduct complained of will not be repeated in the future. Compensation for what they had been through was a secondary goal.

[66] One of the policy goals of a class action is to promote behaviour modification. This may be achieved through an award of damages, or by the agreement of a defendant to reform its conduct, or by a combination of both.

[67] This was noted in the Reasons for Certification in this action where at para. 129 the Court stated:

> "129. I agree with the Plaintiff's submission that if the Plaintiff's allegations are ultimately sustained at trial, then goals of specific and general deterrence will be advanced, public safety improved, and the public confidence in our health care system restored. Health care

2007 NLTD 150 (CanLII)

providers will be encouraged to exercise greater care in the sterilization of medical instruments and in the dissemination of confidential patient information."

[68] As a result, Class counsel points out that the non-monetary relief obtained in this proposed settlement (as described earlier) is an important part of the settlement, a benefit for class members and not seen in other comparable cases.

[69] I agree with Class counsel's submission that this concern accords with a central policy goal of class action legislation which is to promote behaviour modification.

[70] The proposed settlement therefore addresses the primary and secondary goals of the Class. If the matter proceeded to trial the non-monetary issues would be outside the jurisdiction of the Court.

2007 NLTD 150 (CanLII)

(d) Recommendation and experience of counsel.

[71] The Plaintiff has been represented by two experienced litigation firms, Ches Crosbie Barristers of St. John's, and Klein Lyons of British Columbia.

[72] The information provided at the certification hearing describes Plaintiff's counsel, Ches Crosbie, as being admitted to the Newfoundland and Labrador Bar in 1983, and an experienced trial lawyer in this jurisdiction, especially in the fields of personal injury law and medical malpractice and, since the introduction of the Act, in class actions.

[73] Plaintiff's counsel has retained the experienced class action firm of Klein Lyons to assist with this litigation. The certification application described that firm as having years of experience with class actions. It was stated that that firm successfully brought the first certified class proceeding in British Columbia in 1995 and since then had been involved in a wide range of class actions of both provincial and multi-provincial scope, including contaminated blood, TMJ Implants, heart pacemakers, diet pills, flood damage, food poisoning, securities violations and consumer claims, and has successfully obtained compensation for its clients. David Klein, a partner in that firm, is described in the firm's website as being ranked as one of

Canada's top class action litigators; President of the Trial Lawyers Association of British Columbia in 1998-1999; author of two books; and a member of the British Columbia, Ontario and Washington State Bars. He appeared with Ches Crosbie on the certification hearing.

[74] Ches Crosbie Barristers has been a pioneer in the field of class actions in this Province and Klein Lyons has been successfully prosecuting class actions in Canada since the onset of class proceedings litigation in British Columbia and Ontario.

[75] Both firms concur in their recommendation of this settlement and this is certainly a factor in favour of its approval by the Court.

[76] In *Dabbs,* supra, the Court in describing the significance of the recommendation of Class counsel stated at para. 32:

> "32. The fact that this settlement is strongly recommended by experienced class counsel is certainly a factor in its favour. The recommendation of class counsel is clearly not dispositive as it is obvious that class counsel have a significant financial interest in having the settlement approved. Still, the recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line. ..."

[77] Plaintiff's counsel state that having considered the strengths and weaknesses of the Plaintiff's case, and with the benefit of discoveries, it is their recommendation that the settlement achieves a result that is fair, reasonable and in the best interest of the Class as a whole in light of the potential risks and procedural delays of continued litigation to the Class.

(e) Future expense and likely duration of litigation.

[78] If the settlement is not approved, continued litigation would be required. Plaintiff's counsel and defence counsel both state that there would have to be litigation on the common issues and that the possibility exists of further pre-trial applications and more discovery before the common issues get to trial. They also note that there is then the possibility of an appeal, and even if the Plaintiff succeeds on the common issues, there is a possibility that

2007 NLTD 150 (CanLII)

there would have to be individual assessments of the damages, and this would add additional costs and procedural delay and the possibility of further appeals. This process could take years to complete (as much as two to three years).

[79] I concur with counsel's assessment of the future expense and direction of this litigation in the absence of a settlement; that there is a risk of recovering less at trial; and that even if successful at trial any added recoveries over and above the award, could be overcome by the added legal costs and disbursements of continued litigation.

2007 NLTD 150 (CanLII)

(f) Recommendation of neutral parties, if any.

[80] As noted, the proposed settlement was negotiated following a mediation before an experienced mediator. Both counsel state that the mediation involved much discussion on how the legal issues might be resolved, and that both parties got the views of an experienced mediator. The Representative Plaintiff also took part in this process.

[81] No agreement was reached at the mediation but the parties continued to negotiate thereafter, having received the views of the mediator, and this led to the settlement now before the Court.

(g) The presence of good faith and the absence of collusion.

[82] The Plaintiff pursued the claim through a contested certification hearing; document discovery and oral discovery were conducted prior to the mediation; mediation took place; further negotiation took place; the Representative Plaintiff was actively involved in the litigation (she and an advisory group of two) and advised during the mediation and the settlement negotiation; the Class was represented in the negotiations by experienced class action counsel; and in the proposed settlement the Representative Plaintiff does not recover any more funds than other Class members.

[83] I am satisfied of the presence of good faith and the absence of collusion. There is no suggestion of bad faith or collusion tainting the settlement.

(h) Degree and nature of communications by counsel and the

Representative Plaintiff with Class members during the litigation.

[84] This action was certified by the Court by reasons dated July 7, 2005. Notice of the certification was issued in February 2006 and the opt-out period in the notice expired on March 31, 2006. A copy of the notice was sent by the Plaintiff's solicitors to members of the Class with whom they had been in contact, and send by the Defendant to the remaining women on the mailing list. The notice was also published in the Aurora, a newspaper which circulated in Labrador, and posted on the website maintained by the Plaintiff's solicitors. It stated that those requiring more information could contact the Plaintiff's solicitor.

2007 NLTD 150 (CanLII)

[85] On August 25, 2006, e-mails were sent by the Plaintiff's solicitors to the 51 members of the Class who up to that time had contacted their firm advising that the Defendant had agreed to mediate the matter and that the mediation would take place in Labrador City on October 20, 2006.

[86] The mediation was held in Labrador City to facilitate the participation of the Representative Plaintiff and other Class members in the negotiation process. To further encourage participation, the Representative Plaintiff formed a two-person advisory group so that she might receive the input and perspective of other Class members when considering whether to recommend a possible settlement on behalf of the Class.

[87] On October 4, 2006, a case update was mailed by the Plaintiff's solicitors to the Class members with whom they had been in contact. This confirmed the date for the mediation; stated the Plaintiff Class would be represented by the Plaintiff's solicitor together with the Representative Plaintiff and two other members of the Class who would comprise a three-person negotiating committee. In October 2006 an update was also posted on the Plaintiff's solicitors' website with respect to the certification and upcoming mediation. The website also contained the Certification Decision and the Notice of Certification

[88] On October 5, 2006, in response to an inquiry as to why only three Class members would be attending the mediation, a further e-mail was sent to the same Class members advising that the people present at the mediation would be representative of the concerns of the group and that the negotiation would be two unwieldy with more people. All of these Class

members were then asked to consider e-mailing the Plaintiff's solicitor with their comments on how their lives and the lives of their partners had been affected; how it has affected their faith in the health care system and what amends the health care system could be asked to make. They were advised their comments would be presented to the Defendant without personal identifiers, unless indicated otherwise, and that it would help in the negotiations.

[89] On October 9, 2006, there was an article published in the Aurora which advised of the upcoming mediation and contained much of the information provided in the e-mails sent by the Plaintiff's solicitor to the Class members who had contacted his office.

[90] On October 11, 2006, a copy of the discovery transcript of the Defendant's CEO and the Defendant's Patient Safety/Quality Coordinator was forwarded to the Representative Plaintiff.

[91] On October 19, 2006, in preparation for the mediation, a conference call was held with the Plaintiff's solicitor, the Representative Plaintiff and the two members of the advisory group.

[92] Plaintiff's counsel advised that the Representative Plaintiff informed them that she had done her best since the Class action was started to fairly represent the interests of the Class as a whole; she has been contacted via phone and e-mail by many Class members and has attempted to answer any questions throughout the litigation to the best of her ability; that several of the class members who contacted her by telephone did not wish to provide their names or contact information due to privacy concerns; she has been approached by class members on many occasions throughout this class action while she has been out and about in her local community and has discussed the progress of the class action with them; and she has discussed settlement with the negotiating advisory group before and after mediation.

[93] Class counsel state that they advised the representative plaintiff and the negotiating advisory group to keep information pertaining to the mediation and ongoing negotiations confidential so as not to prejudice any proposed settlement. The representative plaintiff was only told on April 20, 2007 that she was free to discuss the proposed settlement.

2007 NLTD 150 (CanLII)

[94] The representative plaintiff was out of the Province from April 30, 2007 until May 24, 2007 and was unable to maintain contact with class members at that time as she was in Ontario undergoing surgery.

[95] However, between April 20, 2007 and her departure on April 30, 2007, she did several media interviews (article in 53 North Magazine published April 29/07; CBC news article published April 25/07; an interview on CBC Radio and a call to VOCM Open Line Show).

[96] Since the Representative Plaintiff's return to the Province class counsel advises she has been in contact with several class members via telephone to discuss the proposed settlement.

[97] Class counsel also did media interviews advising about the proposed settlement (Aurora, April 30, 2007; 53 North Magazine published April 29, 2007; CBC news article published April 25, 2007).

[98] On May 30, 2007, Class counsel participated in a conference call with approximately 40 Class members who were meeting in Labrador City and answered questions pertaining to the Class action and the proposed settlement. Class counsel state that they answered all questions and advised the group that in Class counsel's view the monetary relief achieved was in the range of that obtained in similar cases in other jurisdictions; that there was no guarantee the outcome of litigation would be successful; and that anyone who wished to object to the proposed settlement could forward a written objection by letter, fax, or e-mail to their office and that it would be presented to the Court in advance of a settlement approval hearing. The Representative Plaintiff did not attend the meeting because she was recovering from surgery.

[99] Class action's counsel advised that since the proposed settlement was reached their firm has received numerous telephone and e-mail inquiries from Class members regarding the proposed settlement and the process and timing by which Class members will receive their compensation.

[100] In addition to this, and as described earlier, Class members were also sent correspondence which described the settlement particulars, attached a copy of the Settlement Agreement and contained the recommended approval of Class counsel.

2007 NLTD 150 (CanLII)

[101] On review of the evidence provided on this hearing, I am satisfied that the Representative Plaintiff and Class counsel worked to keep class members informed on the process of the litigation and received input from the Representative Plaintiff and an advisory group of Class members in negotiating the settlement.

(i) Information conveying to the Court the dynamics and the position taken by the parties during the negotiations.

[102] Both counsel advise the Court they tried to achieve settlement initially through the use of mediation. While this did not achieve a settlement, counsel state that the mediation was of assistance in developing the framework that led to the proposed settlement for it involved a lot of discussion on the legal issues and how they might be resolved at the end of the day. There are significant legal issues involved with this action and further discussion led to this proposed settlement. Added to this, Plaintiff's counsel were trying to accommodate the primary goal of Class members which was to receive assurances that the conduct complained of at the clinic will not be repeated in the future.

2007 NLTD 150 (CanLII)

[103] On hearing Class action counsel and defence counsel with respect to the length and intensity of the negotiations leading up to the settlement, I accept their assessment that the negotiations achieved the maximum settlement that could be obtained short of trial. Also the settlement with regard to the non-compensatory items is something a court would have no jurisdiction to order should the matter proceed to trial.

(j) Number of objectors and nature of objections.

[104] Ten of the Class members provided written objections to the settlement. They were from the Class identified as Uninfected Patients. None of the Class members attended the approval hearing.

[105] I have reviewed each of the objections and considered them in reaching a decision in this matter. Some objectors described how they became aware of this incident and described the effects this incident had on them and their spouse, including the effect on their health, privacy and their faith in the health care provided by the Defendant's hospital. They described the terror they felt and the effect this incident has had on their lives and the

lives of their families and, as well, expressed their concern with women's health in the area. They made it clear that while they may not have been "infected" with the described Diseases, they were "affected" by this whole incident.

[106] As noted earlier, the Court on this hearing cannot impose its own settlement. It can only reject or accept the proposed settlement. Also, in making that determination the Court has to consider all the factors which were earlier identified.

[107] The number of objectors and the nature of the objections is one of the factors I am to consider and I shall deal with the nature of these objections.

[108] Some of the objectors felt they should have been more involved in the decision process prior to the settlement being reached.

[109] Carriage of a class action proceeding is performed by a representative plaintiff who acts as a representative of the other class members and who is certified according to s. 5(1)(e) of the *Act.* The representative plaintiff is advised by class counsel, who also have a role in ensuring that the claim is carried forward in the best interest of the class as a whole and without any conflict of interest with class members on the common issues.

[110] The scheme of the *Act* is to establish the role and function of the representative plaintiff as the party who instructs class counsel and is entitled to receive counsel's detailed advice.

[111] The representative plaintiffs duties are described by Branch in *Class Actions in Canada* (Aurora: Canada Law Book Inc., 2005, updated to Jan. 2006), as follows:

> "7.400 After certification, the representative plaintiff has authority to instruct class counsel, direct the litigation, participate in discoveries, and authorize settlement (subject to court approval). However, other class members may apply to court for the right to participate in the decision-making process."

2007 NLTD 150 (CanLII)

[112] At para. 7.470 in that same text it states:

> "7.470 There may exist a fiduciary relationship between the class counsel and the absent class members. At a minimum, class counsel should be careful to take no steps that prejudice the rights of absent class members. However, class counsel should not be bound by a strict solicitor-client relationship with each absent member, requiring regular reporting and the taking of instructions. As stated in *Newberg on Class Actions:*
>
> > 'A Rule 23 class action is intended to be prosecuted by a class representative without the necessity of absent class members taking an active role in the litigation. The class action rule was designed to protect the class member from this burden.'" (Footnotes omitted.)

2007 NLTD 150 (CanLII)

[113] In addition, pursuant to s. 35 of the *Act,* the Court's approval is required in order for the Settlement Agreement to apply, and in making that determination the legal test is whether the settlement is "fair, reasonable, made in good faith and in the best interest of the class as a whole".

[114] The Court is put in the position of determining, on behalf of the Class members, whether the interests of the Class are better served by this settlement than by further litigation. As stated by Sharpe J. in *Dabbs* at para. 30:

> "...A settlement of the kind under consideration here will affect a large number of individuals who are not before the court, and I am required to scrutinize the proposed settlement closely to ensure that it does not sell short the potential rights of those unrepresented parties...."

[115] Therefore it is the representative plaintiff who is responsible for directing the litigation on behalf of the class and who instructs class counsel and to whom class counsel gives advice. To require class counsel and the representative plaintiff to give detailed advice and take instructions from each class member would be impractical, unworkable and contrary to the scheme of the *Act.* One of the purposes of class action litigation is that it be a tool for increased efficiency and judicial economies, which in turn reduces individual and systematic costs and promotes access to justice.

[116] Here the Representative Plaintiff formed an Advisory Group consisting of two other Class members so that she might receive the input and perspectives of other Class members when considering whether to recommend a possible settlement on behalf of the Class. That Advisory Group attended at and participated in the mediation.

[117] However reasonable communications with class members should take place. Here almost all Class members were notified in writing of the proposed settlement and were given a copy of the proposed settlement. In these reasons I have also set forth the other avenues by which notice of the settlement was given. I believe that notice of the proposed settlement reached most, if not all, of the Class members. One of the purposes of the notice is to permit the court to hear concerns that the members might have about the settlement. As noted elsewhere, I am satisfied that the Class had adequate notice of the terms of the settlement and the approval hearing date.

2007 NLTD 150 (CanLII)

[118] Earlier I also detailed the degree and nature of communications by the Representative Plaintiff and by Class counsel with Class members. I am satisfied that within the parameters of a class action that communication was reasonable.

[119] A common theme expressed by the objectors relates to the quantum of compensation. Earlier I reviewed the authorities submitted by Plaintiff's counsel, and referred to by both counsel, which support their positions that the net compensation to be received by Class members in this proposed settlement (with nothing to be taken out for legal fees and disbursements, administration fees and notice fees) falls within a reasonable range when compared to these court-approved settlements in somewhat similar cases.

[120] A couple of the objectors noted that they realized that no amount of money could heal the damage done to them and to their trust and sense of security. The Court realizes that money can never adequately compensate for non-pecuniary loss. Nonetheless the Court must apply legal principles to arrive at a monetary award.

[121] The compensation in this case provides some formal recognition of what Class members had been through and the non-monetary relief may provide some added comfort.

[122] Also because this is an approval hearing of a proposed settlement, the Court in addition to the proposed monetary compensation has to consider the other factors which I have listed elsewhere. These are the likelihood of recovery or the likelihood of success; the recommendations and experience of counsel; the further expense of litigation; and the likely duration of litigation (in this case two to three years).

[123] Here counsel filed case authorities to support their position that the proposed compensation for non-pecuniary damages is within the range of what Class members could expect to receive at trial if successful; the non-monetary relief, which the Representative Plaintiff stated was their first priority (and which many of the objectors noted as being important) is something which could only be achieved by settlement and not something the Court would have jurisdiction to grant if the matter proceeded to trial; if the trial continued the legal fees and disbursements could reduce the recovery available to Class members, while in the settlement the Defendant has agreed to pay Class counsel legal fees over and above the compensation to Class members; there is a risk, as described earlier, that the Representative Plaintiff would be unsuccessful on the common issues at trial; even if successful on the common issues at trial there may have to be individualized hearings on the damages suffered and this would involve further costs and could deter class members from pursuing their individual claims; and the resolution of this matter would be delayed by years if the matter proceeded to trial.

2007 NLTD 150 (CanLII)

[124] The monetary compensation part of the proposed settlement is not to be taken in isolation when assessing whether the settlement as a whole is fair and reasonable to members of the class as a whole. Yet, as counsel stated, and based on the case authorities they submitted, in isolation the monetary compensation is within the range of compensation approved by courts in other jurisdictions.

[125] It is necessary to appreciate fully the unpredictability of the outcome of a trial (both on liability and damages); the further cost of going to trial; and the further delay in bringing the matter to conclusion. Experienced class counsel do not share the same degree of optimism as some of the objectors with respect to the net monetary award in these circumstances. One has to give considerable weight to the opinion of experienced class counsel that

further litigation could not be justified on the basis of an experienced assessment of the litigation risk and the delays that would inevitably ensue.

[126] Three of the objectors expressed dissatisfaction with what they perceived as a threat from the defendant that if the settlement was not accepted they would be required to undergo psychiatric assessment.

[127] In the Statement of Claim one of the particulars of loss or damage claimed by the Class is nervous shock, involving psychiatric illness; and distress, frustration, anxiety, displeasure, vexation, tension, aggravation, upset and inconvenience. In its amended defence the Defendant denied that Class members suffered nervous shock, involving psychiatric illness; and pleaded that stress and anxiety are non-actionable and cannot in law result in compensation.

2007 NLTD 150 (CanLII)

[128] Therefore while the Defendant in its defence admits that a mistake occurred, i.e. that there was a failure to properly sterilize the instruments, they take issue with the claim that affected women or their partners have suffered an injury for which, in law, there is compensation. Their focus in that respect was therefore on minimizing or disproving the damage claims.

[129] Should the matter proceed to trial the Defendant, and indeed both counsel, would be entitled to exercise whatever their rights are under the Rules of Court, including the discovery rules.

[130] On this hearing defence counsel restated its position that in law there Can be no claim for emotional harm without proof of physical illness, and that as it was the members of the Class, in the Statement of Claim, that alleged this as a damage, the onus would therefore be on the members of the Class to bring their own evidence to prove this head of damage.

[131] This is a legal position arising from the pleadings and would have to be dealt with if the matter proceeded to trial. Proof of damages is a live issue in the pleadings.

[132] Two objectors made reference to their not being a judicial inquiry into this matter. However the parties have chosen to settle the issues on a legal basis and the Agreement before the Court is part of the legal process. The Court is therefore constrained by its jurisdiction, that is, to determine whether

the settlement is fair and reasonable and in the best interests of the Class as a whole in the context of the legal issues.

[133] Three objectors expressed concern about their being exposed to Human Papilloma Virus (HPV) and that they should be tested for this virus. They note that although they were tested for HIV, Hepatitis B, Hepatitis C, Chlamydia and/or Gonorrhea, they should also be tested for HPV.

[134] The affidavit of Emma Stirling, who was the Coordinator of Patient Safety Quality at the Defendant's hospital, states that advice received from Health Canada and also from Dr. Jane McGillivray, Medical Officer for Health for Health Labrador Corporation, was that because of the prevalence of HPV in the community, it would be impossible to determine whether there was a causal relationship between a case of HPV infection and the breach in sterilization procedures. She states the decision not to test Class members for HPV was based on this advice given by Health Canada and Dr. McGillivray.

2007 NLTD 158 (CanLII)

[135] However, as both counsel pointed out, the "Diseases" that were the subject of the Statement of Claim, the Certification Order, the Certification Notice, and the Settlement Agreement were defined in this litigation as HIV, Hepatitis B, Hepatitis C, Chlamydia and/or Gonorrhea. HPV was not a matter that was ever asserted in this action and therefore the settlement does not relate to HPV. Pursuit of a remedy over HPV would be a separate matter and if anyone obtains HPV their rights would not be adversely affected by the settlement agreement, which agreement only deals with the Diseases listed in this action. As noted, amendments were made to the Settlement Agreement to make it clear that persons are not releasing any claims outside the scope of this action, as it was certified.

[136] Three objectors mentioned concern about there not being an apology from the Defendant. Again, this is something outside the jurisdiction of the Court to order. However, on this hearing defence counsel stated it was always the intention, as part of the settlement, for the defendant to issue an apology. The parties have now amended the non-compensatory relief section VII of the Settlement Agreement to provide for an apology. Section 7.1 now provides for the Defendant providing an apology to be published in the Aurora and in 53 North Magazine. Section 7.2 now provides for the Defendant's Chief Executive Officer to apologize to the Plaintiff and members

of the Class.

[137] I am obliged to the objectors who took the time to file written objections and the Court has been assisted in scrutinizing the proposed settlement by their submissions.

DISPOSITION ON SETTLEMENT APPROVAL

[138] The Court is constrained in this settlement approval hearing by its jurisdiction and the legal framework in which the proceedings are conducted. The settlement must be reviewed from the standpoint of its fairness, reasonableness, whether it is in the best interest of the Class as a whole, and whether it was made in good faith.

2007 NLTD 150 (CanLII)

[139] The Representative Plaintiff pursued the claim through a contested certification hearing; document and oral discovery was conducted by the Plaintiff's counsel; the Class was represented in mediation and in subsequent negotiations by experienced class action counsel and the Representative Plaintiff was actively involved in the litigation, including forming a negotiating committee and attending the mediation. The Representative Plaintiff does not receive any more from the settlement than other Class members. I am satisfied this is not a case described in Rule 7(A).10(3)(b) where the plaintiff representative is unwilling to continue with the action as a result of financial obligations, time restraints or an individual settlement.

[140] Having considered the submissions of counsel and the individual written objections of the objectors, and having reviewed the proposed settlement on the basis of the factors noted earlier, I am satisfied that the settlement is fair, reasonable and made in good faith and in the best interest of the Class as a whole.

[141] The settlement was arrived at, in part, by assessing the likely value of the individual claims and by taking into account the challenges of causation and proof which would attach if the claims were pursued in the ordinary way. It must be kept in mind, as noted in *Dabbs,* supra, that all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want.

CLASS COUNSEL FEES AND DISBURSEMENTS APPROVAL

[142] Pursuant to s. 38(1) of the *Act,* an agreement respecting fees and disbursements between a solicitor and a representative plaintiff shall be in writing. Pursuant to s. 38(2) of the *Act,* an agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court, on the application of the solicitor.

[143] The Representative Plaintiff entered into a written contingency agreement dated April 12, 2004 with the Plaintiff's solicitor. A portion of that agreement states as follows:

> "This will confirm our compensation agreement for representing you in your capacity as representative plaintiff, as well as on behalf of all other members of the relevant class against the Health Labrador Corporation concerning the improper sterilization of gynecological instruments at the Captain William Jackman Memorial Hospital.
>
> "We have agreed that the legal fee to be paid to Ches Crosbie Barristers as class counsel will be 33.3%, payable as a lump sum, of all monetary amounts recovered on behalf of class members. The client must also pay applicable taxes (HST) on the legal fee, from any amounts recovered. An estimate of expected fee, should we settle or obtain a monetary judgment, and should the judgment be paid, is attached as Schedule A.
>
> "Ches Crosbie Barristers will be reimbursed for all disbursements incurred in working for the common benefit of class members plus interest on those disbursements. Interest on disbursements will be calculated at the rate of 8% per annum, not compounded. The payment of legal fees, disbursements, interest and goods and services taxes to our law firm shall be a first charge on the proceeds of any settlement or judgment payable in such manner that the Court shall direct. You will have no personal liability for the fees or disbursements incurred in this proceeding."

[144] The Contingency Agreement was filed with the Court in accordance with the Rules of Court.

2007 NLTD 150 (CanLII)

[145] The Settlement Agreement with respect to Class counsel fees provides in section 10.1 as follows:

> "Class Counsel shall seek Court approval of Class Counsel Fees of up to $93,571.50 in fees, $12,500.00 in disbursements, and $13,100.00 in HST on fees, totalling the all-inclusive amount of $ 119,171.50, which shall constitute Class Counsel's all-inclusive fee for all past and future services rendered in connection with the Action, the Appeal and this Settlement, including the finalization and implementation of the terms of this Agreement. Class counsel will pay the Representative Plaintiff's share of the costs of the mediator already paid by the parties on a 50/50 basis."

[146] The Plaintiff's solicitor now seeks approval of Class counsel fees of up to $93,571.50 in fees; $12,500.00 in disbursements, and $13,100.00 in HST on fees, for a total all-inclusive amount of $119,171.50. The Defendant, in accordance with the Settlement Agreement, has agreed to pay Class counsel fees that are approved by the Court and is in agreement with the amount submitted by Plaintiff's counsel for approval.

[147] The Representative Plaintiff filed an affidavit stating she retained the Plaintiff's law firm in or about November 2003 on a contingency fee basis; that she signed the retainer agreement dated April 12, 2004; that she is pleased with the work that Ches Crosbie Barristers, and their co-counsel, Klein Lyons, did; and that she supports their fee application as reasonable.

[148] There were no objections filed with respect to the fee application, although one objector inquired about how the total settlement money was divided up.

[149] In addition to the non-compensatory relief, an Uninfected Patient is entitled to $450.00 and an Uninfected Spouse is entitled to $100.00. If this settlement is approved the Defendant will deposit $ 179,850.00 into a settlement fund, from which these claims will be paid. Counsel advise that the amount of $179,850.00 is arrived at by using 327 potential Uninfected Patient claimants (327 x $450.00 '$147,150.00), and 327 potential Uninfected Spouse claimants (327 x $100.00' $32,700.00). Class members will receive this amount without any deduction for legal fees.

2007 NLTD 150 (CanLII)

[150] Both counsel state that the agreement respecting counsel fees and disbursements was only negotiated at the conclusion of settlement negotiations, after issues of compensatory and non-monetary relief to the Class had been finalized.

[151] In this settlement the defendant is therefore committed to paying a total of $299,021.50 ($179,850.00 + $119,171.50), together with looking after the administrative and notice costs. The fee of $93,571.50 works out to be 31.29% of the total amount of monies recovered on behalf of Class members from the Defendant. This is lower than the 33.3% stated in the Contingency Fee Agreement.

[152] In *Fakhri,* Gerow J., in dealing with the purpose of the fee approval, stated commencing at para. 17:

> "17 The purpose of the fee approval requirement is to ensure that the fee charged to the class is fair and reasonable, and that the class counsel is appropriately compensated. Class action litigation can be challenging and risky.
>
> "18 This risk has been recognized by both the Ontario Law Reform Commission on Class Actions and the courts. In Report on Class Actions (Toronto: Ministry of the Attorney General, 1982), the Commission indicated that it was essential that fee awards provide risk premiums to successful class counsel.
>
> "19 The Ontario Court of Appeal in *Gagne v. Silcorp Ltd.* (1998), 41 O.R.(3d) 417 at 422-423 (C.A.) addressed the issue of risk premiums:
>
> > 'Another fundamental objective is to provide enhanced access to justice to those with claims that would not otherwise be brought because to do so as individual proceedings would be prohibitively uneconomic or inefficient. The provision of contingency fees where a multiplier is applied to the base fee is an important means to achieve this objective. The opportunity to achieve a multiple of the base fee if the class action succeeds gives the lawyer the necessary economic incentive to take the case in the first place and to do it well. However, if the Act is to fulfil its promise, that opportunity must not be a false

2007 NLTD 150 (CanLII)

hope.'"

[153] At para. 21 of that case, Gerow J. listed some of the factors courts have considered in assessing the reasonableness of fees stating:

> "21 In assessing the reasonableness of fees courts have considered the extent of work done, the skill and competence of counsel, the complexity of the matter, the importance of the matter to the class, the result achieved, individual claimants' contribution to the fee as a portion of their recoveries and the fee expectation of the representative plaintiffs: see *Fischer v. Delgratia Mining Corp.,* [1999] B.C.J. No. 3149 (S.C.), *Killough v. Canadian Red Cross Society*, 2001 BCSC 1745, [2001] B.C.J. No. 2631 (S.C.); *Knudsen v. Consolidated Food Brands Inc.,* 2001 BCSC 837, [2001] B.C.J. No. 2902 (S.C.)."

2007 NLTD 150 (CanLII)

(a) Extent of legal work done by class counsel.

[154] The lawsuit was commenced in November 2003 and has been actively litigated by Class counsel. In addition to the preparation and filing of pleadings, I would agree with Class counsel's submission that the matter was taken through a contested certification hearing; documentary discovery; oral discoveries; one full day of mediation; and subsequent negotiations. There has been ongoing work in preparing this matter for settlement approval, and in responding to Class members' inquiries. In addition, this fee includes work to be done in the future in monitoring and implementing the settlement. The work has been shared between two law firms, enabling Class counsel to share the risks and to take advantage of experience gained in other jurisdictions in similar class actions. Also the nature of the settlement is that the Defendant has agreed to pay Class counsel's fees and disbursements over and above any compensation paid to Class members.

[155] The Defendant's agreement with the amount of the fees and disbursements is some evidence of their reasonableness as the Defendant would have a good idea of the work involved in bringing the litigation to this stage. As the fees are paid over and above any compensation to Class members, the payments will not reduce compensation to the Class members.

(b) Skill and competence of class counsel.

[156] I described the experience of Class counsel earlier. Ches Crosbie is an experienced trial lawyer in this jurisdiction and a pioneer in class actions since the introduction of class actions in this jurisdiction. Plaintiff's counsel retained the British Columbia law firm of Klein & Lyons to assist in the litigation. That firm has extensive experience with class action lawsuits throughout the country and has been recognized by courts in approving settlements in other class actions.

[157] As well, while the material and issues in this case were complex, the case was well organized on the applications heard in Court and this is indicative of both the difficulty of the work and the skill of counsel.

(c) Complexity of the matter.

[158] I described the legal issues involved in this class action elsewhere. The matter did involve some novel legal issues in this jurisdiction. Those issues could be described as complex. The Defendant strongly contested this action being certified and if the matter proceeded to trial there would have been complex, novel issues to be resolved. As Plaintiff's counsel noted, success could not be assured. This was a case where the work was difficult and there was considerable uncertainty as to the outcome with respect to quantum, with the Defendant seeking to hold each Class member to strict proof of damages.

(d) Importance of the matter to the Class.

[159] As noted earlier, Class counsel were advised that the primary goal for Class members was receiving assurances that the conduct complained of at the clinic will not be repeated in the future. The secondary goal was receiving compensation for what they had been through.

(e) Result achieved.

[160] The non-monetary relief, set forth in section VII of the Settlement Agreement, not only includes an apology but sets forth what has been described as innovative features providing for the appointment by the Defendant of a community representative, approved by the Representative

2007 NLTD 150 (CanLII)

Plaintiff, to the Environmental Service Team responsible for developing infection control processes; providing for the Defendant's insurer to conduct an educational seminar on the topic of infection control; and providing for the Defendant's CEO to discuss publicly the changes in sterilization procedures implemented by the Defendant.

[161] The authorities submitted to the Court support the submission of both Class action counsel and defence counsel that the monetary relief is within the range of that obtained in other comparable cases.

[162] The result goes a long way to successfully achieving both the primary and secondary concerns of the Class.

[163] In addition to this, any member of the Class who has knowledge that he or she has contracted the Diseases or has knowledge that he or she is a Cross-Infected Person may give notice in writing of the claim within the Claim Deadline, and shall have a further sixty days after expiry of the Claim Deadline within which to commence an action for damages with respect to the claim of infection. This section would not apply to Infected Patients or Cross-Infected Persons who have not been diagnosed with one of the Diseases prior to the commencement of the Claim Period.

(f) Independent claimants' contributions to the fee as a portion of their recoveries.

[164] Here the fees and disbursements requested will not reduce the individual recoveries. The fees and disbursements, up to the amount proposed, have been agreed to be paid by the Defendant, over and above the amount to be paid to members of the Class.

(g) Fee expectation of the Representative Plaintiff.

[165] The fee requested is consistent with the Retainer Agreement executed by the Representative Plaintiff at the outset of this litigation and the Representative Plaintiff supports the fee approval.

[166] Courts in some jurisdictions often award Class counsel fees based on standard hourly rates times a multiplier. In the British Columbia case of *Pearson et al. v. Boliden Ltd. et al.,* [2006] B.C.T.C. TBEd. JL.029; 2006

2007 NLTD 150 (CanLII)

BCSC 1031, the Court noted at para. 17:

> "17 It is often the case that Courts in other jurisdictions have awarded fees of between one to five times the value of the docketed or recorded time of class counsel in order to provide a risk premium to counsel: see for instance *Parsons v. Canadian Red Cross Society* (2000), 49 O.R.(3d) 281 (Ont. S.C.J.) affirmed (2001), 11 C.P.C. (5th) 16 (Ont. C.A.) leave to appeal denied [2001] S.C.C.A. No. 190."

2007 NLTD 150 (CanLII)

[167] However, it appears that the British Columbia Courts while not using the fee/multiplier approach as a method of assessing class counsel fees, have used it instead as a tool for testing the reasonableness of the fees *(Pearson* para. 18).

[168] As a crosscheck against reasonableness of the proposed fee in the present action, Class counsel stated the recorded hours and hourly rates of the lawyers involved in the prosecution of this class action were as follows:

Lawyer	Recorded Hours	Hourly Rate.	Total
Chesley F. Crosbie, Q.C.	209.4	$400.00	$83,760.00
Pamela L. Taylor	149.5	$250.00	$37,375.00
David Klein, Q.C.	62	$400.00	$24,800.00
Doug Lennox	84	$250.00	$21,000.00
-	-	-	$166,935.00

[169] Based on those stated hours and hourly rates, the fees would be higher than those now requested. If one divided the requested fee of $93,571.50 by the total number of hours recorded of 504.9, the averagely hourly rate would be approximately $185.00. This rate would not be unreasonable.

[170] Applying the fee/multiplier approach as a test would add support to Class counsel's submission that the proposed fees are reasonable.

DISBURSEMENTS

[171] The Office Administrator for Class counsel's law firm filed an affidavit, attaching accounting printouts, stating the firm disbursements in this matter as of August 1, 2007, total $12,700.86. The disbursements asked to be approved in this matter are up to $12,500.00.

DISPOSITION ON FEE APPROVAL

[172] Taking into account the factors mentioned, I am satisfied in all the circumstances that the fee in this matter meets the criteria for approval and accordingly I approve it. This is on the understanding that it covers all future work to be done by Class counsel in monitoring the implementation of the settlement.

2007 NLTD 150 (CanLII)

[173] In addition to being reasonable and being in accordance with the Contingency Agreement, and being approved by the Representative Plaintiff, such a fee in this case fulfills the policy objective of encouraging greater access to justice through the mechanism of class proceedings for those who might otherwise be unable, by compensating counsel for the realistic and significant risk they expose themselves to by taking on difficult and time-consuming cases with no guarantee of success, on a contingency basis.

APPROVAL OF NOTICE PLAN

[174] Pursuant to s. 35 of the *Act,* the Court in approving a settlement may consider whether notice should be given under s. 20 of the *Act.* The Plaintiff seeks an order approving the Notice Plan (Schedule "C" to the Settlement Agreement).

[175] The Notice Plan provides that the Defendant's solicitors will by registered mail send a copy of the Notice of Settlement to each of the Class members who was a patient at the clinic, is a resident of the Province of Newfoundland and Labrador and who has not opted out of the Class action. The Defendant's solicitors will also send a copy of the Notice of Settlement to each of the Class members who was a patient at the clinic but is not a resident of the Province of Newfoundland and Labrador where that person has opted into the Class action.

[176] The Notice of Settlement will also include a copy of the patient claim form, the spouse or common law partner claim form and instructions for completion of same. The notice is to be sent no later than 30 days after the date of final court approval of the settlement.

[177] The Defendant's solicitors will also publish the Notice of Settlement in the Aurora no later than 30 days after the final court approval of the settlement.

[178] The Defendant will pay the mailing cost and the cost of publishing the notice and will administer the fund at their expense.

[179] The deadline for submission of claims is 90 days after the date of final Court approval of the settlement.

[180] The Defendant's solicitors will confirm receipt of a claim to any Class member who submits a claim. Within 60 days after the Deadline for submission of claim forms the Defendant's solicitor will provide written notice to any claimants whose claim may have been disallowed. In cases where a claim is allowed, the Defendant's solicitors will, within 60 days after the Deadline for submitting claim forms, pay the claim.

[181] I am in agreement with and approve the overall Notice Plan.

DISPOSITION

[182] The Settlement Agreement, as amended for clarification purposes on this hearing, and the schedules attached, is approved as fair, reasonable and made in good faith and in the best interests of the Class as a whole.

[183] The Notice Plan (Schedule "C" of the Settlement Agreement as amended) is approved, and the Defendant shall cause the Notice of Settlement (Schedule "B" of the Settlement Agreement as amended) and the Claim Forms and Instructions (Schedule "A" of the Settlement Agreement as amended) to be published to Class members in accordance with the Notice Plan.

[184] Class counsel's fees and disbursements as submitted are hereby approved.

2007 NLTD 150 (CanLII)

[185] The Claim Deadline shall be 90 days from the Final Order date.

[186] This Court reserves its continuing exclusive jurisdiction over the parties to this Agreement and the Settlement Class Members, to supervise, construe and enforce this Agreement in accordance with its terms, for the mutual benefit of all parties. Application allowed.

2007 NLTD 150 (CanLII)

Kenneth Smith, as Estate Trustee of the Last Will and Testament of Margaret Smith, deceased, et al. v. National Money Mart Company et al.

[Indexed as: Smith Estate v. National Money Mart Co.]

106 O.R. (3d) 37

2011 ONCA 233

2011 ONCA 233 (CanLII)

Court of Appeal for Ontario,
Moldaver, R.P. Armstrong and Juriansz JJ.A.
March 28, 2011

Civil procedure -- Class proceedings -- Compensation for representative plaintiff -- Motion judge erring in ordering representative plaintiff's compensation to be paid out of class counsel fees rather than out of settlement fund.

Civil procedure -- Class proceedings -- Fees -- Counsel fee -- Fee agreement in class proceeding not approved by court and not satisfying requirements of s. 33(4) of Class Proceedings Act -- Determination of counsel fees governed by s. 32(4) of Class Proceedings Act -- Motion judge not erring in failing to apply base fee/multiplier approach in [page38]s. 33(7) -- Settlement of class proceeding consisting of payment of $27.5 million to class, forgiveness of indebtedness, provision of transaction credits to reduce cost of using defendants' services in future, and payment of $3 million to Class Proceedings Fund -- Motion judge entitled to reject class counsel's submission that settlement had value of $120 million and to find that class counsel's claim for fees in amount of $27.5 million was not reasonable -- Class counsel's appeal from all-inclusive award of $14.5 million dismissed -- Class

Proceedings Act, 1992, S.O. 1992, c. 6, ss. 32(4), 33(4), (7).

Civil procedure -- Class proceedings -- Fees -- Disbursements -- Motion judge not erring in failing to give effect to contingency fee agreements entered into by class counsel and non-counsel and in treating those fees as disbursements -- Class Proceedings Act not contemplating contingency fee arrangements with persons other than class counsel and not giving court jurisdiction to allow premium on service providers' fees -- Motion judge not erring in treating fees of other lawyers retained by class counsel to assist them as disbursements where there was no evidence that representative plaintiff made or participated in decision to retain those lawyers.

2011 ONCA 233 (CanLII)

The plaintiffs brought a class proceeding alleging that they were charged a criminal rate of interest by the defendants for payday loans. The class action was strenuously resisted. Following a mid-trial mediation, the parties agreed to a settlement on the following terms: the defendants would pay $27.5 million to the settlement class; the defendants would forgive the class members' indebtedness to them in the amount of $56,388,071; the defendants would make available fully transferable transaction credits in the amount of $30 million to reduce the cost of using the defendants' services in the future; the defendants would pay $3 million to the Class Proceedings Fund; and the defendants would pay the costs of administering the settlement, in the amount of $2 million. Class counsel sought approval of a counsel fee of $27.5 million. The motion judge fixed class counsel fees in the amount of $14.5 million, inclusive of GST and disbursements, and allowed the representative plaintiff compensation of $3,000, to be paid out of class counsel fees. Class counsel appealed.

Held, the appeal should be allowed in part.

An uncontested motion for approval of class counsel fees places judges in a difficult position. It would be advisable for motion judges to consider the appointment of amicus curiae to assist them in approving class counsel fees.

The motion judge did not err by failing to apply the base fee/multiplier approach provided for in s. 33(7) of the Class Proceedings Act ("CPA"). In the circumstances of this case, the determination of counsel fees was governed by s. 32(4) of the CPA, not s. 33(7). The court's jurisdiction to determine class counsel fees under s. 33(7) is premised and conditioned on the existence of a fee agreement providing for payment of fees and disbursements only in the event of success and which permits class counsel to make a motion to the court to have his or her fees increased by a multiplier. In this case, the agreement regarding class counsel fees did not provide that counsel may bring a motion to have the court increase the base fee by a multiplier. Rather, the agreement stipulated how counsel fees were to be calculated and also stipulated that it would become enforceable only if it were approved by the court under s. 32(2). If it were not approved, then, under s. 32(4) of the CPA, the court could determine the amount owing to counsel. The motion judge in this case did not approve the fee agreement. [page39]

In determining the reasonableness of the claimed counsel fee, the motion judge was entitled to reject class counsel's submission that the settlement had a value of $120 million. The appellants had not established any basis for interfering with his determination that $14.5 million was a fair and reasonable fee for class counsel in this case.

The motion judge did not err in failing to give effect to contingency fee agreements entered into by class counsel and consultants and by treating the consultants' fees as disbursements of class counsel. The CPA does not contemplate contingency fee arrangements with persons other than class counsel and does not give the court the jurisdiction to allow a service provider a premium on its fees.

The motion judge did not err in treating the fees of other lawyers retained by class counsel on a contingency basis to assist them as disbursements. There was no evidence that the representative plaintiff made or participated in any decision to retain those lawyers as class counsel. While counsel may

2011 ONCA 233 (CanLII)

require assistance and may incur disbursements on the clients' behalf, clients decide who are their counsel. Moreover, if there was a change in the composition of class counsel, the court was not immediately and directly notified of the changes. Finally, the record did not indicate that those lawyers were intended to have a solicitor-client relationship with the representative plaintiff.

The motion judge erred in ordering that the representative plaintiff's compensation be paid out of class counsel fees rather than out of the settlement fund.

Cases referred to

Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998), 40 O.R. (3d) 83, [1998] O.J. No. 1891, 160 D.L.R. (4th) 186, 62 O.T.C. 71, 21 C.P.C. (4th) 272, 79 A.C.W.S. (3d) 459 (Gen. Div.); Fantl v. Transamerica Life Canada (2009), 95 O.R. (3d) 767, [2009] O.J. No. 1826, 2009 ONCA 377, 72 C.P.C. (6th) 1, 249 O.A.C. 58; Gagne v. Silcorp. Ltd. (1998), 41 O.R. (3d) 417, [1998] O.J. No. 4182, 167 D.L.R. (4th) 325, 113 O.A.C. 299, 39 C.C.E.L. (2d) 253, 27 C.P.C. (4th) 114, 83 A.C.W.S. (3d) 125 (C.A.); Nantais v. Teletronics Proprietary (Canada) Ltd. (1996), 28 O.R. (3d) 523, [1996] O.J. No. 5386, 134 D.L.R. (4th) 470, 7 C.P.C. (4th) 189, 62 A.C.W.S. (3d) 443 (Gen. Div.), consd

Other cases referred to

Baxter v. Canada (Attorney General) (2006), 83 O.R. (3d) 481, [2006] O.J. No. 4968, 40 C.P.C. (6th) 129, 153 A.C.W.S. (3d) 1044 (S.C.J.); Frohlinger v. Nortel Networks Corp., [2007] O.J. No. 148, 40 C.P.C. (6th) 62, 154 A.C.W.S. (3d) 542 (S.C.J.); Garland v. Enbridge Gas Distribution Inc., [2006] O.J. No. 4907, 153 A.C.W.S. (3d) 785, 56 C.P.C. (6th) 357 (S.C.J.); Killough v. Canadian Red Cross Society, [2001] B.C.J. No. 191, 2001 BCSC 198, 85 B.C.L.R. (3d) 233, 102 A.C.W.S. (3d) 655; Killough v. Canadian Red Cross Society, [2001] B.C.J. No. 1481, 2001 BCSC 1060, 91 B.C.L.R. (3d) 309, 106 A.C.W.S. (3d) 787; Lawrence v. Atlas Cold Storage Holdings Inc., [2009] O.J. No. 4067, 2009 ONCA 690, 78 C.P.C. (6th) 208, 311 D.L.R. (4th) 323, 257 O.A.C. 39 (C.A.); Martin v. Barrett, [2008] O.J. No. 3813 (S.C.J.); McCarthy v. Canadian Red Cross Society, [2001] O.J. No. 2474, [2001] O.T.C. 470, 8 C.P.C. (5th) 349, 106 A.C.W.S. (3d)

2011 ONCA 233 (CanLII)

193 (S.C.J.); McCutcheon v. Cash Store Inc., [2008] O.J. No. 5241, 174 A.C.W.S. (3d) 90 (S.C.J.); Miller v. Mackey International, Inc., 70 F.R.D. 533, 23 Fed. R. Serv. 2d (Callaghan) 337 (S.D. Fla. 1976); Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2005] O.J. No. 1117, [2005] O.T.C. 208, 138 A.C.W.S. (3d) 20 (S.C.J.); Walker v. Union Gas Ltd., [2009] O.J. No. 536, 74 C.P.C. (6th) 366 (S.C.J.); Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518 (1st Cir. 1991); Windisman v. Toronto College Park Ltd., [1996] O.J. No. 2897, 10 O.T.C. 375, 3 C.P.C. (4th) 369, 65 A.C.W.S. (3d) 207 (Gen. Div.); Zucker v. Franklin, 374 F.3d 221 (3d Cir. 2004) [page40]

Statutes referred to

An Act Respecting Champerty, R.S.O. 1897, c. 327

Class Action Fairness Act of 2005, 28 U.S.C. (2005), 1712(d)

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 32, (1), (2), (3), (4), (a) 33, (1), (2), (3), (4), (5), (6), (7), (a), (b), (c), (8), (9)

Criminal Code, R.S.C. 1985, c. C-46 [as am.]

Payday Loans Act, 2008, S.O. 2008, c. 9 [as am.]

Solicitors Act, R.S.O. 1990, c. S.15 [as am.]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 13.02

Authorities referred to

Law Society of Upper Canada, Rules of Professional Conduct, rule 2.08(8)(a)

Watson, Gary, "Settlement Approval -- The Most Difficult and Problematic Area of Class Action Practice" (Paper prepared for the NJI Conference on Class Actions, April 2008)

Winkler, Warren K., and Sharon D. Matthews, "Caught In a Trap -- Ethical Considerations for the Plaintiff's Lawyer in Class Proceedings" (Paper delivered at the 5th Annual Symposium on Class Actions, April 11, 2008)

APPEAL by class counsel from the order of Perell J., [2010] O.J. No. 873, 94 C.P.C. (6th) 126 (S.C.J.) fixing counsel fees in class proceedings.

Terrence J. O'Sullivan and James Renihan, for appellants.

2011 ONCA 233 (CanLII)

Chris Hubbard, for Money Mart (not participating in appeal).

Mahmud Jamal and Jason MacLean, for Dollar Financial Group, Inc. (not participating in appeal).

2011 ONCA 233 (CanLII)

The judgment of the court was delivered by

[1] JURIANSZ J.: -- This is an appeal from the order of Perell J. fixing the appellants' counsel fees in this class proceeding. The appellants are four law firms that acted as class counsel in this class proceeding.

[2] By order dated March 3, 2010, Perell J. varied the certification order by expanding the class definition, approved the settlement of the class action, allowed the representative plaintiff compensation of $3,000 to be paid out of class counsel fees and fixed class counsel fees in the amount of $14.5 million, being $12,806,074.94 for fees, $640,303.75 for GST and $1,053,621.31 for disbursements, including GST. The disbursements included the fees of certain consultants and other counsel retained by class counsel that the appellants had requested be treated as contingency fees.

[3] The class definition was expanded to add a group of payday loan borrowers who entered into transactions between the publication of the original certification order and December 15, 2009. [page41]The date December 15, 2009 is significant. As of that date, because of legislative changes, it could no longer be alleged that the transactions contravened the Criminal Code's [R.S.C. 1985, c. C-46] provisions prohibiting criminal rates of interest.

[4] Before Perell J., class counsel sought approval of a counsel fee of $27.5 million. On appeal, they seek a fee of $20 million. They also seek, as they did before Perell J., to have fees, disbursements and taxes of other counsel -- who had provided their services on a contingency basis -- treated as a component of the class counsel base fee rather than as disbursements, to have the fees of consultants -- who had also

provided their services on a contingency basis -- increased by the multiplier the court awarded to class counsel and to have the compensation paid to the representative plaintiff paid out of the class fund rather than out of class counsel fees.

[5] For the reasons that follow, I would allow the appeal in part. I would vary the motion judge's order so that the fees of the representative plaintiff are paid out of the class fund. I would dismiss the remainder of the appeal.

[6] I add the observation that in a case such as this, the motion judge should give serious consideration to the appointment of amicus curiae or a guardian of the settlement fund on the hearing of counsel's application for approval of their fees.

Background

[7] In this class proceeding, the plaintiffs alleged that they were charged a criminal rate of interest by the defendants for small loans with a due date for repayment connected to their payday. The issue in the action was whether the various charges, i.e., a finance charge, a cash chequing fee and an item fee, should be characterized as interest under the Criminal Code's provisions prohibiting criminal rates of interest.

[8] The class action was strenuously resisted. There were many interlocutory proceedings. According to the motion judge's count, there were 39 orders, 12 endorsements and four judgments. There was one leave application to the Divisional Court, four appeals to the Court of Appeal and three leave applications to the Supreme Court of Canada. The issues litigated included whether the order for service of the claim, ex juris, on the defendant Dollar Financial Group, Inc. was valid, whether the loan agreements required the plaintiffs to mediate or arbitrate their disputes, whether the defendants' franchisees should be added as defendants and whether the plaintiffs were entitled to partial summary judgment.

[9] The trial began on April 27, 2009 and proceeded for 17 days. It was established that during the class period, class

2011 ONCA 233 (CanLII)

[page42]members had paid cheque cashing fees and interest totalling $224,791,507. Money Mart counterclaimed for the class members' indebtedness from payday loans that were in default. The amount of that indebtedness was ultimately calculated to be $56,388,071 at the time of the motion.

[10] Following a mid-trial mediation, the parties agreed to a settlement on the following terms:

(i) the defendants would pay $27.5 million to the settlement class;

(ii) the defendants would forgive the class members' indebtedness to them, in the amount of $56,388,071;

(iii) the defendants would make available fully transferable transaction credits in the amount of $30 million to reduce the cost of using the defendants' services in the future, to be allocated among those class members who were not indebted to Money Mart;

(iv) the defendants would pay to the Class Proceedings Fund the sum of $3 million, in annual instalments of 10 per cent of the transaction credits as they are used, and 10 per cent of the unused transaction credits after the expiration date; and

(v) the defendants would pay the costs of administering the settlement, in the amount of $2 million.

[11] At the motion, class counsel asserted the value of the settlement was in the range of $120 million. The time value of the hours docketed by class counsel was $9,750,024.

Issues

[12] The appellants resist the characterization of the appeal as primarily involving a claim for higher fees. Rather, they say that the appeal raises important issues about access to justice, since it concerns the legal principles that govern the determination of fair fees for class counsel. The fees awarded must not only provide adequate compensation to class counsel but must also provide a suitable incentive to skilled lawyers to take on complex and expensive class proceedings, all without unreasonably diminishing the fund available for distribution to the class. The appellants say that contingency fees should be available to firms who provide essential but non-legal services

2011 ONCA 233 (CanLII)

to the class and that it is important that class counsel be able to retain, on a contingency basis, the expert services necessary to effectively assert the class' claim. Finally, they say that as a matter of principle, a [page43]representative plaintiff's compensation should be paid out of the fund and not out of class counsel fees.

[13] I summarize the appellants' arguments as follows:

(i) the motion judge erred by failing to apply the base fee/ multiplier approach provided for in s. 33(7);

(ii) the motion judge erred by failing to allow class counsel fees in an amount that was fair and reasonable;

(iii) the motion judge erred by refusing to treat the fees payable to the consultants, Price Waterhouse Cooper ("PWC") and Mr. Anand, in accordance with the contingency basis on which class counsel had retained them;

(iv) the motion judge erred by refusing to consider the fees of Fraser, Milner, Casgrain LLP ("FMC") and Prof. Krishna as class counsel fees because the court had not appointed them as part of the class counsel group; and

(v) the motion judge erred by ordering that the representative plaintiff's compensation be paid from class counsel fees.

[14] There is another matter worth discussing though, strictly speaking, it is not a legal issue raised by the appeal. During oral argument, the court raised with counsel the difficulties that stem from the fact that class counsel fees are determined in a non-adversarial forum. Counsel for the appellants frankly acknowledged the difficulties and suggested that it would be useful to the profession for this court to discuss the issue. I begin with that discussion.

The non-adversarial forum

[15] Our system of justice is based on the basic tenet that the court will be able to reach the most informed, considered, impartial and wise decision after presiding over the confrontation between opposing parties, in which each side can identify issues, lead evidence, cite law, discuss policy considerations and seek to undermine the position of the other. Motions for the approval of settlements and class counsel fees

2011 ONCA 233 (CanLII)

in class proceeding depart from this basic tenet as a matter of routine. They usually proceed unopposed in large part because individual class members often have too small a stake to be compelled to participate.

[16] The motion judge was troubled by what he described at one point as the "ex parte" nature of the hearing before him and included a lengthy comment about it in his reasons, a comment that is worth reading. The comment emphatically observes that [page44]it is "well known" that the court is placed in a difficult position in determining whether a settlement and class counsel fees should be approved without "the dynamics of the adversary system where opposing views are heard".

[17] Winkler J. in McCarthy v. Canadian Red Cross Society, [2001] O.J. No. 2474, 8 C.P.C. (5th) 349 (S.C.J.) also compared unopposed motions in class action to ex parte proceedings. After referring to authorities that highlighted that [at para. 20] "there is no situation more fraught with potential injustice and abuse of the Court's powers than application[s] for an ex parte injunction", he stated that counsel in unopposed motions in class proceedings are under a special duty to make full and frank disclosure, just as in ex parte proceedings. He stated:

> By comparison, a class proceeding by its very nature involves the issuance of orders or judgments that affect persons who are not before the Court. These absent class members are dependent on the Court to protect their interests. In order to do so, the Court must have all of the available information that has some bearing on the issues, whether favourable or unfavourable to the moving party. It is the obligation of counsel to provide that information in a manner that is consonant with the duty to make full and frank disclosure. Moreover, that information must be provided in a manner that is not misleading or even potentially misleading. In most class proceedings, voluminous records develop as a consequence of the complexity of the litigation. The Court is not equipped, nor should it be required, to engage in a forensic investigation into the material or to mine the

2011 ONCA 233 (CanLII)

record to inform itself. Counsel must direct the Court to all relevant information that would impact on the Court's determination. This is especially important where the motion is for the approval of settlement agreements, class counsel fees or consent certifications for the purpose of settlement.

[18] In one respect, counsel's duty to make full and frank disclosure is more significant in unopposed class action motions than in ex parte motions. An order obtained ex parte is very often brought back before the court by an interested party not present at the ex parte hearing. This does not happen with orders approving counsel fees in class proceedings. This court recently found that a class member lacks standing to appeal an order approving class counsel fees: Lawrence v. Atlas Cold Storage Holdings Inc., [2009] O.J. No. 4067, 311 D.L.R. (4th) 323 (C.A.).

[19] On appeal, counsel for the appellants summed up the court's concern well. The process, he said, places the court in the position of adversary and adjudicator at the same time; the court must test the case being put to it, while impartially adjudicating it. He suggested this was "perhaps a flaw in the legislation".

[20] Nothing in the legislation, however, discourages the court from exercising its inherent jurisdiction to ensure the proceedings before it are fair or resorting to its authority under rule 13.02 [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194] to appoint [page45]an amicus. In fact, counsel for the appellants advised that now some judges of the Superior Court appoint amicus to present an opposing view in such motions. As well, "monitors" have been appointed in several Ontario cases. In the United States, it is not uncommon for the courts to appoint a guardian ad litem for the settlement fund.

[21] An uncontested motion for fees also places counsel in an awkward position. Lawyers are expected to be zealous but personally disinterested advocates of their clients' positions. On an uncontested motion for fees, the lawyer represents the class whose interest is in maintaining the maximum settlement amount possible for distribution among class members. The

2011 ONCA 233 (CanLII)

lawyer, on the other hand, seeks fees that will diminish the amount of the settlement available for distribution. The lawyer's interests appear to be pitted against those of the client. In appropriate cases, class counsel may, on their own initiative, seek to reduce the awkwardness of this position by arranging for independent counsel to advise the representative plaintiff in relation to class counsel's application for fees. Class counsel have taken this action in at least one reported Canadian case.

[22] I discuss each of these strategies briefly.

Amicus

[23] The court has jurisdiction to appoint an amicus to preserve the fairness of the proceedings before it. In Ontario, though, there is no judicial discussion of the appointment of amicus in the context of class action proceedings. Commentators, however, have pointed out the benefits of allowing amicus to assist the court in the approval of settlements and class counsel fees, which are often dealt with together. The motion judge cited Prof. Garry Watson, who, in his paper "Settlement Approval -- The Most Difficult and Problematic Area of Class Action Practice" (Paper prepared for the NJI Conference on Class Actions, April 2008), argued that "judges should give serious thought to precipitating an adversarial hearing by appointing counsel to advise the court and oppose the settlement if appropriate".

[24] Another significant paper is "Caught In a Trap -- Ethical Considerations for the Plaintiff's Lawyer in Class Proceedings", authored by Winkler C.J.O. and Sharon D. Matthews (Paper delivered at the 5th Annual Symposium on Class Actions, April 11, 2008) and available online at http://www.ontariocourts.on.ca/ coa/en/ps/speeches/caught.htm. The authors note the effect of the absence of an adversary in these situations and suggest the use of amicus: [page46]

> Depending on the terms of the settlement, the defendant may not have standing on the fee approval and in such cases there will be no effective adversary to assist the court on either

2011 ONCA 233 (CanLII)

> settlement or fee approvals. Class counsel may find themselves in a conflict in supporting settlement approvals. . . . It may be appropriate to appoint amicus curiae to assist courts in understanding the merits of the settlement generally and as it relates to fees in particular.

[25] The only Canadian case that actually discusses the appointment of an amicus in the context of approving a class settlement or class counsel fees seems to be Killough v. Canadian Red Cross Society, [2001] B.C.J. No. 191, 85 B.C.L.R. (3d) 233 (S.C.). K.J. Smith J. of the B.C. Supreme Court cautioned against too quickly resorting to the appointment of an amicus in motions to approve class counsel fees [at para. 14]:

> In my opinion, there is merit in [the] submission that amicus curiae should not be appointed as a matter of course in these matters. It may be that, in a particular case, the class-action judge will consider that amicus would be helpful, but to make such an order in the absence of some special circumstances warranting it would be to add an unnecessary layer of complexity and expense to the fee-approval process.

[26] He found the appointment of an amicus was premature because it appeared the court would have the benefit of an independent perspective. Class counsel had retained separate independent counsel to advise the representative plaintiff as to the fairness and reasonableness of the proposed fees and class counsel had undertaken to file independent counsel's opinion with the court. Moreover, the Public Guardian and Trustee had sought standing to take a position and that application had not yet been dealt with. When the matter eventually came on for hearing (see Killough v. Canadian Red Cross Society, [2001] B.C.J. No. 1481, 91 B.C.L.R. (3d) 309 (S.C.), at para. 40), K.J. Smith J. declined to give the Public Guardian formal standing, but did allow the Public Guardian to participate in the hearing:

> Counsel have an inherent conflict of interest on applications for approval of their own fees and

2011 ONCA 233 (CanLII)

disbursements. While those of us who are trained in the workings of the legal system understand that counsel put aside their own self-interest in such matters, as they are ethically bound to do, decisions that take into account the objective, perhaps adversarial, submissions of other interested parties will generally better withstand scrutiny. Accordingly, if the Public Guardian and Trustee wishes to address the Court on behalf of legally incapable persons in the class, it is my view that the Court should hear those submissions.

2011 ONCA 233 (CanLII)

Monitors

[27] Monitors have been appointed in a number of Ontario class actions. The published reasons do not always make clear the role assigned to the monitor. For example, in Baxter v. Canada (Attorney General) (2006), 83 O.R. (3d) 481, [2006] O.J. No. 4968 (S.C.J.) [page47]and Frohlinger v. Nortel Networks Corp., [2007] O.J. No. 148, 40 C.P.C. (6th) 62 (S.C.J.), court-appointed monitors are included in the list of those appearing before the court, but no mention of them is made in the reasons. Both of these cases involved a motion for the approval of class counsel fees as well as other issues.

[28] Monitors can assist the court by analyzing the volumes of information that may be filed on approval motions. For example, on a fee approval motion, a monitor could be assigned to review in detail the dockets of counsel with a view to understanding the fees charged in respect of each step in the litigation, identifying duplicated effort and instances in which a greater number of hours than reasonably necessary has been expended.

Guardian ad litem

[29] American jurisprudence, as one would expect, is more mature given the much longer experience with class proceedings in the United States. American courts do appoint amicus: see, e.g., Zucker v. Franklin, 374 F.3d 221 (3d Cir. 2004); Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518 (1st Cir. 1991). However, the predominant American approach appears

to be the appointment of a guardian ad litem for the settlement fund.

[30] The landmark case seems to be the 1976 decision Miller v. Mackey International, Inc., 70 F.R.D. 533, 23 Fed. R. Serv. 2d (Callaghan) 337 (S.D. Fla. 1976). The court considered a class counsel fee application to be analogous to litigation between a guardian and a ward. The substantive interests of the members of the class are at stake because the benefits they receive are reduced by the compensation sought by counsel representing the class. Therefore, over the strenuous objections of class counsel, the court appointed a guardian ad litem for the members of the class, saying [at p. 535 F.R.D.], "The appointment of a guardian ad litem is appropriate where there is litigation between a Guardian and Ward -- herein, the attorneys for the class and the class". Since the guardian is charged with the protection of the fund for the class, his fee was to be charged against the fund. The court observed [at p. 535 F.R.D.]:

> [T]his procedure both achieves protection for the members of the class and enables the trial judge to remain in an impartial position. Counsel for the class strenuously objected to the appointment of a guardian ad litem and asserted that the court should conduct cross examination of the witnesses testifying for plaintiff's counsel. However, that contravenes the court's traditional role, tending to cast the court into an advocate's role.

[31] The legislation in the United States is more mature as well. The Class Action Fairness Act of 2005, 28 U.S.C. (2005), [page48]which brings most large class actions within the jurisdiction of the federal courts, specifically authorizes judges to have the value of "coupon settlements" assessed by an independent expert before approval: see 1712(d).

Independent counsel

[32] Class counsel may consider going beyond their strict duty to make full and frank disclosure on an unopposed motion for fees and retain separate counsel to provide independent

2011 ONCA 233 (CanLII)

advice to the representative plaintiff regarding the fairness and reasonableness of the fees class counsel is seeking. Class counsel took this step in Killough.

[33] It seems to me that counsel who bring and proceed with a motion without ensuring that an independent perspective is put forward have little cause for complaint if the court departs from the passive role it traditionally plays by raising new issues, dealing with arguments not advanced and actively challenging the uncontradicted evidence. A court, though, should not appear confrontational. The line between a sceptical and confrontational approach may be difficult to navigate for a court that bears the full responsibility for testing the merits of the position put forward by counsel in order to fulfill its responsibility to protect members of the class. Courts should not be reticent in resorting to one of the strategies discussed above when they consider that confrontation of counsel's unopposed position would be helpful and reasonably warranted in the circumstances. Such resort is, of course, discretionary. Appointment of amicus or a guardian is neither necessary nor desirable in every case.

Application to this case

[34] A glance at the major features of the case placed before the motion judge might suggest it was appropriate for the court to consider exercising its discretion to appoint a guardian for the fund or an amicus or monitor. Non-monetary items figured prominently in the settlement. Class counsel was seeking fees of $27.5 million. The fees class counsel sought would exhaust all the cash in the settlement fund, leaving only the non-monetary benefits for distribution to the class members. While the record was huge, an accounting firm reviewed much of the voluminous documentation produced by the defendants. The hourly rates charged by counsel were substantial; they were described by the motion judge as "not bargain-basement". The total time value of class counsel's docketed hours was $9,750,024. Class counsel was comprised of four law firms, raising the possibility of duplication of effort in becoming familiar with this very large file [page49]and dealing with it. Class counsel had not placed before the court any

2011 ONCA 233 (CanLII)

independent evidence of the value of the various components of the settlement.

[35] No doubt, the motion judge faced a difficult task.

[36] In our adversarial system, in which the case is prepared by the parties, the court should not be expected to scrutinize in detail a massive set of counsel's dockets for duplicative or excessive hours. Winkler J.'s comments in McCarthy [at para. 21] are worth repeating: "The Court is not equipped, nor should it be required, to engage in a forensic investigation into the material or to mine the record to inform itself." A court must also guard against appearing confrontational by embarking on a cross-examination of counsel about the dockets or on matters such as whether they perform work at other than the "usual" rates indicated in the fee agreement, and if so, at what rate and for what type of client.

[37] The motion judge, after underscoring that [at para. 33] "the tasks are difficult and made more difficult by the adversarial void", considered that he was "up to the task" and proceeded. However, the adversarial void did affect his reasoning and the way he dealt with the case. The motion judge did not resolve the fundamental question whether a court under the CPA [Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA")] could allow a premium for service providers engaged by class counsel on a contingency basis. He declined [at para. 87] to deal with that question on "what is essentially an ex parte motion where the voices against any change are not being heard". He added [at para. 87] that the matter "should be attended to by the Legislature and not as an exercise of law reform on an uncontested fee approval motion".

[38] The motion judge should not have felt inhibited from seeking the assistance he considered necessary to address the question. He could have appointed amicus and invited intervention from interested groups, such as the Law Society, in regard to the interpretation of its Rules of Professional Conduct.

[39] Before leaving this topic, I add the observation that the

2011 ONCA 233 (CanLII)

adversarial void also affects the case on appeal. The appellant decides what issues will be raised on appeal and what material will be included in the appeal book. There is no respondent to raise additional issues or to focus the court's attention on different material in the exhibit books. In crafting the appeal, the appellant is able to attack some findings of the court below and leave others undisturbed. For example, here the applications for approval of the settlement and determination of counsel fees were brought before the court in one motion; the motion judge dealt with both matters at one hearing, and he rendered one set [page50]of intertwined reasons. In those intertwined reasons, he expressly stated, at paras. 95, 104 and 113, [See Note 1 below] that his approval of counsel fees in the amount of $14.5 million was one of the factors on which his approval of the settlement was based. Yet, this appeal seeks to modify the motion judge's order only in respect of fees divorced from his approval of the settlement.

[40] This court, no less than the motion court, had the discretion to appoint an amicus or guardian to articulate opposition to the appeal. In hindsight, the appointment of amicus or guardian may have been of great assistance in this appeal. The analysis upon which this appeal turns was not raised in the appellants' material and did not come up at the appeal hearing. After the hearing, the court found it necessary to seek the appellants' written submissions on further issues.

[41] With that preface, I turn to the issues raised by the appellants.

Quantum of fees

[42] The appellants advance two arguments regarding the quantum of fees assessed by the motion judge.

[43] First, at the appeal they argued that the motion judge was bound to use the analytical framework of s. 33(7) of the CPA in assessing what would be an appropriate counsel fee and that he erred in law by failing to do so. In their supplementary factum filed after hearing, they argue that a motion judge determining fees under s. 32(4) must apply the

2011 ONCA 233 (CanLII)

analytical framework of s. 33(7) in a case in which counsel seek a premium by the application of a multiplier.

[44] Second, in their supplementary factum they argue that any mode of analysis should result in the approval of fees that are fair and reasonable. Here, they submit, the counsel fee that the motion judge approved was not fair or reasonable.

Sections 32 and 33 of the CPA

[45] In advancing their initial argument, the appellants presumed that the motion judge was bound to apply the two-step analysis of s. 33(7). Under s. 33(7), the court must first determine the number of hours worked and the hourly rate to be allowed in order to calculate a "base fee". Second, the court must determine the appropriate multiplier to be applied to the base [page51]fee in order to arrive at fair and reasonable compensation to class counsel for the risk they have assumed in representing the class on a contingency basis.

[46] The appellants contend that the two steps of s. 33(7) are distinct and must be separately applied. In determining the base fee, the court may consider a number of factors, including the time expended by class counsel, the legal complexity of the action, the importance of the matter to the client, class counsel's skill, the results achieved and the ability of the client to pay. By contrast, they say, the court may consider only two factors -- the degree of risk undertaken and the degree of success achieved -- in determining the multiplier to be applied to the base fee.

[47] The appellants argue that the motion judge conflated the first and second steps. Because he failed to distinguish between the two steps, they say, he considered factors relevant to the base fee in determining the multiplier to be applied to the base fee. They submit that he improperly weighed all the factors in one stage and, as a result, the class counsel fee he approved was lower than was warranted.

[48] In setting out the analysis the motion judge should have carried out, the appellants begin by submitting that the motion

2011 ONCA 233 (CanLII)

judge found that their base fee was reasonable. Although he made no express finding on that point, they say it is clear he approved their hourly rates and all the hours they recorded in their dockets. Using a base of $10,327,525.20 for fees and GST, they calculate that the "premium" the motion judge allowed amounts to a multiplier of only 1.29. Fees in the amount of $20 million, which they request on appeal, would amount to a multiplier of 1.78. They say that 1.78 is a modest multiplier in the circumstances.

[49] I note in passing that the appellants' calculations are not in accordance with the CPA. Section 33(3) defines the base fee as "the result of multiplying the total number of hours worked by an hourly rate". Under the statutory definition, the GST does not get multiplied. If the GST included the appellants' calculations is excluded, the premium granted by the motion judge would amount to 1.48, and fees of $20 million would represent a multiplier of 2.05.

[50] As noted, the appellants presumed that s. 33(7) of the CPA governs the determination of counsel fees in this case. I set out s. 33(7) in the context of the section as a whole:

> 33(1) Despite the Solicitors Act and An Act Respecting Champerty, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding. [page52]
>
> Interpretation: success in a proceeding
>
> (2) For the purpose of subsection (1), success in a class proceeding includes,
>
> (a) a judgment on common issues in favour of some or all class members; and
>
> (b) a settlement that benefits one or more class members.
>
> Definitions

2011 ONCA 233 (CanLII)

(3) For the purposes of subsections (4) to (7),

"base fee" means the result of multiplying the total number of hours worked by an hourly rate;

"multiplier" means a multiple to be applied to a base fee.

Agreements to increase fees by a multiplier

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.

Motion to increase fee by a multiplier

(5) A motion under subsection (4) shall be heard by a judge who has,

(a) given judgment on common issues in favour of some or all class members; or

(b) approved a settlement that benefits any class member.

Idem

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.

Idem

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

(a) shall determine the amount of the solicitor's base fee;

(b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and

(c) shall determine the amount of disbursements to which the solicitor is entitled, including interest

2011 ONCA 233 (CanLII)

calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement.

Idem

(8) In making a determination under clause (7)(a), the court shall allow only a reasonable fee.

Idem

(9) In making a determination under clause (7)(b), the court may consider the manner in which the solicitor conducted the proceeding. [page53]

[51] It is readily apparent that the motion judge did not proceed in the manner contemplated by s. 33(7). He made no express finding of counsel's "base fee" under s. 33(7)(a). He made no determination of the "multiplier" to be applied to the base fee under s. 33(7)(b). Instead, the motion judge considered a number of factors, including counsel's rates and the hours they docketed. Instead of applying a multiplier, he indicated he was allowing counsel a "premium" and concluded that a counsel fee in the amount of $14.5 million was fair and reasonable.

[52] While I agree that the motion judge did not apply the analysis contemplated by s. 33, I do not agree that he erred. The determination of counsel fees, on the facts of this case, is not governed by s. 33(7) of the CPA, but by s. 32(4). Section 32 provides:

Fees and disbursements

32(1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

(a) state the terms under which fees and disbursements shall be paid;

(b) give an estimate of the expected fee, whether contingent on success in the class proceeding or

2011 ONCA 233 (CanLII)

not; and

(c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

Court to approve agreements

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

Priority of amounts owed under approved agreement

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

Determination of fees where agreement not approved

(4) If an agreement is not approved by the court, the court may,

(a) determine the amount owing to the solicitor in respect of fees and disbursements;

(b) direct a reference under the rules of court to determine the amount owing; or

(c) direct that the amount owing be determined in any other manner.

[53] Section 32 is mandatory and generally applies to all fee agreements. Its own terms leave no doubt that it applies to contingency fee agreements as well. Section 32(1) requires that all fee agreements meet certain formal requirements. All fee agreements must be in writing and must state the terms under [page54]which fees and disbursements are to be paid, must provide an estimate of the expected fee and must state the method of payment. Section 32(2) provides that fee agreements in class proceedings are prima facie unenforceable. They are only enforceable after being approved by the court. Section 32(3) provides that amounts owing under an enforceable agreement, i.e., one that is approved by the court, are a first charge on any settlement moneys or monetary award. Finally, "if an agreement is not approved by the court", s. 32(4) gives the court the authority to determine class counsel fees or to

2011 ONCA 233 (CanLII)

direct the manner in which class counsel fees are to be determined or calculated.

[54] The court's authority to determine class counsel fees under s. 32(4) is distinct from its authority to determine class counsel fees under s. 33(7). The court's authority to determine fees under s. 32(4) arises "if an agreement is not approved by the court". The court's authority to determine fees under s. 33(7) arises "on the motion of the solicitor who has entered into an agreement under [s. 33(4)]".

[55] In their supplementary factum, the appellants contend that it should make no difference which one of these sections apply, as both should lead to the same result -- the approval of fees that are fair and reasonable. What is clear is that the mode of analysis open to the court under the two sections is different. The court's authority under s. 32(4) is far more expansive than its authority under s. 33(7). Section 33(7) provides only for the base fee/multiplier approach, whereas s. 32(4) provides the court with broad discretion to set the fee, direct a reference or direct the fee be determined "in any other manner".

[56] The relationship between ss. 32 and 33 has been the subject of previous judicial comment. Winkler J., in Crown Bay Hotel Ltd. Partnership v. Zrich Indemnity Co. of Canada (1998), 40 O.R. (3d) 83, [1998] O.J. No. 1891 (Gen. Div.), observed [at para. 11] that "[t]he scheme of the CPA seems to envisage that sections 32 and 33 operate independently of one another. Hence the duplicate provisions for court approval." In Crown Bay Hotel, Winkler J. concluded that the court had authority under s. 32(4) to approve a contingent counsel fee based on a percentage of the recovery, rather than on a base fee/multiplier as contemplated by s. 33(7).

[57] In an earlier case, Nantais v. Telectronics Proprietory (Canada) Ltd. (1996), 28 O.R. (3d) 523, [1996] O.J. No. 5386 (Gen. Div.), Brockenshire J. commented [at para. 11] that the arrangement of ss. 32 and 33 was "somewhat confusing". He suggested that "it would have been clearer if s. 33(1) and (2) had come first, followed by s. 32 and then followed by s. 33(4)

2011 ONCA 233 (CanLII)

[page55]through (9)". That is because s. 33(1) and (2) apply generally to make it clear that a contingency fee agreement is permitted by the CPA, despite the provisions of the Solicitors Act, R.S.O. 1990, c. S.15 and An Act Respecting Champerty, R.S.O. 1897, c. 327. Section 32(3) also applies generally. Sections 33(3) through (9), in Brockenshire J.'s view, apply in cases in which there is "an arrangement under which hourly rates are quoted, with a provision for applying to the court after the fact, for an increase in such hourly rate, based on the risk incurred in undertaking the case under an agreement to be paid only if successful".

[58] In Crown Bay Hotel, Winkler J. quoted and approved of Brockenshire J.'s comments in Nantais.

[59] Cullity J. in Garland v. Enbridge Gas Distribution Inc., [2006] O.J. No. 4907, 56 C.P.C. (6th) 357 (S.C.J.), at para. 16 said:

> Section 32 is concerned with fee agreements -- contingent or otherwise -- in general. Section 33 is confined to a particular type of contingent fee agreement: one that contemplates, and permits, the solicitor to make a motion to the court to have his or her fees increased by a multiplier. The jurisdiction under this section appears to be premised and conditioned on the existence of such an agreement.

[60] I agree with these earlier decisions. The court's jurisdiction to determine class counsel fees under s. 33(7) is premised and conditioned on the existence of a fee agreement providing for payment of fees and disbursements only in the event of success and which permits class counsel to make a motion to the court to have his or her fees increased by a multiplier. To spell this out, I observe that the court's jurisdiction under s. 33(7) is brought into play by a motion of a solicitor [at para. 15] "who has entered into an agreement under subsection (4)". An agreement under s. 33(4) is one that permits counsel to make a motion to the court to have his or her fees increased by a multiplier.

[61] Illustrative of a fee agreement to which s. 33(7)

2011 ONCA 233 (CanLII)

applies is the fee agreement that was before this court in Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417, [1998] O.J. No. 4182 (C.A.). Gagne is the main authority on which the appellants relied in this appeal. In Gagne, Goudge J.A. provided the following description of the fee agreement [at para. 8]:

> As required by the Act, the appellant solicitors executed a written agreement with the representative plaintiff respecting their fees and disbursements. It provided that the payment of any legal fees was contingent on the class action being concluded successfully as defined by the Act. It also provided that the base fee would be the product of the hours worked by the solicitors and their usual hourly rates. In addition, it set out that the solicitors could seek court approval for a multiplier to be applied to [page56]that base fee. Finally, the agreement described two examples of how this might work[.]

(Emphasis added)

[62] In the case on appeal, the agreement is quite different. Paragraph 9 of the agreement provides:

> In the event of Success in the Action, and in addition to any costs paid by the Defendants to the Solicitor, the Solicitor shall be paid and shall receive the aggregate of the following in accordance with paragraph 8:
>
> (a) an amount equal to any disbursements not paid by the Defendant(s) as costs, plus applicable taxes plus interest thereon in accordance with s. 33(7) (c) of the Act;
>
> plus
>
> (b) the greater of:
>
> (i) one-third of the Recovery; or
>
> (ii) the Base Fee increased by a multiplier of four;
>
> less
>
> (iii) the fee portion of any costs paid to the Solicitor in accordance with paragraph 8;

2011 ONCA 233 (CanLII)

plus

(iv) applicable taxes.

[63] This paragraph, which is the agreement regarding class counsel fees, does not provide that counsel may bring a motion to have the court increase the base fee by a multiplier. Rather, if para. 9 were given effect, counsel fees may not even be premised on the base fee/multiplier approach, but on one-third of the recovery.

[64] Nowhere else in the agreement is it stipulated that class counsel is permitted to bring a motion to have their fees increased by a multiplier. Recital D of the agreement merely states that "[t]he Act provides, among other things, that a Fee Agreement: . . . (d) may permit a solicitor to be paid by having a Base Fee increased by a multiplier or as a percentage of the Recovery". While this is accurate as a general statement, it does not bring the fee agreement under s. 33(4) of the CPA. It does not, as a matter of contract, "permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier".

[65] The distinction is not merely technical. Class members may understand the phrase "[t]he Act . . . may permit a solicitor to be paid . . . a base fee increased by a multiplier" to mean that such fees are payable if specified in the fee agreement. On the other hand, an agreement that precisely complies with s. 33(4) of the CPA can leave no doubt in the mind of class members that the size of the multiplier and the fees themselves rest completely [page57]within the discretion of the court. It is a matter of emphasis. A fee agreement that simply states that "the Act provides that a Fee Agreement may permit a solicitor to be paid by having a Base Fee increased by a multiplier" does not emphasize that the court must, in every case, approve both the base fee and the multiplier before the fee agreement is enforceable.

[66] The agreement in this case does make clear the court must approve it. Paragraph 4 of the fee agreement states, "This agreement requires Court approval. If this agreement is approved by the Court, it shall bind the Solicitor, the Client,

2011 ONCA 233 (CanLII)

and all members of the Class who do not opt out of the Action." Paragraph 4 speaks to the fee agreement as a whole. No provision of the agreement, however, expressly indicates that the court must determine what fees will be allowed to counsel.

[67] It is interesting to note the difference between para. 8, which deals with costs paid by the defendants, and para. 9, which deals with counsel fees. Paragraph 8 expressly provides that counsel's entitlement to costs payable to the client is specifically subject to the approval of the court. Paragraph 9 sets out precisely how counsel fees are to be calculated, but unlike para. 8, does not state that counsel fees are subject to the approval of the court.

[68] I conclude that the fee agreement in this case does not satisfy the requirements of s. 33(4). It does not permit counsel to apply to the court for a multiplier, but instead stipulates how counsel fees are to be calculated. The agreement for the fees stipulated would become enforceable only if it were approved by the court under s. 32(2). If the agreement was not approved, then, under s. 32(4), the court could determine the amount owing to counsel.

[69] In this case, the motion judge did not expressly state that he was disapproving the fee agreement. Section 32(4), however, does not require that a fee agreement be expressly disapproved before it applies. Section 32(4) applies whenever there is no approval of the fee agreement. This is made clear by the opening words of s. 32(4), which clearly state that the court's authority to determine the amount owing to class counsel in respect of fees and disbursements under that subsection arises "if an agreement is not approved by the court". Cullity J. put it well in Martin v. Barrett, [2008] O.J. No. 3813 (S.C.J.), at para. 35: "If the court withholds approval, it then has a discretion to determine the fee pursuant to section 32(4)(a)."

[70] There can be no doubt the motion judge withheld approval of the fee agreement in this case. Had he approved it, it would be enforceable and the fees owing under para. 9 would be a first charge on the settlement fund by virtue of s. 32(3) of

2011 ONCA 233 (CanLII)

the [page58]CPA. By assessing fees in a different amount, the motion judge made evident he was not approving the fee agreement. Section 32(3) makes apparent that a substantive as well as a formal review of the fee agreement is necessary for court approval. The current practice of some trial courts to approve the fee agreement simply upon being satisfied that it contains the formal requirements of s. 32(1) ignores the effect of s. 32(3). The motion judge in this case followed the correct approach by withholding approval of the fee agreement.

[71] Because the fee agreement in this case was not approved and because it does not meet the requirements of s. 33(4), I conclude that class counsel were not entitled to invoke the application of s. 33(7). Rather, counsel's fees in this case fell to be determined under s. 32(4).

[72] I do not accept the contention advanced in the appellants' supplementary factum that, even if s. 32(4) applies, the court must apply the analytical framework of s. 33(7) when counsel who have taken the case on a contingency basis apply for a multiplier. The wording of s. 32(4) is clear. The court has broad authority to itself determine the "the amount owing to the solicitor in respect of fees", or even to direct that the amount owing be determined "in any other manner". Gagne, the only Court of Appeal authority on which the appellants rely for this argument, was a s. 33(7) case. The proper view is that the court acting under s. 32(4)(a) has the authority to determine the fees owing to the solicitor after considering and weighing all relevant factors. It is within the court's discretion to test the reasonableness of the quantum of a lump sum fee by looking at the result as a multiplier, as Cumming J. suggested in Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2005] O.J. No. 1117, [2005] O.T.C. 208 (S.C.J.). It is, however, a matter of discretion.

[73] I conclude that the motion judge was not bound to apply the base fee/multiplier analysis provided for in s. 33(7) of the CPA. He committed no error in exercising his authority under s. 32(4) of the CPA to determine class counsel fees without determining the amount of the appellants' base fee and applying a multiplier to it.

2011 ONCA 233 (CanLII)

[74] Before leaving this issue, I add that it is not apparent to me that, before the motion judge, class counsel pressed the application of the base fee/multiplier analysis, which they now allege he erred in failing to apply. The notices to the class members and the notice of motion filed with the motion court are more consonant with the application of s. 32(4) than with s. 33(7) of the CPA.

[75] The notice of certification, drafted and advertised by class counsel, advised the class members that the agreement "which must be approved by the court to be effective, provides for a [page59]contingency fee of at least one-third of the amount recovered in the class action". The notice of the approval hearing stated that "[c]lass counsel will ask the court to approve their fee agreement with the plaintiffs and award $27.5 million in cash in full payment of the plaintiffs' obligations to class counsel". Neither indicates that counsel would apply to the court for the application of a multiplier to their base fee.

[76] Paragraph 1(d) of the notice of motion sought an order "approving the agreements as to fees, disbursements and taxes between [the representative plaintiffs] and Harvey T. Strosberg ('Agreements')". Paragraph 1(e) sought an order "fixing the amount of class counsel's fees at $27.5 million". The notice of motion refers generally to both ss. 32 and 33, but does not seek to have counsel's base fees increased by a multiplier, as contemplated by s. 33(7). Nowhere in the notice of motion is there a reference to either the base fee or a multiplier. The supporting affidavits filed on the motion do not refer to a multiplier.

[77] Finally, the motion judge made no reference to any argument by the appellants that he was bound to apply the base fee/multiplier analysis, as would be expected had the argument been advanced. He only referred to the position in the appellants' notice of motion and notices to the plaintiff class that they were seeking a specific dollar amount -- namely, $27.5 million.

2011 ONCA 233 (CanLII)

[78] I would not give effect to this ground of appeal. Before moving on, I caution that these reasons should not be taken to indicate acceptance of the appellants' submissions on how s. 33(7) should be interpreted and applied.

Reasonableness of class counsel fees

[79] I turn then to the second leg of the appellants' argument, that, irrespective of the mode of analysis used, the quantum of fees allowed by the motion judge was too low. The appellants submit that the amount of $14.5 million is inadequate to achieve the policy objective of providing incentives for lawyers to undertake complex and protracted class actions, and that the amount is not fair and reasonable compensation given the work they performed, the risk they undertook and the success they achieved.

[80] At para. 25 of his reasons, the motion judge set out the general principles that apply to the assessment of class counsel fees:

> Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the [page60]class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

[81] There can be no quarrel that these factors are relevant in assessing the reasonableness of class counsel fees. These factors have been applied in a number of cases, including those cited by the motion judge.

[82] The motion judge found that the class proceeding dealt

2011 ONCA 233 (CanLII)

with matters of high factual and legal complexity, had a substantial monetary value, was important to the class and that class counsel performed with competence and admirable skill. The motion judge also considered that class counsel had assumed a high risk in taking on the class proceeding and he recognized that that risk should be rewarded. He also attached weight [at para. 127] to the fact that "Class Counsel's compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well".

[83] The motion judge, however, refused to accept class counsel's contention that they deserved fees in the amount of $27.5 million for achieving a settlement worth $120 million because, in his view, the settlement was not worth $120 million. The motion judge seemed taken aback by class counsel's insistence that the settlement had a value of $120 million as he "would have thought it obvious that the settlement in the case at bar, which involves cash, coupons, and releases, is not worth $120 million". He repeated [at para. 118] that the settlement was not worth $120 million "for the purposes of the contingency fee agreement". He described [at para. 17] the result as "adequate or satisfactory" and said it was "to spin a silk purse from a sow's ear to suggest that the result was excellent". He added [at para. 93] that an objecting class member "was right in expressing disappointment about the settlement".

[84] The motion judge had a solid foundation for finding that the settlement did not have a value of $120 million. To begin with, the motion judge did not regard the transaction credits as having a benefit to the class members equal to their face value. He was sceptical that there would be much take-up and stated his view that the most likely beneficiaries would not be class members but future Money Mart customers. The implication that class counsel do not earn a premium in fees by obtaining benefits for persons outside the class is sound.

[85] The motion judge also observed [at para. 97] that the transaction credits could be viewed "as a business promotion [page61]scheme under which Money Mart discounts its price and makes less profit from a profitable transaction" but

2011 ONCA 233 (CanLII)

"obtains business it would otherwise not have obtained". He also drew attention to the fact that the settlement provided that a maximum of $5 in transaction credits could be used per transaction. This meant that class members would have to enter into a number of further transactions with Money Mart repeatedly in order to exhaust their transaction credits.

[86] The motion judge was not impressed with class counsel's argument that the transaction credits should be considered to have marketable value because Money Mart's competitors would likely honour the transaction credits. That competitors would find acceptance of the transaction credits attractive confirmed that credits were a business promotion scheme for more payday loans, in the motion judge's mind.

[87] The motion judge, in making the point that the transaction credits were not equivalent to cash, surmised that class counsel would likely not accept an assignment of $27.5 million worth of transaction credits as payment of their fees. In my view, this was a fair inference based on class counsel's position that the entire cash remnant of $27.5 million should be devoted to paying their fees rather than them taking a share of the "marketable" transaction credits. The motion judge concluded [at para. 97] that it was "hard to paint [the transaction credits] as a success for the mission of this class proceeding".

[88] The motion judge also substantially discounted the value of the debt forgiveness component of the settlement. He considered that payday loans were uneconomical to recover given their small value and the expense of collecting them. The evidence indicated that much of the debt forgiveness component of the settlement released debts that were already written off or reserved in Money Mart's financial records.

[89] The motion judge did recognize [at para. 104] that the $30.5 million in cash that the settlement provided was solid value, though he observed it "should be present-valued because it is being paid in instalments over approximately two and a half years and there is no interest until the payments are due".

2011 ONCA 233 (CanLII)

[90] These matters provided an abundant basis for the motion judge's finding that the settlement was not worth $120 million. The appellants' arguments at the appeal hearing and in their written submissions were all premised on the settlement being worth $120 million. However, they did not establish that the motion judge made any error in arriving at the clear finding of fact that it was not. The appellants complain that the motion judge made no finding as to what the settlement was worth. [page62]The record before the motion judge, compiled by the appellants, provided a poor basis for doing so. There was no independent expert opinion on the value of the transaction credits or the debt reduction.

[91] Besides finding that the settlement was worth less than the appellants contended, another important factor in the motion judge's approval of the settlement was the $13 million in cash that would become available for distribution to the class upon class counsel fees being fixed in the amount of $14.5 million instead of the $27.5 million that the appellants sought.

[92] Placing importance on providing fair and reasonable compensation to counsel and providing incentives to lawyers to undertake class actions, as the motion judge noted [at para. 127], does not mean that the court should "ignore the other factors that are relevant to the determination of a reasonable fee". In this light, it was an important aspect of the motion judge's analysis that the settlement he approved provide some cash for distribution among the class members. The motion judge stressed [at para. 96] that the settlement he was approving was one in which "Class Counsel's fee does not take up all the cash portion of the settlement".

[93] The motion judge found [at para. 130] that "[h]aving regard to all the factors, an all-inclusive award of $14.5 million is a reasonable fee in the circumstances of this case". He concluded [at para. 130] that $14.5 million was "ample compensation and a reasonable fee" and there was "no necessity to award more having regard to the success achieved and the risk taken".

2011 ONCA 233 (CanLII)

[94] The appellants submit that the motion judge made errors in his analysis of specific issues. I agree he may have overstated one or two things, but this does not undermine his central reasoning and the conclusion that he reached.

[95] For example, the appellants submit that the motion judge's comment that the settlement failed to achieve behaviour modification is unreasonable because the section of the Criminal Code prohibiting criminal rates of interest was amended in May 2007 to exempt from its application small short-term loans in provinces that enact legislation to regulate the payday loan industry. At the time of the hearing before the motion judge, British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, Saskatchewan and Ontario had introduced such legislation. The provisions of Ontario's Payday Loans Act, 2008, S.O. 2008, c. 9, which regulate the cost of payday loans borrowing, came into force on December 15, 2009. The appellants make the point that it was impossible for the settlement to achieve "behaviour modification" because the new legislation [page63]legalized the defendants' business practices. The motion judge erred, they say, by minimizing the success they achieved on the basis that the settlement did not accomplish "behaviour modification".

[96] The motion judge could have explained more clearly why he commented [at para. 99] that "there was not a peep about behaviour modification" during the settlement approval motion. As I understand his reasons, the point he was making is that the settlement, by providing coupons for the defendants' services, provided support for the payday loan industry and hence diminished the degree of success achieved. The settlement did not sever the business relationship between the defendants and the class members who receive transaction credits under the settlement, but rather continued that business relationship. I gather this because, after observing there was no behaviour modification, the motion judge said [at para. 100]:

> [B]ut for the members of the Transaction Credit group, if they are to obtain a benefit under this settlement it is by abandoning the original purposes of this class action, which

2011 ONCA 233 (CanLII)

was to enjoin, not encourage, payday loans pricing policies. Once again, it is hard to paint this as a success for the mission of this class proceeding.

[97] I have no doubt that the motion judge did not expect that a settlement or judgment could have resulted in the modification of the defendants' business practices. The motion judge was aware of the new legislation. He set out the evolution of the legislative changes and noted the irony that the defendant's charge for the representative plaintiff's loan was now apparently legal in Ontario and that, indeed, Money Mart could even charge him an additional $2. The motion judge could have meant nothing more than that there was no "behaviour modification" as far as these members of the class were concerned because the scheme of the settlement destined them to continue to borrow payday loans from the defendants on essentially the same, albeit now unquestionably legal, terms.

[98] In any event, I do not see the motion judge's comment about the lack of behaviour modification as the foundation for his conclusion that the value of the settlement was much less than the claimed $120 million.

[99] The appellants also take strenuous and justified umbrage to the motion judge's description of the settlement as the self-serving design of class counsel. The motion judge said [at para. 122]:

> With respect to the factor of the class' ability to pay, the settlement has been structured in a way that the class is able to pay Class Counsel's fee, but that is the self-serving design of Class Counsel, and as I have already [page64]explained, the class would not have been able to pay the contingency fee if Class Counsel had been able to enforce the contingency fee agreement based on its own self-serving evaluation of the value of the settlement.

[100] I agree with the appellants that a court ought not to attribute self-interest to counsel in the absence of a proper evidentiary basis. There was, in this case, no evidentiary basis for the modifier "self-serving". Regrettably, the risk of

2011 ONCA 233 (CanLII)

such an overstatement is increased in a non-adversarial motion brought by class counsel that requires the court to depart from its traditional neutrality and take on an active role to protect the interests of the class. In fulfilling that active role, the motion judge could allude to the fact that the settlement was structured to provide for a cash payment of $27.5 million and that class counsel was seeking approval of fees in the amount of $27.5 million, and highlight that this would leave the class members only with transaction credits and debt forgiveness. His use of the modifier "self-serving" in making that observation was unfortunate.

[101] None of the isolated comments that the appellants objected to provide any reason to interfere with the motion judge's exercise of discretion in setting class counsel fees.

[102] The motion judge's determination was discretionary. The appellants have not established any basis for interfering with his determination that $14.5 million was a fair and reasonable fee for class counsel in this case.

The fees of PWC and Mr. Anand

[103] Class counsel retained PWC and Mr. Anand to perform certain work on the basis that they would only be paid if and when the action was successful and then on the same basis as class counsel. For example, PWC agreed to the following:

> We understand that our fees will be payable on a contingency basis. We will accumulate our hours. In the event that your action is successful when you achieve either a settlement or an award from the court, our fees will be payable on a pro rata basis with payment of your own fees and the fees of other members of your team. To this end, our usual fees for time incurred would attract the same multiplier applied to usual hourly rates as the multiplier applied to each of your team's members.
>
> Our expenses incurred will also be on a contingency basis. They will be paid, pro rata, with the disbursements of the members of your team from any proceeds received before

2011 ONCA 233 (CanLII)

distribution of any fees to the team members.

In the event that your action does not result in a settlement or an award from the court, no amount will be payable to us on account of fees for time incurred or expenses.

[104] The motion judge decided that the fees of PWC and Mr. Anand would be treated as disbursements of class counsel. [page65]The appellants submit that the motion judge erred by failing to approve PWC and Mr. Anand's fees in an amount consistent with the contingency basis on which they were retained. The time value, taxes and disbursements for the work of PWC amounted to $835,629.03; those of Mr. Anand amounted to $16,800. Though the motion judge treated these amounts as disbursements incurred by class counsel, class counsel say they remain contractually obligated to pay these service providers on the basis on which they were retained.

[105] By way of relief, the appellants seek an order that a premium be added to the fees of PWC and Mr. Anand in proportion to the premium added to the fees of the appellants. The unstated premise of this request seems to be that treating the consultants' fees as contingency fees would enlarge the aggregate quantum of fees allowed. I do not agree that this would necessarily be so.

[106] Insofar as the premium granted depends on the risk undertaken in a contingency case, the issue is the quantum of that risk, not the number of risk-takers who have shared it. It is illogical that the total amount of the premium allowed for a given total risk should be higher because there are more risk-takers. For example, the premium allowed should not increase because class counsel in this case was comprised of four law firms. Thus, if the premium allowed to class counsel is predicated on the risk of counsel's fees and disbursements, granting service providers a contingency premium should result in a redistribution of the premium rather than an enlargement of the premium. After all, the risk undertaken by class counsel is diminished by the amount of risk the service providers undertake when they are retained on a contingency basis. If the CPA permits the court to allow contingency premiums to service

2011 ONCA 233 (CanLII)

providers, the appellants, to obtain an increase in the total premium allowed, would have to demonstrate that the motion judge did not base his determination of the premium on the total risk of undertaking the case, including the disbursements for the services of PWC and Mr. Anand.

[107] As I mentioned earlier, the motion judge considered [at para. 87] it unwise to determine the general question whether the CPA could be interpreted to permit contingency fee arrangements with service providers on what was "essentially an ex parte motion where the voices against any change are not being heard". He decided to treat the accounts of PWC and Mr. Anand as disbursements in this case because he was troubled by the appellants' contention for four reasons. First, as non-lawyers, the service providers could not be appointed class [page66]counsel. Second, the CPA does not envisage contingency fee agreements with anyone other than properly appointed class counsel. He pointed out [at para. 85] that s. 32(2) of the CPA refers to an agreement respecting fees and disbursements "between a solicitor and a representative party". Third, it was not clear that the arrangement complied with the Law Society of Upper Canada's Rules of Professional Conduct. Rule 2.08(8)(a), for example, provides that a lawyer shall not "directly or indirectly share, split, or divide his or her fees with any person who is not a licensee". And fourth, the arrangement with the non-lawyers might well be champertous. The motion judge pointed out that An Act Respecting Champerty was still in effect.

[108] I agree that the appellants placed before him a fundamental question with far-reaching implications for the future of class actions, and that it is usually desirable to hear the perspectives of all the interests that might be affected before deciding such questions.

[109] While that may be generally so, in my view the answer to the far-reaching question raised in this case is straightforward. The CPA does not contemplate contingency fee arrangements with persons other than class counsel and does not give the court the jurisdiction to allow a service provider a premium on its fees.

2011 ONCA 233 (CanLII)

[110] Section 33(1) allows a contingency agreement "between a solicitor and a representative party". Section 32(1) requires all agreements between a solicitor and a representative party, including contingency agreements, to meet certain formal requirements. Section 32(2) interferes with freedom of contract by providing that all agreements between a solicitor and a representative party are unenforceable unless approved by the court. If contingency agreements with service providers are allowed under the CPA as the appellants contend, I find it odd that the Act does not set out formal requirements for such agreements or make them unenforceable unless approved by the court.

[111] Section 33(7), which the appellants wish to have applied in this case, could not be clearer. Read in context, s. 33(3)'s definition of "base fee" clearly refers to the hours worked by counsel multiplied by counsel's hourly rates. The only multiplier that the court has jurisdiction to grant under s. 33(7)(b) is one that results in a fair and reasonable compensation to the solicitor for the risk undertaken. Under s. 33(7)(c), the court has jurisdiction to determine the amount of disbursements, but these are disbursements "to which the solicitor is entitled". The text of s. 33 is not concerned with fair and reasonable compensation to [page67]others for risk incurred in undertaking work on the action on a contingency basis.

[112] Section 32(4) may not be as rigidly structured, but still provides the court with authority to determine the amount owing to the solicitor in respect of fees and disbursements. As the appellants argue in their supplementary submissions, the application of the two sections should theoretically lead to roughly the same result -- fair and reasonable compensation for class counsel. I do not read the broader more general authority granted to the court by s. 32(4) as extending to allow a premium to service providers in order to achieve fair and reasonable compensation for them for the risk undertaken in the provision of their services.

[113] The grammatical and ordinary sense of ss. 32 and 33,

2011 ONCA 233 (CanLII)

read in the context of the entire statute and considered in light of its purpose, leads me to conclude that the legislature did not intend to grant the court jurisdiction to allow service providers a premium for providing their services on a contingency basis. The legislature's intent was to authorize the court to allow class counsel a premium or multiplier for the risk incurred by investing their time and underwriting disbursements, if they take on the case on a contingency basis. The representative plaintiff's selection of counsel who is prepared and able to carry the case on a contingency basis is relevant to the court's determination whether the plan for the proceeding sets out a workable method of advancing the proceeding on behalf of the class.

[114] As I find the text of the current legislation to be clear, I do not find it necessary to deal with the other legal and policy arguments advanced by the appellant. Suffice it to say, I agree with the motion judge that what the appellants seek [at para. 87] "would amount to a fundamental change to the design of the Act". The policy issues are not confined to access to justice considerations, the only one identified by the appellants. For example, the broad proposition the appellants assert, that contingency agreements with service providers should be allowed, would apply to expert witnesses and others whose work products are tendered in evidence. This could give rise to concerns about the quality and reliability of the work product.

[115] I might add, I do not anticipate that this decision will have the dire impact on access to justice that the appellants assert. In the almost 20 years the CPA has been in effect, a great number of class actions have proceeded without the court allowing premiums to service providers. [page68]

The fees of FMC and Prof. Krishna

[116] Class counsel also retained FMC and Prof. Krishna to perform certain specialized discrete tasks. The total time value of the work they performed was $32,002.96 and $10,237.50, respectively. Class counsel's agreements with them are not in the record, but the motion judge found that they too were

2011 ONCA 233 (CanLII)

retained by class counsel on a contingency basis. Class counsel requested that the multiplier or premium the motion judge granted to class counsel also be applied to the fees of FMC and Prof. Krishna. The motion judge refused this request and treated their fees as disbursements incurred by class counsel. On appeal, the appellants ask that the order of the motion judge be varied to treat Prof. Krishna and FMC as part of class counsel, and that a premium be added to their fees in proportion to the premium added to the fees of the appellants.

[117] Different considerations apply to the work of FMC and Prof. Krishna because they are lawyers. The same concerns of fee splitting and champerty do not arise in relation to lawyers who have actually worked on the client's file.

[118] The appellants' position is that FMC and Prof. Krishna became part of the class counsel team and their fees should be treated as class counsel fees. They say that the motion judge refused to recognize them as class counsel on the erroneous belief that court approval was necessary for any change in the plaintiff's representation. The motion judge did note that the litigation plan that the representative plaintiff had approved by the court defined class counsel to be the four law firms Sutts, Strosberg, Paliare Roland, Koskie, Minksy and David Stratas of Heenan, Blaikie.

[119] The appellants rely on this court's decision in Fantl v. Transamerica Life Canada (2009), 95 O.R. (3d) 767, [2009] O.J. No. 1826 (C.A.) to submit that no court approval was required to enlarge the class counsel group to include FMC and Prof. Krishna. Fantl merits closer examination. In Fantl, the law firm acting for the representative plaintiff in a class action split up and its former members disputed who should continue as class counsel. The narrow issue was whether the representative plaintiff could choose to retain one of the successor firms and serve a notice of change of solicitors without court approval. Winkler C.J.O. writing for this court said [at para. 47] that he did not view it "as necessary for the plaintiff to seek and obtain approval of the court for every decision involving the selection or change of counsel". Yet, he immediately added, "However, I am of the view that the

2011 ONCA 233 (CanLII)

case management judge charged with responsibility for [page69]the supervision of the proceeding should be immediately and directly notified of such a change."

[120] Fantl is of little assistance to the appellants in this case.

[121] First, in this case there is no indication the representative plaintiff made a decision to change the makeup of the class counsel team indicated in the litigation plan. In Fantl, what was in issue was the client's choice of new counsel. Winkler C.J.O. said, at para. 44 of Fantl, that "[t]he representative plaintiff in a class action lawsuit is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report". I can see no indication in the record that the representative plaintiff made or participated in any decision to retain FMC and Prof. Krishna as class counsel in this action. While counsel may require assistance and may incur disbursements on the clients' behalf, clients decide who are their counsel.

[122] Second, if there was a change in the composition of class counsel, the court was never immediately and directly notified of the change as Fantl indicates is required.

[123] Moreover, the record does not indicate that Prof. Krishna or FMC were intended to have a solicitor-client relationship with the representative plaintiff. It is not clear to me in what sense FMC and Prof. Krishna are said to be class counsel except for the purpose of being entitled to the same premium allowed to class counsel. I briefly review the relevant portions of the record.

[124] The affidavit of Patricia A. Speight, sworn February 1, 2010, in support of the motion under the heading "Class Counsel" states that "[t]he four law firms acting on behalf of the Class are SS [Sutts, Strosberg], Heenans [Heenan Blaikie], PR [Paliare Roland Rosenberg Rothstein] and KM [Koskie, Minksy]". It adds that other lawyers from other firms "assisted class counsel as required".

2011 ONCA 233 (CanLII)

[125] The affidavit goes on to describe the role fulfilled by each of Sutts, Strosberg, Heenan Blaikie, Paliare Roland and Koskie, Minksy, but does not mention Prof. Krishna or FMC in this section. The motion material includes costs briefs for Sutts, Strosberg, Heenan Blaikie, Paliare Roland and Koskie, Minksy setting out the supporting details for their fees and disbursements. The motion material before the motion judge did not contain costs briefs for FMC and Prof. Krishna. Without details of their rates and hours worked, it was not possible to treat their fees as class counsel fees under the CPA.

[126] In a later section of Ms. Speight's main affidavit under the heading "Class Counsel Obtained Advice From Others", the affidavit sets out that "class counsel expanded the counsel group to include Professor Vern Krishna who is an expert in international [page70]taxation". In the same paragraph, it indicates that a U.S. insolvency firm was also retained and that Prof. Krishna and the U.S. counsel had "reviewed and approved the parts of this affidavit stating their information, opinions and beliefs". The affidavit does not mention FMC.

[127] The details of FMC's retainer are set out in the supplementary affidavit of Ms. Speight sworn February 11, 2010:

> Money Mart had entered into a settlement agreement with counsel in an Alberta payday class action at the time that the Ontario action was structured as a national class. A class member, resident in Alberta, retained SS to file an objection to the proposed Alberta settlement. Mr. Strosberg attended in Alberta and met with plaintiffs' counsel in the Alberta action. As a result of this meeting, Alberta counsel did not proceed to tender the settlement to the Alberta court for approval. Money Mart then sued the objector and sought damages against him and plaintiffs' counsel in Alberta . . . . [Class counsel] arranged for Fraser Milner to act on behalf of the objecting class member . . . with the responsibility of defending the action for the objector[.]

[128] The material indicates that class counsel used FMC and Prof. Krishna as consultants to perform discrete, specialized tasks. FMC was retained on a different action to represent an

2011 ONCA 233 (CanLII)

individual other than the representative plaintiff in this case. Prof. Krishna's work product seems to have been treated like that of an expert witness on international taxation issues.

[129] The appellants claim that paragraph 5(d) of the retainer agreement allowed them to include FMC and Prof. Krishna in the class counsel group. I disagree. Paragraph 5(d) authorizes the Solicitor to

> . . . use such persons or resources from the firms Paliare Roland LLP, Koskie Minsky LLP, Heenan Blaikie LLP and any other firm as the Solicitor deems necessary and their services shall be deemed to be provided as members of the Solicitor's law firm.

[130] I do not read the paragraph as purporting to allow class counsel to unilaterally establish a solicitor-client relationship on behalf of the representative plaintiff with any person or resource "used" by class counsel. If the paragraph does intend to do so, it would be unacceptable as it is inconsistent with Winkler C.J.O.'s observation in Fantl that the representative plaintiff is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report. Whatever the import of this paragraph, to the extent it deals with fees, it is part of the fee agreement that was not approved and is not enforceable.

[131] The appeal, which is brought on behalf of class counsel, indicates the appellants are the four law firms Sutts, Strosberg, Heenan Blaikie, Paliare Roland and Koskie, Minksy. Prof. Krishna [page71]and FMC are not included as part of class counsel for the purposes of this appeal.

[132] The motion judge had the general discretion to determine the allowable fees and disbursements in this case. As the material before him did not show that the representative plaintiff made or was even aware of any change in the composition of counsel representing him, or that FMC and Prof. Krishna functioned in a solicitor-client relationship with him, I see no error in his treatment of the fees of FMC and Prof.

2011 ONCA 233 (CanLII)

Krishna as disbursements rather than as part of class counsel's base fee.

Compensation for the representative plaintiff

[133] The motion judge agreed that the representative plaintiff's "contribution to the class action exceeded that which is normally expected of a representative plaintiff" and granted him compensation in the amount of $3,000 as requested by class counsel. However, without discussion, he ordered that the representative plaintiff's compensation be paid out of class counsel fees. The appellant argues that the motion judge erred by not ordering the representative plaintiff's compensation to be paid out of the settlement fund.

[134] In advancing this argument, class counsel relied upon the decision of Sharpe J. in Windisman v. Toronto College Park Ltd., [1996] O.J. No. 2897, 3 C.P.C. (4th) 369 (Gen. Div.). Counsel did not draw the court's attention to the more recent decisions of Cullity J. in Garland v. Enbridge Gas Distribution Inc., supra, and McCutcheon v. Cash Store Inc., [2008] O.J. No. 5241, 174 A.C.W.S. (3d) 90 (S.C.J.), and Cumming J. in Walker v. Union Gas Ltd., [2009] O.J. No. 536, 74 C.P.C. (6th) 366 (S.C.J.). It seems that the most that can be said is that judges of the Superior Court have different approaches with respect to the payment of the representative plaintiff's fees. This court has never dealt with the issue.

[135] I take the view that as a general matter the representative plaintiff's fee should be paid out of the settlement fund and not out of class counsel fees. Class counsel fees are predicated on the work that class counsel have done for the class. Allocating a part of that fee to a layperson, especially a representative plaintiff, raises the spectre of fee splitting, a concern the motion judge expressed at an earlier point in his reasons.

[136] In the absence of any reason for providing otherwise, I conclude that the $3,000 compensation for the representative plaintiff should be paid out of the settlement fund. I would vary the motion judge's order accordingly. [page72]

2011 ONCA 233 (CanLII)

Conclusion

[137] I would allow the appeal in part by varying para. 31 of the motion judge's order to provide that the compensation for the representative plaintiff be paid out of the settlement fund. I would dismiss the appeal in all other respects.

Appeal allowed in part.

Notes

Note 1: There is an error in the paragraph numbering in the reasons released by the motion judge. I refer to the corrected paragraph numbering in the Quicklaw version of his reasons.

2011 ONCA 233 (CanLII)

Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2005] O.J. No. 1117

Ontario Judgments

Ontario Superior Court of Justice

P.A. Cumming J.

Heard: March 8 and 9, 2005.

Judgment: March 23, 2005.

Court File Nos. 00-CV-202080CP, 00-CV-200045CP,

00-CV-198647CP, 00-CV-201723CP, 00-CV-200044CP,

40610, and 42267CP

[2005] O.J. No. 1117 | [2005] O.T.C. 208 | 138 A.C.W.S. (3d) 20 | 12 C.P.C. (6th) 226 | 2005 CarswellOnt 1094 | 2005 CanLII 8689

PROCEEDING UNDER the Class Proceedings Act, 1992 (Biotin) (Bulk Vitamins) (Choline Chloride) (Methionine) (Niacin) (Supplemental Choline Chloride) (Suppplemental Ontario Methionine) Between Glen Ford, Vitapharm Canada Ltd., Fleming Feed Mill Ltd. and Marcy David, plaintiffs, and F. Hoffmann-La Roche Ltd., Hoffmann-La Roche Ltd., Merck KGaA, Lonza AG, Alusuisse-Lonza Canada Inc., Sumitomo Chemical Co. Ltd., Sumitomo Canada Limited/Limitée and Tanabe Seiyaku Co. Ltd., defendants And between Glen Ford, Vitapharm Canada Ltd., Fleming Feed Mill Ltd., Aliments Breton Inc., Oger Awad and Mary Helen Awad, plaintiffs, and F. Hoffmann-La Roche Ltd., Hoffmann-La Roche Limited/Limitée, Rhône-Poulenc S.A., Aventis Animal Nutrition S.A., Rhône-Poulenc Canada Inc., Rhône-Poulenc Animal Nutrition Inc., Rhône-Poulenc Inc., BASF Aktiengesellschaft, BASF Corporation, BASF Canada Inc., Eisai Co. Ltd., Takeda Chemical Industries Ltd., Takeda Canada Vitamin and Food Inc., Merck KGaA, Daiichi Pharmaceutical Company, Ltd., Reinhard Steinmetz, Dieter Suter, Hugo Strotmann, Andreas Hauri, Kuno Sommer and Roland Brönnimann, defendants And between Fleming Feed Mill Ltd., Aliments Breton Inc., Len Ford and Marcy David, plaintiffs, and BASF Aktiengesellschaft, BASF Corporation, BASF Canada Inc., Chinook Group Ltd., Chinook Group, Inc., DCV Inc., Ducoa L.P., Akzo Nobel NV, Akzo Nobel Chemicals BV, Bioproducts Inc., Russell Cosburn, John Kennedy, Robert Samuelson, Lindell Hilling, John L. ("Pete") Fischer and Antonio Felix, defendants And between Glen Ford, Fleming Feed Mill Ltd., Aliments Breton Inc. and Kristi Cappa, plaintiff, and Rhône-Poulenc S.A., Rhône-Poulenc Canada Inc., Degussa-Hüls AG, Degussa Corporation, Degussa Canada Inc., Novus International Inc. and Aventis Animal Nutrition S.A., defendants And between Vitapharm Canada Ltd., Fleming Feed Mill Ltd., Aliments Breton Inc., and Kristi Cappa, plaintiffs, and Degussa-Hüls AG, Degussa Corporation, Degussa Canada Inc., Reilly Industries Inc., Reilly Chemicals S.A., Vitachem Company, Alusuisse-Lonza Canada Inc., Lonza AG, Nepera Incorporated, Roger Noack and David Purpi, defendants And between Fleming Feed Mill Ltd., Aliments Breton Inc., Glen Ford and Marcy David, plaintiffs, and UCB S.A. and UCB Chemicals Corporation, defendants And between Glen Ford, plaintiff, and Novus International (Canada) Inc., defendant

(115 paras.)

Case Summary

Civil procedure — Parties — Class or representative actions — Legal profession — Barristers and solicitors — Compensation — Measure of compensation — Reasonable charges, reasonably performed.

Application for the approval of class counsel fees. In 1999 multiple putative class actions were commenced in Ontario, British Columbia and Quebec that alleged a complex price-fixing and market-sharing conspiracy related

to the sale of vitamins in Canada. Ultimately, five class actions were reconstituted and pursued in Ontario and dealt with discrete vitamins and separate representative plaintiffs. Two additional actions were pursued. Some of the defendants entered into a proposed settlement with some of the plaintiffs in the Ontario class actions. The agreement was lengthy and complex. It was approved in separate reasons and sought to compensate all class members across Canada. The settlement compared favourable to the results achieved in American litigation even though there was a higher scale of damages available in the United States. Class counsel agreed with the representative plaintiffs to be paid counsel fees equal to 15 per cent of the settlement funds. It was anticipated that the class counsel fee would be $14,732,906. The agreement allocated a maximum of $18 million for the payment of administration expenses and class counsel fees. The base fee for class counsel's time was $5.3 million. The anticipated class counsel fee was based on a multiplier of 2.78 on the base fee. It also represented a 14.73 per cent fee on a recovery of $100 million after settlement credits. The settlement was based on a total value of $140 million and a total payable to the administrator of $100 million after settlement credits. The damages suffered by the class members was in the range of $103 to $138 million.

HELD: Application allowed.

The legal issues were complicated and challenging. The litigation approach was designed to maximize recovery for the classes. Class counsel faced many risks. There was a multiplicity of actions throughout Canada against many defendants in different jurisdictions. There was a possibility that certification could be denied and that some or all of the actions could be dismissed. Price fixing civil litigation was novel in Canada when the actions were commenced. There was also the possibility that the actual recovery could be much smaller than the settlement amount. There was a chance that the value of counsels' time could be disproportionate to the amount involved. A further risk was that the settlement would not be approved. The amount of $15 million for fees was fair and reasonable if the actual recovery was $100 million. If the recovery was higher counsel would receive slightly more than this amount.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, *S.O. 1992, c. 6, s. 32*, s. 33, s. 33(2), s. 33(7)(b), s. 33(7)(c), s. 33(9).

Counsel

Harvey T. Strosberg, Q.C., C. Scott Ritchie, Q.C., J.J. Camp Q.C., and Joe Fiorante for the Plaintiffs in all actions

Glenn M. Zakaib, for the Defendant Merck KGaA

John Callaghan, for Sumitomo Chemical Co. Ltd.

William Vanveen and François Baril, for the Defendants Hoffmann-La Roche Limited, F. Hoffmann-La Roche Ltd.

Ariane Farrell, for Sumitomo Canada Ltd.

Donald Houston, for Lonza AG

Katherine L. Kay and Eliot N. Kolers, for the Defendant Eisai Co. Ltd.

Evangelia Kriaris, for Takeda Pharmaceutical Company Limited (formerly Takeda Chemical Industries Ltd.); Takeda Canada Vitamin and Food Inc.

Sandra A. Forbes, for Aventis Animal Nutrition S.A., the Rhône-Poulenc defendants and Daiichi Pharmaceutical Company, Ltd.

David W. Kent, for BASF Aktiengesellschaft, BASF Corporation and BASF Canada Inc.

Andrew J. Roman, for Akzo Nobel N.V. and Akzo Nobel Chemicals B.V.

George D. Hunter, for DCV Inc. and Ducoa L.P.

James Doris, for Bioproducts, Inc.

Tycho Manson, for Chinook Group, Ltd.

F. Paul Morrison and J.P. Brown, for Degussa Corporation, Degussa Canada Inc. and Degussa-Huls A.G.

S.A. Dawson, for Novus International, Inc.

Donald Houston, for Lonza AG (acting previously discontinued agent) for Alusuisse-Lonza Canada Inc.

Jennifer Badley (per D. Kent) for Reilly Industries Inc. and Reilly Chemicals S.A.

S. Vlahakis, for Nepera Inc., Roger Noack and David Purpi

Donald Houston, for Wippon Soda Co. Ltd.

Pauline W. Wong for Defendant, Mitsui & Co., Ltd.

S.A. Dawson, for Novus International (Canada) Inc.

Donald Houston, for UCB S.A. and UCB Chemicals Corporation

[Editor's note: A corrected copy was released by the Court April 5, 2005; the corrections have been made to the text and the corrigendum is appended to this document.]

CLASS PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992

REASONS FOR DECISION

P.A. CUMMING J.

The Motion

1 This is a motion for approval of class counsel fees in respect of a group of class actions under sections 32 and 33 of the Class Proceedings Act, *S.O. 1992, c. 6* ("CPA").

2 In 1999, multiple putative class actions were commenced in Ontario, British Columbia, and Quebec alleging a complex, global, multi-party, price-fixing and market-sharing conspiracy relating to the sale of vitamins in Canada. Ultimately, five separate class actions were reconstituted and pursued in Ontario, dealing with discrete Vitamins and with separate representative plaintiffs. Two additional, so-called "supplemental", class actions have also been initiated. Certain "Settling Defendants" have now entered into a proposed settlement with certain "Settling Plaintiffs" in these class actions in Ontario, culminating in what is called the "Amended Canadian Vitamins Class Actions National Settlement Agreement" ("Agreement") made as of November 1, 2004 and amended as of January 6, 2005. The proposed settlement is for the national classes contemplated in the class actions at hand, together with separate class proceedings in British Columbia and Quebec. Separate settlement approval hearings will take place before the Courts in those provinces. (The status of the several class actions, following upon the successful motions for certification and settlement approval, is set forth in paragraph 106 of the separate Reasons for Decision in respect of the certification motions and for settlement approval released contemporaneously with these Reasons for Decision.)

3 The Agreement is lengthy and complex with several schedules and can be found (together with additional information), online: <http://www.vitaminsclassaction.com>. (See Exhibit D to Affidavit of Charles M. Wright in Volume 1 of 9 of Motion Record). There are also very recent, trailing, additional, separate Settlement Agreements for three Defendants (Akso Nobel Chemicals BV ("Akso"), UCB S.A. ("UCB"), and Reilly Industries Inc. ("Reilly")) which, for the purposes of the motion at hand, can be notionally treated as though they are part of a single overall settlement.

4 The alleged conspiracies remain simply that, i.e. "alleged" conspiracies, although it is to be noted that many of the Settling Defendants have pleaded guilty to charges of conspiracy in separate criminal proceedings with consequential fines.

5 The motion for certification and Court approval of the proposed settlement was heard on March 8, 2005 with the motion for the approval of "Class Counsel Fees" being heard separately March 9, 2005. Reasons for Decision in respect of certification and settlement approval have been given separately. The Reasons for Decision at hand deal with the discrete issue of fees for class counsel.

6 Capitalized terms used herein are as defined in the Agreement. However, the term "Class Counsel" means the law firms known as Siskinds, Cromarty, Ivey & Dowler ("Siskinds"), Sutts Strosberg ("Strosberg"), Camp Fiorante Matthews ("Camp"), Desmeules, and Allen Cooper. This definition of "Class Counsel" is different from the definition of "Class Counsel" found in the Agreement. The term "Quebec Counsel" means the two Montreal firms, Sylvestre, Charbonneau, Fafard and Unterberg, Labelle, Lebeau.

7 As well, "Class Counsel Fees", as this term is used herein, means the total fees payable to both Class Counsel and Quebec Counsel.

8 Class Counsel decided at an early stage that the litigation would be pursued in Ontario ahead of the actions in British Columbia and Quebec. Lawyers J.J. Camp and Joe Fiorante of the British Columbia bar both obtained a special call in Ontario to assist in the Ontario litigation.

9 Alleging distinct conspiracies, Class Counsel devised a theory which had not previously been postulated. Simply put, in separate actions (collectively called the "Vitamins class actions"), they alleged damage on behalf of all persons in Canada injured as a result of each alleged conspiracy. The class members have been divided into three groups, namely, Direct Purchasers, Intermediate Purchasers and Consumers. Class Counsel have sought to assess damages for them on a global basis. This theory has been pleaded in subsequent price-fixing actions and, indeed, approved by this Court in Alfresh Beverages Canada Corp. v. Hoechst AG, *[2002] O.J. No. 79*.

10 Several pre-certification motions have been heard. Class Counsel brought a carriage motion to defeat a challenge by other counsel in Ontario seeking to prosecute class actions on behalf of only Consumers (Vitapharm

Canada Ltd. v. F. Hoffmann-La Roche Ltd., *[2000] O.J. No. 4594*). Then, some Defendants unsuccessfully challenged the Ontario Court's jurisdiction (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., *[2002] O.J. No. 298*). Some Defendants challenged the plaintiffs' right to obtain evidence in the U.S. (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., *[2001] O.J. No. 237*). This issue was argued in the District of Columbia and, ultimately, in the Ontario Court of Appeal where the plaintiffs prevailed (*[2003] O.J. No. 868* (C.A.)).

11 The settlement Agreement, now approved by this Court (and if approved by the British Columbia and Quebec Courts), seeks to compensate all class members across Canada. As discussed in the Reasons for Decision relating to the settlement approval, the cy-près mechanism is employed to some extent in giving effect to the distribution of the settlement funds.

12 The settlement compares favourably to the results achieved in U.S. litigation even though in the U.S. there is a regime of statutory treble damages and a jury culture. As well, the settlement falls within the range of damages estimated by the plaintiffs' expert economist, Dr. Thomas Ross.

13 The proposed overall class action settlement totals by far the largest amount recovered in class actions relating to price-fixing in Canada. The settlement is based on a total damage assessment in excess of $140,000,000 including interest, expenses and costs and results in an expected payment by the Settling Defendants to the Administrator of about $100,000,000 after the deduction of "Settlement Credits" (being credits against the overall Canadian assessment of damages by excluded customers, that is, Direct Purchasers or Distributors who have already settled their individual claims with Settling Defendants separate and apart from the Agreement at hand).

14 Class Counsel in Ontario agreed with the representative plaintiffs to be paid counsel fees equal to 15% of the settlement funds or monetary award plus applicable taxes plus recovered costs, plus their unrecovered disbursements and applicable taxes.

15 Section 18.1 of the Agreement deals with "Class Counsel Fees and Disbursements and Administration Expenses." Paragraph 13 of the factum of Class Counsel sets forth the expected calculations under that provision:

Amount for Administration Expenses and Class Counsel Fees	$ 18,000,000
Plus Fees on Additional Settlements	$ 75,000
Plus estimated Costs and Interest recovery from Mr. Borden and/or his clients	$ 70,000
Subtotal	$ 18,145,000

Less Administration Expenses (actual and estimated)	($ 1,390,709)
Less Quebec Counsel's Disbursements and GST (estimated)	($ 40,000)
Less Class Counsel Disbursements (paid and payable)	($ 1,552,392)
Less interest authorized by CPA s. 33(7)(c)	Not calculated
Less GST on Class Counsel Disbursements where applicable	($ 94,667)
Subtotal	$ 15,067,232
Less GST on Class Counsel Fees and Quebec Counsel Fees	($ 985,707)
Maximum amount available for Class Counsel Fees and Quebec Counsel Fees	$ 14,081,525
Percentage for Class Counsel Fees and Quebec Counsel Fees based on $100,000,000 recovery	14.08%
Less Quebec Counsel Fees (estimated) net of GST and disbursements	($ 2,000,000)

Maximum amount available for Class Counsel Fees $ 12,081,525

Multiplier inherent in Class Counsel Fees 2.28

16 An "Expense Fund" of $10,000,000 was negotiated by Class Counsel as part of the Agreement. This is often seen in the practice in Ontario in class action and general litigation. For example, in a personal injury action involving a minor or a person under a disability, plaintiff's counsel will negotiate a fixed amount for "costs" as part of a settlement which is tendered to the court for approval.

17 There are problematic aspects to a discrete amount being labeled in a settlement agreement as being a contribution for class counsel fees. On the one hand, as the class is going to be required in all events to pay class counsel their fees, this factor is a necessary consideration in looking to the overall quantum of the funds being sought by the class in negotiating a settlement.

18 On the other hand, the structure for any sum isolated and labeled in any settlement agreement as going toward counsel fees requires careful scrutiny to ensure that the determination of class counsel fees is ultimately fair and reasonable.

19 A Court must be cognizant that any amount so labeled in a class action as being "on account of Class Counsel Fees" does not imply the minimum starting point in a determination of the quantum of fair and reasonable legal fees. The isolated amount, if such there is, should properly be seen as simply an indistinguishable part of the total global recovery for the class with fair and reasonable fees then being determined by looking to the global recovery along with all other appropriate factors.

20 I turn now to the Agreement at hand. Section 6.1(1) of the Agreement "notionally" allocates the "Settlement Amount" (defined in s. 1.1(65) as being "$132.45 million, including an amount of $10 million on account of Class Counsel Fees and Administration Expenses," plus interest) into five funds, including an "Expense Fund of $10 million."

21 Section 18.1(1) then proceeds to state, "The $10 million allocated to the Expense Fund is a payment by the Settling Defendants on account of Class Counsel Fees and Administration Expenses." Section 18.1(2) then provides that "The maximum amount the Courts shall allocate for Class Counsel Fees and Administration Expenses is $18 million." Section 18.1(10) states that as a result of this $18 million cap the Settling Defendants agree not to oppose the approval of Class Counsel Fees and Administrative Expenses.

22 Further elaboration on the regime for Class Counsel Fees and Administration Expenses is set forth in the remaining subsections of s. 18.1.

23 Class Counsel in their Factum emphasize that they "agreed to an $18,000,000 cap on Administration Expenses and Class Counsel Fees during the negotiations of the Amended Settlement Agreement knowing that this could result in a payment to them of less than Class Counsel agreed to and expected as a result of their fee agreements with each plaintiff." Presumably this was because the calculation as shown in the above chart would result in Class Counsel Fees of only 14.08% whereas the contingency fee agreements provide for a 15% fee of the recovered amount.

24 The written agreement between each plaintiff in the Ontario Actions and Strosberg or Siskinds states:

> Solicitor's Fees
>
> 4. Whether or not Success is achieved in the Action, the CLIENTS agree that the SOLICITOR shall be paid and shall receive all recovered party and party costs in the Action irrespective of the scale upon which the party and party costs are awarded, applicable taxes and any interest accruing on account of party and party costs.
>
> 5. In addition to any fees recovered as party and party costs paid to the SOLICITOR pursuant to the provisions of paragraph 4 above, in the event of Success in the Action the CLIENTS agree that the SOLICITOR shall be paid and shall receive the aggregate of the following:
>
> (a) to the extent that any disbursements are not received and recovered as party and party costs, an amount equivalent to the cost of the unrecovered disbursements plus applicable taxes; and
>
> (b) 15% of the settlement funds or monetary award plus applicable taxes.
>
> Disbursements
>
> 6. The CLIENTS agree that disbursements to be paid to the SOLICITOR shall include all amounts incurred or which may be incurred by the SOLICITOR and his firm and the Associate Counsel in connection with the representation of the CLIENTS and the Class in relation to the trial of the Common Issues and/or settlement, including but not limited to expenses incurred for investigation, court fees, duplication, travel, lodging, long distance telephone calls, the cost of a toll-free telephone line, the cost of specialized computer equipment and management systems software, the cost of a website, courier, postage, telecopier, imaging, and all services provided to the SOLICITOR by consultants, experts and agents. [Emphasis added]

25 Class Counsel take the position that the written agreement between each plaintiff in the B.C. Actions and Camp provides for Camp to be compensated on the same basis except that there is no provision for costs because no costs may be awarded in favour of or against a plaintiff in a B.C. class action. (It is noted the B.C. action retainer agreements apparently provide for legal fees that vary, depending on the stage of litigation, from 15% to 25% of all benefits obtained for class members, plus disbursements and applicable taxes.)

26 The representative plaintiffs each signed the Settlement Agreement and thereby agreed to $18,000,000 for Administration Expenses and Class Counsel Fees. However, it is noted that the expectations of the Ontario class action representative plaintiffs in doing so are that there is about $100 million in actual settlement benefits and that the legal fees being requested are consistent with the retainer agreements' stipulation of legal fees being in the amount of 15% of all benefits obtained for class members, plus disbursements and applicable taxes. See for example the affidavit of Ms. Kristi Cappa, a representative plaintiff in the Ontario Methionine Action and the Ontario Niacin Action. Indeed, the affidavit of Ms. Heather Rumble Peterson of the lead plaintiff counsel firm, Strosberg, reiterates this intent and expectation.

27 Section 18.1(3) limits the maximum amount of fees for Quebec Counsel at $2.18 million, inclusive of taxes and disbursements.

28 Section 18.1(4) states that Class Counsel Fees and Administration Expenses "shall first be paid from the Expense Fund." Section 18.1(5) goes on to state that if there is Court approval to greater fees and expenses that the excess shall be paid from the four funds in given percentages (Direct Purchaser Fund - 80%, Methionine Fund - 4%, Intermediate Purchaser Fund - 8%, and Consumer Fund - 8%).

29 Section 18.1(6) provides that, "Class Counsel Fees and Administration Expenses shall constitute a first charge upon and shall be paid as the first payments from each fund."

30 In my view, there are some required adjustments to the calculations as shown in the chart above. First, some of the claimed disbursements in reality are notionally properly considered as fees for legal services implicit to the services provided by Class Counsel.

31 The factum of class counsel in the first instance sought to treat a payment to another Canadian law firm of some $200,000 as a simple disbursement. This payment arose because of an agreement resulting from a commitment by the other law firm to drop out of the contest in respect of the carriage motion back in 2001. There was nothing improper about this arrangement and it was made known to the Court at the point of the agreement. However, the payment should properly come out of the quantum determined as Class Counsel Fees and not be treated as a disbursement before determination of the quantum of Class Counsel Fees.

32 As well, the factum sought in the first instance to treat the $451,381 to be paid to American law firm advisors as a simple disbursement outside the determination of the quantum of Class Counsel Fees. This amount is notionally for legal services as a part of the overall legal services being provided by Class Counsel. Such amount is properly payable by Class Counsel out of the Class Counsel Fees after the determination of the quantum of Class Counsel Fees. Such amount is not properly treated as a disbursement by Class Counsel outside of the determined quantum of Class Counsel Fees. (It is noted incidentally as well that payment to the Canadian law firm of the $200,000 and to the American law firms of the $451,381 was agreed to by Class Counsel to be contingent upon success in the class actions at hand.)

33 Class Counsel were first alerted to the alleged conspiracies by several groups of U.S. counsel with experience in prosecuting antitrust cases, some of whom were involved in the prosecution of vitamins anti-trust litigation in the U.S. Federal court. U.S. counsel provided advice and guidance that assisted in a preliminary manner in shaping the general strategy and in developing expert evidence. They provided information about the alleged Vitamin conspiracies that was not readily available, even though not subject to U.S. protective orders. They introduced Class Counsel to some of the representative plaintiffs and to their expert economist, Dr. Beyer. They also assisted in the motion seeking access to evidence in the District of Columbia. The U.S. firms are: Much Shelist Freed Denenberg Ament & Rubenstein P.C.; Freed and Weiss LLC; Gallagher, Shrap, Fulton & Norman; Cohen, Milstein, Hausfeld & Toll P.L.L.C.; Levin, Fishbein, Sedran & Berman; and The Cuneo Law Group. Class Counsel negotiated with some of the U.S. counsel in an attempt to formalize a working relationship with them; however, no agreement was ever finalized and signed.

34 Thus, in my view, there should be added into the quantum of Class Counsel Fees actually being received the two sums of $200,000 and $451,381 or a total add-in of $651,381. (There is a corresponding deduction to Class Counsel disbursements of this amount of $651,381, resulting in the adjusted anticipated expenses of Class Counsel being only $901,011 (rather than $1,552,392, as shown on the above chart)).

35 Thus, the chart, as properly adjusted in my view, would be as follows:

Amount for Administration Expenses and Class Counsel Fees	$ 18,000,000
Plus fees on additional settlements	$ 75,000
Plus estimated costs and interest recovery from Borden and/or his clients	

Plus potential costs and interest recovery on jurisdiction motions

Subtotal	$ 18,075,000
Less Administration Expenses (actual and estimated)	($ 1,390,709)
Less Quebec Counsel's disbursements and GST (estimated)	($ 40,000)
Less Class Counsel disbursements (paid and payable)	($ 901,011)
Less interest authorized by CPA s. 33(7)(c)	Not calculated
Less GST on Class Counsel disbursements where applicable	($ 63,071)
Subtotal	$ 15,680,209
Less GST on Class Counsel Fees	($ 1,025,808)
Maximum amount available for Class Counsel Fees	$ 14,654,401

Percentage for Class Counsel Fees based on $100,000,000 recovery	14.654%
Less fees of Quebec Counsel (estimated) net of GST and disbursements	($ 2,000,000)
Estimated amount available for fees of Class Counsel	$ 12,654,401
Less $651,381 payable to other counsel excluded from the multiplier	($ 651,381)
Estimated amount available for Class Counsel	$ 12,003,020
Multiplier inherent in fees of Class Counsel on base fee of $5,306,189	2.26

36 The s. 18.1 regime as illustrated in the above charts makes Class Counsel Fees the residual amount after the payment of Administration Expenses. Class Counsel know with certainty the specific amounts for disbursements, taxes and administration expenses (having negotiated with the intended Administrator a capped fixed fee - see s. 17 of the Agreement). The adjusted chart shows anticipated total Class Counsel Fees of $14,654,401. In my view, it is quite possible that the Administration Expenses will be less than anticipated, which would mean some further increase to the residual calculation of Class Counsel Fees.

37 Class Counsel estimate that they will expend further time valued at approximately $350,000 and approximately $40,000 in disbursements. These future activities of Class Counsel (excluding the Methionine Actions) will include: preparation for and attendance at the motions for the approval of the settlement agreements and fees in the three jurisdictions; responding to questions from class members and their lawyers regarding the settlement and questions from, and interacting with, industry and consumer organizations; and bringing motions to declare the settlements operative.

38 Class Counsel will not be paid any additional fees or disbursements (except in relation to the Methionine Actions) for these further services. Therefore, the estimated value of these future services has been included by Class Counsel in the calculation of the base fee and factored into the calculation of the multiplier, as are their estimated future disbursements.

39 The result is that the regime set forth in the Agreement for the suggested overall Class Counsel Fees amounts to a reasonable certainty of expectation to Class Counsel of approximately $14,654,401 to $15,000,000.

40 Subject to the Court's approval, the Agreement allocates a maximum of $18,000,000 for the payment of

Administration Expenses and Class Counsel Fees. The chart prepared by Class Counsel assumes the recovery and distribution of about $100 million in settlement funds. A recovery of $100 million is the premise underlying the estimate that Class Counsel Fees will be less than 15% of the recovered amount.

41 But the s. 18.1 regime is not dependent upon a recovery of $100 million. As drafted, the calculation of Class Counsel Fees does not change if the recovery in fact falls below $100 million due to opt outs. If the total Purchase Price of Vitamins by Direct Purchasers and Distributors who opt out of the Settling Proceedings exceeds the "Opt Out Threshold" the Settling Defendants may elect to terminate the Agreement (s. 15 of the Agreement). However, if there is no termination the s. 18.1 regime provides in effect that the Class Counsel Fees will always be calculated as set forth in the chart which should result in at least $14,654,401. (The "Opt Out Threshold" has been fixed by the agreement of counsel but will remain unknown to others (the set amount has been placed in a sealed envelope deposited with the Court) until the Opt Out date has passed.)

42 Suppose hypothetically that there is an opt out by Direct Purchasers such that recovery is only $90 million. In such event, Class Counsel Fees of $14,654,401 would be 16.28% of the actual settlement recovery.

43 In the course of submissions, given concerns expressed by the Court, various possibilities were mooted as alternatives to the proposal of Class Counsel as to a regime to determine the quantum of fees. One alternative considered as a possibility was that of a 'hard cap' in respect of Class Counsel fees, being determined as the least amount resulting from two calculations: first, 15% of the actual recovered amount for the classes and second, $15 million (inclusive of payment to Quebec counsel of $2,180,00.00) (plus any recovery of costs in the Borden court proceedings and the Methionine motion). The concept of a so-called 'hard cap' is based upon the underlying contingency fee agreement of 15% of any recovery of damages (plus any recovery in respect of the so-called "Borden court proceedings," discussed hereafter).

44 Quebec Counsel would be paid $2,180,000 out of the total fees allowed for counsel or such lesser amount as the Quebec Court directs.

45 If the British Columbia Court also gives its approval to the proposed settlement and the Quebec Court approves a payment of $2,180,000 to Quebec Counsel for fees, disbursements and taxes, then it is estimated Class Counsel (i.e. counsel for the plaintiff classes apart from Quebec Counsel) would receive under the hypothetical hard cap maximum:

(a) the balance of the $18,000,000 available after payment of Administration Expenses and Quebec Counsel to a maximum of $12,820,000.00 (i.e. the cap of $15 million less Quebec counsel fees of $2,180,000,00); plus

(b) any recovery of the costs and interest in respect of the Borden court proceedings.

46 The base fee representing the value of Class Counsel's time expended to about February 23, 2005 and their estimated time to completion is $5,306,189. (However, this amount excluded any inclusion for the unknown figure for the time of Quebec counsel.) With a base fee of about $5,306,189, the maximum of $12,003,020 (after deduction of $651,381 payable to non-class counsel, as their time has not been included in the base fee calculation of $5,306.189) for Counsel Fees would imply a multiplier of 2.26 on the base fee.

47 A court may fix as a fee a lump sum or a base fee increased by a multiplier or a percentage of the recovery. In the case of a lump sum, the court should test the reasonableness of the result by considering it as a multiplier and as a percentage of the amount recovered. Serwaczek v. Medical Engineering Corp. *(1996), 3 C.P.C. (4th) 386* at 393 (Ont. Gen. Div.); Gagne v. Silcorp Ltd. *(1998), 41 O.R. (3d) 417* at 425 (C.A.).

48 The adjusted chart shows that, in total, it is estimated Class Counsel and Quebec Counsel would actually receive an amount of about $14,654,401 for fees or a percentage fee of about 14.654% based on a recovery of $100,000,000 after Settlement Credits. To the extent the recovery may be greater than $100 million and/or the

estimated charges against the recovery in the above chart are less than the estimates, the fees would increase but could not exceed $15 million if there was a 'hard cap' of that amount.

49 If there are greater amounts for expenses, disbursements or taxes than as contemplated in the above calculations, such debits will reduce the amount of Class Counsel Fees as they are calculated as the residual after the various deductions as seen in the chart. However, as discussed above, the estimation as to the quantum of expenses, disbursements and taxes seems to have a fair degree of certainty.

50 Class Counsel express concerns as to a possible hard cap of 15% of the actual recovery. They suggest that if this approach were to be favoured by the Court then a protective proviso would be appropriate. They suggest that to the extent there are opt outs up to $6,000,000 of the settlement's Direct Purchasers Fund (the figure of $6,000,00 being calculated from $50 million in sales, i.e. 12% of sales) the 15% limiting factor for Class Counsel Fees would not apply. That is, if there were to be a reduction in recovery monies within the range of $100 million to $94,000,000 due to opt outs, the possible 15% hard cap limiting factor would not apply. At $94 million, total Counsel Fees of $14,654,401 would then represent a 15.59% return to Class Counsel and Quebec Class Counsel.

51 Under this possible regime for Class Counsel Fees, if the opt outs were to exceed $6,000,000 (i.e., the recovery for the classes fell below $94 million) it was mooted in the exchanges with the Court during submissions that an adjusted limiting factor might then apply. The Class Counsel fees would be reduced by a percentage, say perhaps 10% hypothetically, times the amount of the shortfall in recovery below $94 million.

52 For example, suppose only $90 million were to be recovered after the impact of opt outs. Then under this hypothetical regime the Class Counsel Fees of $12,654,401 (after payment to Quebec Counsel of $2,000,000) would be decreased by $4,000,000 ($94,000,000 minus $90,000,000), times 10% = $400,000, leaving an amount of $12,254,401 as Class Counsel Fees. In the example, the total Class Counsel Fees of $14,254,401 would then be 15.84% of the amount recovered, $90 million. However, Class Counsel would also propose that their fees should never be allowed to fall below a given figure, say, $13,500,000.

53 As I have said, s. 18.1 of the Agreement serves the function of calculating Class Counsel Fees, subject to Court approval. There is an explicit cap in the formula of about $15 million for Class Counsel Fees given the overall ceiling of $18 million for Administration Expenses and Class Counsel Fees. This is arguably appropriate, fair and reasonable. But it is based upon the underlying premise of an actual recovery of $100 million.

54 There is, however, also an implicit floor in respect of Class Counsel Fees through the s. 18.1 regime. That is, the Class Counsel Fees would always amount to about $15 million, no matter what the actual recovery is through the settlement after possible opt outs, so long as a settlement survives (i.e. the Agreement is not terminated because the Opt Out Threshold is exceeded and the Settling Defendants elect for termination).

The Law

55 A solicitor and a representative party may enter into a written agreement providing for the payment of fees and disbursements only in the event of success in the class proceeding, that is, on a contingency basis.

56 Subsection 33(2) of the CPA defines success in a class proceeding to include a settlement that benefits one or more class members.

57 The contingency agreement between each plaintiff in the Ontario Actions and Strosberg or Siskinds is set forth above. Each contingency agreement states that counsel fees shall be "15% of the settlement funds[.]" Class Counsel state that the contingency agreements with B.C. counsel are to be read the same way.

58 The CPA has the following three principal goals:

(a) judicial economy, or the efficient handling of potentially complex cases of mass wrongs;

(b) improved access to the courts for those whose actions might not otherwise be asserted (put otherwise, potentially meritorious claims might have legal costs implications so disproportionate to the amount of each claim that plaintiffs would not be able to pursue their legal remedies without the assistance afforded by the statute); and

(c) modification of the behaviour of actual or potential wrongdoers who might otherwise be tempted to ignore legal obligations.

(a)

See generally Western Canadian Shopping Centres Inc. v. Dutton, *[2001] 2 S.C.R. 534* at paras. 27-29.

59 The realization of the foregoing objectives is achieved by providing appropriate rewards to counsel prepared to assume the manifold risks of the litigation. Professor Garry Watson of Osgoode Hall Law School of York University has expressed the need for adequate compensation for class counsel in the context of the CPA:

> This [issue of compensation] is a vitally important subject, not just because it determines what will go into class counsel's pocket but because it will determine whether or not the legislation is successful. In the final analysis whether or not the Class Proceedings Act will achieve its noble objectives will largely depend upon whether or not there are plaintiff class lawyers who are prepared to act for the class and hence bring the actions. This in turn depends on two factors [:] (a) the level of monetary reward given to class counsel, and (b) the predictability and reliability of the award. In the final analysis, both of these aspects are crucial. Class actions will simply not be brought if class counsel are not adequately remunerated for the time, effort and skill put into the litigation and the risk they assume (under contingency fee arrangements) of receiving nothing. Equally important is that such remuneration be reasonably predictable i.e., that class counsel can take on class actions with a reasonable expectation that in the event of success they will receive reasonable remuneration. It is vital to the viability of class actions that class counsel not be met on "judgment day" with judicial pronouncements (issued with the "benefit" of hindsight) that class counsel "spent too much time, had hourly rates that were too high and in any event were conducting a case which was not really risky at all" and awarded a low base fee and a niggardly multiplier - except in very clear cases. Garry D. Watson, Q.C., "Class Actions: Uncharted Procedural Issues" (Address to the Canadian Institute Seminar in Class Actions, 4 October 1996) at 3-4.

60 A frequently quoted passage supporting the introduction of contingency fee arrangements in class proceedings is found in the Report of the Ontario Law Reform Commission on the then-proposed legislation:

> Under the kind of fee arrangement permitted by the Act, the class lawyer will receive a fee only in the event of success. If he agrees to act on this basis, the class lawyer will be assuming a risk that, after the expenditure of time and effort, no remuneration may be received. It is essential that the successful lawyer be compensated for accepting the risk of non-payment. Otherwise, lawyers very likely will refuse to act for classes on this basis and will insist on the usual solicitor and client cost arrangements, in which case potential representatives may be unable or unwilling to retain them. Ontario Law Reform Commission, Report on Class Actions, vol. 3 (Toronto: Ministry of the Attorney General, 1982) at 737.

61 If individuals are to have access to capable and effective legal representation, an incentive must be provided for counsel to act for plaintiffs and class members who would not otherwise have the means to retain counsel. In support of this incentive, the CPA and the courts have provided the rationale and the means for premium fees to be paid to counsel who are willing to act for class members and who seek payment only in the event of success.

Winkler J. has observed:

> In furtherance of the intent of the legislation -- that counsel be encouraged to accept the risk associated with litigation of this type, and encouraged to pursue it diligently in circumstances where they may never be remunerated for their efforts -- it is necessary to reward the successful resolution with a reasonable multiplier of the base fee. Serwaczek, supra, at 399. See also Gagne, supra, at 422-423 and Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada *(1998), 40 O.R. (3d) 83* at 88 (Gen. Div.).

62 Courts must be cognizant of many problematic factors, including: whether legal fees are based on the benefits actually received by class members and are not illusory; whether fees awarded to class counsel are proportionate to what class counsel actually accomplish for the benefit of the class members; whether the proposed settlement is reversionary with repayment to the defendant of unclaimed monies such as to potentially reduce the claimed settlement; whether the defendant agrees to pay class counsel's fees or purports to set their fees; and the expectations of class counsel and the representative plaintiffs as reflected in any fee agreement.

63 I turn now to a further consideration of the structure of the proposed settlement before the Court.

64 There is explicit expert economic evidence from Dr. Thomas Ross that the damage suffered by the class members is in the range of $103,000,000 to $138,000,000. The settlement is based on a total value of $140,676,928 (including interest) and a total payable to the Administrator of about $100,000,000 after Settlement Credits.

65 Significantly, the settlements have no reversionary aspect for unclaimed monies. That is, no unclaimed money will be repaid to the Settling Defendants. Any monies not paid out of the Direct Purchaser Fund will trickle down to the Consumer Fund. The Intermediate Purchaser Fund and Consumer Fund will be fully distributed cy-près.

66 The negotiations underlying the settlement of the class actions at hand were long and adversarial and involved mediation.

67 Factors relevant in assessing the reasonableness of the fees of any class counsel include the following:

(a) the factual and legal complexities of the matters dealt with;

(b) the risk undertaken, including the risk that the matter might not be certified;

(c) the degree of responsibility assumed by class counsel;

(d) the monetary value of the matters in issue;

(e) the importance of the matter to the class;

(f) the degree of skill and competence demonstrated by class counsel;

(g) the results achieved;

(h) the ability of the class to pay;

(i) the expectations of the class as to the amount of the fees; and

(j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

See generally Serwaczek, supra, at 393; Windisman v. Toronto College Park Ltd. *(1996), 3 C.P.C. (4th) 369* at 376 (Gen. Div.); Endean v. Canadian Red Cross Society, *[2000] B.C.J. No. 1254* at paras. 44-89 (S.C.).

68 The classes in the class actions at hand are comprised of three groups: Direct Purchasers numbering in the thousands, Intermediate Purchasers numbering in the tens of thousands and Consumers numbering in the millions.

69 The legal issues have proven to be complicated and challenging. The litigation approach was designed to maximize recovery for the classes by first quantifying the overcharges on all Canadian Vitamin sales and, thereafter, to distributing the amount recovered under court supervision.

70 Factual complexities arose because of the global nature of the alleged conspiracies among major corporations and some individuals. The carriage action involved a novel situation at the time for a Canadian court. The challenges to the jurisdiction of the Ontario Court and the need to attend outside of Canada for cross-examinations added cost and expenses, as did the attempts of some of the Defendants to block the plaintiffs' from gathering evidence in the United States.

71 When fixing class counsel fees after a settlement is reached, the Court should look at the matter not only from the present perspective of the conclusion but should also be mindful of the challenges and risks that confronted class counsel at the outset and over the course of the action. The risks involved in prosecuting the class action should be assessed as they existed when the litigation commenced and as it continued. Risk ought not to be assessed with the benefit of hindsight. See Gagne, supra, at 423, Goudge J.A.; Maxwell v. MLG Ventures Ltd. *(1996), 30 O.R. (3d) 304* at 311 (Gen. Div.).

72 In addition to the traditional analysis which addresses litigation risk, the Court has considered "certification risk" and "resolution strategy risk" as substantial factors to consider in assessing whether the proposed fees in a class proceeding are fair and reasonable. Parsons v. Canadian Red Cross Society *(2000), 49 O.R. (3d) 281* at 293, 295 (S.C.J.).

73 Some of the risks affecting Class Counsel in respect of the class actions at hand included:

(a) the fact of the multiplicity of actions in Ontario (seven), British Columbia (seven) and Quebec (two);

(b) the fact of the multitude of Defendants in different jurisdictions;

(c) the possibility that certification might be denied generally, a national class might not be certified or certification might be denied in Quebec or British Columbia or Ontario (in particular, that certification for a class of consumers seemed problematical, given the decision in Chadha v. Bayer Inc. *(2003), 63 O.R. (3d) 22* (C.A.), aff'g *(2001), 54 O.R. (3d) 520* (Div. Ct.) (certification denied), rev'g *(1999), 45 O.R. (3d) 29* (Gen. Div.) (certification granted), leave to appeal to S.C.C. denied, *[2003] S.C.C.A. No. 106*, and if certification was denied in one of the provinces, the Canada-wide approach to damages would have been problematical;

(d) the possibility the actions, or some of them, might be dismissed at a trial of the common issues;

(e) the possibility that actual recovery might be much smaller than that seen through the settlement;

(f) the chance that the value of counsels' time expended might be disproportionate to the amount involved;

(g) the possibility the litigation might be delayed, resulting in any recovery being postponed for a significant period of time.;

(h) the possibility of liability for wasted significant out-of-pocket disbursements (including for expert reports);

(i) the possibility that some of the Non-Settling Defendants could object to the settlement because of the form of the proposed bar order;

(j) the possibility that objectors might persuade the court not to approve the settlement;

(k) the possibility the settlement may not be approved in British Columbia and Quebec giving some of the Settling Defendants the right to terminate the Amended Settlement Agreement; and

(l) the possibility the Opt Out Threshold may be exceeded and the settlement thereby declared null and void.

74 Class Counsel assumed significant risk in undertaking the class actions at hand. At the time the actions were commenced, price fixing civil litigation was novel in Canada (although the American experience served as a beacon of possibility for Canadian class action counsel). During the course of this litigation, other price-fixing actions have been defended in Ontario. There has been a refusal to certify an action brought on behalf of consumers that alleged the defendant sought to maintain prices of various audio-visual products in breach of Canadian competition laws. Price v. Panasonic Canada Inc., *[2002] O.J. No. 2362* (S.C.J.). The Ontario Court of Appeal declined to certify an action brought on behalf of a group of consumers who alleged that manufacturers conspired to fix the price of iron oxide. Chadha v. Bayer Inc., supra.

75 Risks continue even if the settlements are approved in all three Courts. The "blow out" provision in s. 14.4 of the Agreement puts the settlements at risk if the Opt Out Threshold is exceeded.

76 Although the expert economic evidence applied in respect of all of the class actions, it was necessary to draw separate motion material seeking certification in each of the actions because the factual underpinnings for each were different.

77 There are about 21 firms defending in Ontario and 15 firms in British Columbia. In the context of settlement negotiations, it was necessary to deal with many of these firms.

78 The interests of each of the Defendants differed depending upon the Vitamin involved. For example, the "Degussa" Defendants settled the Niacin Actions but refused to settle the Methionine Actions.

79 The definition of class in Ontario includes Quebec corporations but not individuals. The considered view is that the class action legislation in Quebec in 1999 only allowed class actions for the benefit of individuals: Book IX, C.C.P. That is, corporations could not then be members of any Quebec class action. Consequently, the definition of the class in Ontario includes Quebec corporations. For this reason, and also because of the need to deal with Quebec Counsel, Class Counsel was expanded to include Desmeules.

80 Moreover, it was necessary to have negotiations that were really on two planes: first, with some of the Defendants and concurrently with Quebec Counsel and, then, with other Defendants.

81 When the carriage motion was decided in December, 2000, it was the first carriage motion in Ontario. Six separate groups initially sought carriage of the Vitamins class actions. Ultimately, the Court gave carriage to Strosberg and Siskinds.

82 In Quebec, similar jockeying went on. Initially, there was a dispute between Desmeules and the other Quebec law firms about who would have carriage of which Vitamin action in Quebec. Ultimately, all plaintiffs' counsel agreed to cooperate, but this took substantial time and effort on Class Counsel's part.

83 Mr. Perry Borden Q.C. was one of the counsel in Ontario seeking carriage of the Vitamins class actions on behalf of retail purchasers or individual consumers. The affidavit of Ms. Patricia A. Speight of the Strosberg law firm, dated February 28, 2005, sets forth the history of the Borden court proceedings. Although other potential plaintiffs ceased their involvement after this Court's decision in respect of the carriage motion in favour of the present Class Counsel and consequential order dated December 4, 2000 (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., *[2000] O.J. No. 4594*, supra), Mr. Borden's clients did not.

84 Mr. Borden has represented a series of persons seeking to commence a class action on behalf of retail purchasers. The putative representative plaintiff Horvath, represented by Mr. Borden, initially appealed the carriage order to the Court of Appeal. She abandoned her appeal on a without costs basis and Class Counsel state they anticipated that there would be no further proceedings.

85 However, Mr. Borden then subsequently appeared on behalf of other individuals, being Messrs. Curran, Webster, Nightingale and Soderstrom, seeking to commence a new class action relating to retail purchasers. The motion for leave to commence a new action was dismissed by this Court September 14, 2001 (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche, *[2001] O.J. No. 3682*) and the appeal of this order was quashed by the Court of Appeal May 14, 2002 (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., *[2002] O.J. No. 2010*).

86 Leave to appeal was also sought by Mr. Borden in Divisional Court with several appearances in the fall of 2002, and a lengthy saga involving a multitude of proceedings, as set forth in Ms. Speight's affidavit, ensued, which proceedings are as yet incomplete.

87 Class Counsel say that they have expended in excess of $250,000 in the value of their time in dealing with Mr. Borden's attempts to seek leave on behalf of his clients to commence actions on behalf of retail purchasers. I agree with the submission of Class Counsel that they could not reasonably have foreseen these continuing collateral attacks on their authority to prosecute the class actions following upon this Court's decision in respect of the carriage motion December 4, 2000.

88 The following are reportedly the outstanding costs orders in favour of the plaintiffs relating to the interventions of Mr. Borden's clients:

(a) $10,000, inclusive of GST and disbursements, plus interest payable at the rate of 6% per annum, as a result of the dismissal of the leave application on September 14, 2001;

(b) $10,000 as a result of the Court of Appeal quashing the appeal of the September 14, 2001 order on May 14, 2002;

(c) $3,500 as a result of the November 4, 2002 order dismissing the motion for leave to appeal the September 14, 2001 order to the Divisional Court;

(d) $17,500 plus disbursements of $1,637.01, plus GST as a result of the November 7, 2003 decision of Madam Justice McFarland; and

(e) an amount, estimated by Class Counsel to be about $25,000, to be determined at a hearing scheduled for April 8, 2005, as a result of the August 21, 2003 order by the Divisional Court dismissing the motion for an order setting aside the November 4, 2002 order.

89 On August 18, 2003, Mr. Curran paid $20,000 into court in partial satisfaction of the costs awarded against him. These monies have not yet been paid out.

90 On April 8, 2005, the Divisional Court is scheduled to hear and determine the issue of costs as a result of its August 21, 2003 order. That is, the court will decide whether or not Mr. Borden's client and/or Mr. Borden must pay the costs of the appeal. Class Counsel estimate that the Divisional Court will fix costs in an amount of about $25,000.

91 Mr. Borden commenced yet another new, pending application February 23, 2005 on behalf of Mr. Lars Soderstrom seeking to advance a claim on the basis of an alleged infringement of the Canadian Charter of Rights and Freedoms.

92 The above proceedings relating to Mr. Borden's clients have been collectively referred to herein as "the Borden court proceedings." In my view, given the very exceptional circumstances of these continuing proceedings, it is reasonable that any recovery of costs in respect of the Borden court proceedings by Class Counsel should fairly go to Class Counsel, as requested, without reduction to the quantum of fees otherwise awarded to Class Counsel by the motion at hand in achieving a settlement.

93 Class Counsel and The Cuneo Law Group obtained an order from Hogan J. granting the plaintiffs leave to

intervene in the Niacin litigation pending in the District of Columbia (In re Vitamins Antitrust Litigation, 2001 WL 34088808). However, Hogan J. deferred his ruling on whether to allow Class Counsel to participate in the deposition and have access to documentary productions until authorized by the Ontario Court.

94 Some Defendants then sought an order preventing or enjoining plaintiffs' access to the Niacin productions and depositions in the U.S. No such order had ever before been argued. By reasons released on January 26, 2001, this Court dismissed the motion, stating that there was "no consequential unfairness to the defendants" if the plaintiffs were given the access they sought to documents and depositions (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., *[2001] O.J. No. 237*).

95 Some of the Defendants challenged the jurisdiction of the Ontario Court in some of the Ontario Actions. Counsel from Siskinds and Camp attended in the United States and Europe for the purposes of cross-examinations. On January 28, 2002, this Court dismissed the jurisdiction motions (Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., *[2002] O.J. No. 298*). This Court held that it had jurisdiction over the Ontario Actions and that Ontario was the forum conveniens.

96 The degree of success achieved is a relevant consideration in assessing whether the fees sought by counsel are fair and reasonable. Total recovery or the nature of payment is not the only criterion on which to judge the settlement. A court should also give weight to the relative ease or difficulty of access to the benefits achieved through the settlement for class members. Parsons, supra, at 289; Gagne, supra, at 424; Roberts v. Morana *(1998), 37 O.R. (3d) 333* (Gen. Div.) at 343, aff'd *(2000), 49 O.R. (3d) 157* (C.A.).

97 Class Counsel estimate that it would cost another $3,000,000 to prosecute the class actions to trial if the settlements were not approved. In such event, it is estimated it would take another three to five years before the class members might gain any compensation through a favourable result at trial.

98 The overall settlement is based upon total damages of $140,676,928 (inclusive of interest). It is estimated the Administrator will have about $100,000,000 (after deduction for Settlement Credits) in its hands by the time of distribution.

99 The amount of this settlement is the largest in Canadian legal history for price-fixing. It provides an expeditious claims process for a large number of Direct Purchasers who will receive the amount the Administrator calculates as due, unless a Direct Purchaser specifically disagrees.

100 Class Counsel proposes a plan of distribution which fairly deals with all members of the classes. The constituent Funds achieve this result. The cy-près distribution protocols and governing rules developed are precise and detailed. The precise formulation of this settlement "demonstrated ingenuity and imagination" in the face of "real and substantial risk." Roberts, supra, at 343.

101 The cost of prosecuting an individual action would be beyond the financial capability of most class members except for substantial Direct Purchasers. The disposition of these class actions through the overall settlement achieved represents an exemplary example of the public policy objective underlying the CPA of deterring wrongful conduct and achieving behaviour modification in the public interest. Put otherwise, public regulation by government authorities is often ineffectual. By encouraging the private sector of class action attorneys to police such behaviour through civil class actions (with the inducement of sizeable legal fees when successful) the realization of the public policy objectives of the regulators is enhanced. Wrongful anti-competitive behaviour through price-fixing in the marketplace is discouraged. Meritorious claims that would otherwise go uncompensated are effectively dealt with.

102 IDRC, now known as Micronutrient Initiative, is a Crown corporation. It was the only Intermediate Purchaser which commenced an individual court action. IDRC contracted with Accucaps, a Direct Purchaser, to put vitamins into capsules. IDRC then distributed these vitamin capsules, without charge, through UNICEF to persons in Third World countries. IDRC was not a typical Intermediate Purchaser because it was involved in a unique, non-profit situation.

103 The recovery of at least $11,400,000 for each of the Intermediate Purchaser Fund (see Schedule F to the Agreement) and the Consumer Fund (Schedule G to the Agreement) compensates these class members by means of a cy-près distribution.

104 There are two factors specifically enumerated in the CPA to determine a multiplier. The first factor, specified under clause 33(7)(b), is the risk which class counsel "incurred in undertaking and continuing the proceeding." The second factor, set out under subsection 33(9), is "the manner in which the solicitor conducted the proceeding." Also to be considered is the degree of success achieved by counsel, either at trial or through settlement of the proceeding.

105 In Gagne at 422 to 424, Goudge J.A. reasoned that a multiplier is a necessary ingredient if the CPA is to successfully achieve its goal of providing access to justice for claimants otherwise excluded.

106 In Gagne, the Court concluded that the determination of a multiplier is an art, not a science. All relevant factors must be weighed in order to determine an appropriate multiplier. Goudge J.A. said at 425:

> In the end, three considerations must yield a multiplier that, in the words of s. 33(7)(b), results in fair and reasonable compensation to the solicitors. One yardstick by which this can be tested is the percentage of gross recovery that would be represented by the multiplied base fee. If the base fee as multiplied constitutes an excessive proportion of the total recovery, the multiplier might well be too high. A second way of testing whether the ultimate compensation is fair and reasonable is to see whether the multiplier is appropriately placed in a range that might run from slightly greater than one to three or four in the most deserving case. Thirdly, regard can be had to the retainer agreement in determining what is fair and reasonable. Finally, fair and reasonable compensation must be sufficient to provide a real economic incentive to solicitors in the future to take on this sort of case and to do it well.

107 Using a percentage calculation in determining class counsel fees properly places the emphasis on the quality of representation, and the benefit conferred to the class. A percentage-based fee rewards "one imaginative, brilliant hour" rather than "one thousand plodding hours." In Re Warner Communications Securities Litigation, 618 F. Supp. 735 at 747 (D.C.N.Y. 198); see also Endean, supra, at para. 74.

108 Class Counsel intend to continue to prosecute the Methionine Actions in respect of "Non-Settling Defendants." The existing Methionine Fund of $6,000,000 created as the result of a Settling Defendant is to be held for the benefit of the Settlement Class Members who are Direct Purchasers or Distributors of Methionine and shall be paid as the Court directs on later motions brought by Class Counsel.

109 Class Counsel have advised that they may, at some future time, ask this Court to approve an amendment to the fee agreement with the plaintiffs in the Methionine Actions to provide, among other things, that if the plaintiffs in the continuing Methionine Actions become liable for costs, that the costs will be paid out of the Methionine Fund.

110 As I have discussed above, I agree that Class Counsel have achieved remarkable results and a successful overall settlement. They are experienced, imaginative, thorough and diligent counsel. However, they embarked upon this venture on the basis of contingency agreements providing for, inter alia, 15% of the recovery. Class Counsel throughout the submissions and in their factum have emphasized that their claim to fees is justified in large part on the basis of the significant risk as to whether they might be successful ultimately and what might be recovered. With respect, in my view, that risk must properly continue in the determination of their ultimate fees. The risk of a shortfall in the anticipated recovery having an adverse impact upon fees (because of the 15% contingency fee arrangement) should not be shifted to class members in the event there are opt outs from the Settling Plaintiff classes.

111 Class Counsel calculate their requested fees in the chart they prepared as part of their factum by emphasizing that they would receive not more than what they agreed upon with their clients through the contingency

agreements, i.e. 15% of the recovery. Yet the regime in s. 18.1 is drafted to guarantee them about $15 million in Class Counsel Fees so long as the Agreement is not terminated due to the Opt Out Threshold being exceeded and Settling Defendants then making the election to terminate the Agreement. In effect, the s. 18.1 regime transfers the risk of opt outs reducing the recovery below $100 million (but not being sufficient to trigger the termination) to the class members and means that Class Counsel Fees might rise beyond 15% of the actual recovery.

112 It was argued in the course of submissions that the implicit multiplier of about 2.26 upon the base fee is modest and a higher multiple would be supportable. In my view, the implicit multiplier applied to the base fee is one standard to measure whether the fees sought are fair and reasonable. The $15 million sought for fees is reasonable if the actual recovery is $100 million. In my view, the agreed-upon standard for fees of 15% of actual recovery as set forth in the bargained-for contingency agreements governing the Ontario actions must properly set a ceiling. Moreover, it is an appropriate ceiling. The results achieved, i.e. the actual recovery, is a seminal factor in determining fair and reasonable fees in any class action settlement.

113 In my view, the Class Counsel Fees should be limited to being not greater than 15% of the actual recovery through the overall settlement. If the actual recovery is more than $100 million, counsel may receive slightly more than $15 million in Class Counsel Fees (but subject to the agreed-upon cap with the Settling Defendants in s. 18.1(2) of $18 million (plus $75,000 in respect of the trailing, additional settlement agreements), less Administration Expenses, disbursements and applicable taxes). If their estimate of a recovery of $100 million proves accurate they will receive about $15 million. If there are opt outs such that the actual recovery falls below $100 million then they will receive less than $15 million in fees. Moreover, there should not be payment of fees until the actual recovery is known with certainty and precision.

114 Taking all factors into consideration, in my view, and I so find, Class Counsel Fees to a ceiling of 15% of the actual recovered amount for the class members (i.e. after the impact of any opt outs) is fair and reasonable. For the reasons given, it is stipulated that the s. 18.1 regime is to operate to accord with these Reasons for Decision. Considering all relevant factors, in my view, and I so find, the quantum of fair and reasonable Class Counsel Fees through the overall settlement at hand is fixed with a ceiling of 15% of the settlement funds or monetary award actually recovered.

DISPOSITION

115 For the reasons given, subject to the Agreement not being terminated in accordance with its provisions, but rather coming into full force and effect, an order shall issue that accords with these Reasons for Decision:

(1) declaring that an amount up to a ceiling of $18,075,000, calculated in accordance with subparagraph (2), for Class Counsel Fees (plus qualifying disbursements and applicable taxes) and Administration Expenses relating to the overall settlement of the subject class actions is fair and reasonable;

(2) declaring that Class Counsel Fees shall be calculated and paid, after deduction for the payment of qualifying disbursements, applicable taxes and Administration Expenses, on the basis of being limited to 15% of the actual recovery of monies for class members through the overall settlement; and

(3) declaring that it is fair and reasonable that Class Counsel are entitled to all costs and interest, if any, recovered in the Borden court proceedings and the methionine jurisdiction motion, in addition to the amount received under subparagraph (1) as calculated under subparagraph (2).

P.A. CUMMING J.

* * * * *

Corrigendum

Minor changes have been made to the chart in para. 35 to achieve greater clarity and accuracy, with follow-on consequential minor changes in some amounts and percentages seen in paragraphs 36, 39, 41, 42, 46, (also with the added explanatory note therein in brackets), 48, 50 and 52. The words "and the Methionine jurisdiction motion" have been added in paragraphs 43 and 115 for greater certainty. Also, in paragraph 112, 1st line, the multiplier reference has been changed to 2.26.

End of Document

REPORT

ON

CLASS ACTIONS

ONTARIO LAW REFORM COMMISSION



VOLUME I

Ministry of the
Attorney
General

1982

assumption has not gone unchallenged. It has been contended that a failure to pursue an existing substantive remedy may reflect not so much a considered judgment by the claimant concerning the merits and importance of the claim, as the operation of economic, social, and psychological barriers precluding the assertion of that claim. Indeed, it has been suggested that the potential of class actions to provide access to justice for aggrieved persons who would otherwise be denied the benefit of existing remedies is one of the most important goals of class actions.

The usefulness of class actions in furthering this goal was specifically recognized by Mr. Justice Arnup in *Naken v. General Motors of Canada Ltd.*:[80]

> In these days of mass merchandising of consumer goods, accompanied as it often is by widespread or national advertising, large numbers of persons are almost inevitably going to find themselves in approximately the same situation if the article in question has a defect that turns up when the article is put to use. In many instances the pecuniary damages suffered by any one purchaser may be small, even if the article is useless. It is not practical for any one purchaser to sue a huge manufacturer for his individual damages, but the sum of the damages suffered by each individual purchaser may be very large indeed.
>
> In such cases it would clearly be both convenient and in the public interest if some mechanism or procedure existed whereby the purchasers could sue as a class, with appropriate safeguards for defendants, who ought not to be subjected to expensive law suits by class action plaintiffs who cannot pay costs if they lose.

Many class action critics concede that economic and other barriers to litigation do exist; and most commentators agree that class actions could, in theory, play a role in overcoming these barriers and thereby increase access to the courts. However, such commentators suggest that, in practice, class actions do not play a sufficiently significant role in achieving access to justify the burdens that such suits impose upon the courts and defendants. It has been argued that, in fact, class members display little or no interest in achieving the relief sought in many or most class actions, and that this fact is demonstrated by a failure of class members to participate in class actions where they are requested to do so.

Class action proponents reply that the empirical evidence casts serious doubts upon the accuracy of the contention that class members are unwilling to participate in class actions. It has been suggested that any problems in this area reflect the continuing operation of economic and other barriers, rather than indifference to the claims asserted.

Finally, class action critics have contended that, even if class actions do assert claims that are important to class members, the access function will not be served because class members will ultimately achieve no net monetary recovery. It has been asserted that, as a practical matter, the amounts ultimately recovered will be consumed by lawyers' fees or administrative costs, or that the cost to each class member of claiming his or her share, even after the completion of the action, will exceed the amount of the share, because, it is alleged, the claims asserted in most class actions are nonviable.

---

[80] (1978), 21 O.R. (2d) 780, at 784-85, 92 D.L.R. (3d) 100 (C.A.).

While, for the reasons advanced above, the Commission is of the view that class actions can serve a useful function, we do recognize, of course, that not every wrong can be remedied in the courts; some individuals may justifiably be denied access by means of a class action where the overall costs of pursuing their claims in this fashion outweigh any benefits that might accrue to them or to society. We believe, however, that a class action procedure can be designed that is flexible enough to permit the assertion of class actions that serve a valuable access function, while barring inappropriate class actions.[154]

(iii) Behaviour Modification

Hitherto, we have concentrated on the benefits that class actions may confer by achieving judicial economy and providing increased access to the courts. But, in addition to these important functions of class actions, attention has been drawn to the potential of such actions – indeed, all civil litigation – to modify inappropriate behaviour on the part of potential defendants.

The potential of civil litigation to modify wrongful behaviour is most obvious in the case of injunctive relief. This type of relief confers no direct monetary benefit upon plaintiffs, but rather creates pressure upon defendants to alter their conduct in order to conform to the injunction, in a manner that presumably benefits the plaintiffs. But civil suits seeking monetary relief also have the potential to modify behaviour, although the incentives to do so are brought to bear more indirectly.

Most obviously, a civil action has the potential to deprive wrongdoers of any unjust enrichment that results from their misconduct. If, at the outset, the potential defendant is aware that there is a real possibility of such a result, the incentive to commit the wrong may be removed. Even if the prospect of civil litigation does not have this impact upon a particular defendant, a successful action by an aggrieved plaintiff may set an example for others similarly situated to the defendants, and thereby may deter them from following the defendant's example.

The courts have long recognized the legitimacy of utilizing civil suits to prevent unjust enrichment. Indeed, restitutionary causes of action, such as *quantum meruit*, or the equitable action to compel a trustee to account for profits derived from trust property or from information obtained as a trustee, are designed precisely to prevent unjust enrichment.[155] Moreover, the House of Lords has expressly recognized the legitimacy of utilizing an award of punitive damages to achieve this objective:[156]

---

[154] See *infra*, chs. 7, 8, and 9. In particular, the Commission will recommend that the courts be given a discretion to refuse to allow a class action to proceed where the adverse effects of the proceedings upon the class, the courts, or the public would outweigh the benefits to the class, the courts, or the public if the action were certified: see *infra*, ch. 9, sec. 3(c).

[155] See *infra*, ch. 14, sec. 3(c)(vi)a.(1)(B).

[156] *Rookes v. Barnard*, [1964] A.C. 1129, at 1226-27, [1964] 1 All E.R. 367, at 410-11 (H.L.), *per* Lord Devlin (subsequent references are to [1964] A.C.).

REPORT

ON

CLASS ACTIONS

ONTARIO LAW REFORM COMMISSION



VOLUME III

Ministry of the
Attorney
General

1982

compares unfavourably with that of a lawyer who performs non-contingent work compensable on a certain or hourly basis. If a class lawyer were not compensated in a manner that reflected the risk of failure, in addition to being reimbursed for his investment of time and resources, it is argued that lawyers would prefer to undertake other kinds of work for which payment was certain.

A court's examination of the contingency factor at the termination of a class action is an *ex post facto* assessment of the probability of success. The court engages in a retrospective inquiry in which the risk of failure is evaluated from the perspective of the time the action was initiated. In considering the contingency factor, courts have identified certain elements that, in their view, bear upon the probability of success. These elements have been summarized as follows:[138]

> At the outset it is helpful to outline the various elements of the contingency factor. Analysis of these elements will focus on their positive or negative effects on certainty of success. The risk of success or failure requires consideration, for example, of the presence or absence of prior governmental proceedings or prior legal precedent. These two elements are often cited as affecting the contingency factor, but their importance can only be assessed in light of the specific facts of each controversy.[139] For this reason, the likelihood of obtaining a favorable liability judgment, and the risks involved in proving damages even after liability is shown, are particularly important. The risk that the damages proved will be disproportionate to the litigation efforts expended, thus resulting in inadequate compensation is also present. The contingencies in obtaining class certification present another large hurdle. The decision to commit a lawyer's time, money and personnel to resolution of the class action issues represents a unique risk borne by the attorney, though the class representative remains personally responsible for costs should the case be dismissed. Additionally, the vigor and capabilities of the defense may increase the difficulties, and the risk of litigating the counsel fee petition remains.

Although the *Lindy* approach was developed in the context of an application for fees from a settlement fund, its impact has extended beyond that context. Courts have held that this approach is to be followed where the defendant has agreed to pay reasonable attorney's fees in addition to a settlement fund.[140] Where fees are assessed pursuant to statutory fee provisions, the *Lindy* approach also has influenced the method of fee calculation.[141]

---

[138] Newberg, *supra*, note 83, Vol. 3, §6926, at 1165.

[139] The effect of prior government proceedings appears to be uncertain. It has been suggested that, from the perspective of the class lawyer, the risk of failure will be reduced where there has been a criminal conviction or where "substantial investigations undertaken by the government indicate that a private party can prove guilt in a separate trial". Short of a guilty plea or a guilty verdict after trial, there will not be a substantial reduction in the contingency factor. However, in the course of a particular proceeding, evidence supporting the class may be generated, which would attenuate the risk. The absence of any governmental proceeding accentuates the complexity and novelty of the action, thereby increasing the risk of failure assumed by counsel: see Newberg, *supra*, note 83, Vol. 3, §6926b, at 1179, and §6926i, at 1180.

[140] *Merola v. Atlantic Richfield Co.*, 493 F.2d 292 (3d Cir. 1974), and *Merola v. Atlantic Richfield Co.*, 515 F.2d 165 (3d Cir. 1975).

[141] *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978); *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert.* denied 100 S. Ct. 2999 (1980); and *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980).

disbursements, we recommend that the judge should be empowered to make this determination at the conclusion of individual proceedings or at such other time and upon such terms and conditions as is considered proper.[397]

(iii) Assessment of Fees and Disbursements

a. Lawyers' Fees

We now turn to consider how lawyers' fees should be determined. When we discussed how attorneys' fees are calculated in the United States, we noted that the dominant method of assessment emphasizes the hours expended on behalf of the class by the lawyer.[398] The value of the lawyer's services is calculated and then is adjusted to reflect two factors, namely, the quality of work demonstrated in the conduct of the action, and the fact that payment is contingent on success. While this method, the so-called "*Lindy* approach", does oblige the court to follow certain prescribed steps, the calculation of attorneys' fees nonetheless involves the exercise of considerable discretion on the part of the court. In the United States, in an effort to promote consistency of approach, certain proposals to reform class action procedures have addressed the question of fee determination.[399]

The Commission, however, does not believe that it is necessary to give express instruction to the trial judge concerning how to determine the appropriate fee. We are confident that the courts will seek guidance in those cases that have delineated relevant criteria.[400]

Nevertheless, there is one aspect of fee assessment that must be addressed specifically in the proposed *Class Actions Act*. Under the kind of fee arrangement permitted by the Act, the class lawyer will receive a fee only in the event of success. If he agrees to act on this basis, the class lawyer will be assuming a risk that, after the expenditure of time and effort, no remuneration may be received. It is essential that the successful lawyer be compensated for accepting the risk of non-payment. Otherwise, lawyers very likely will refuse to act for classes on this basis and will insist on the usual solicitor and client cost arrangements, in which case potential representatives may be unable or unwilling to retain them. Alternatively, lawyers may decline to act even under the usual arrangements because they do not wish to take the chance that representative plaintiffs will be unable to pay them if the action fails. Therefore, we recommend that the *Class Actions Act* should provide that the class lawyer's fees should include an additional amount that is determined by the court to be fair and reasonable compensation to the lawyer for the risk incurred in undertaking the action on a basis of payment only in the event of success.[401]

---

[397] *Ibid.*, ss. 42(4) and 43.

[398] See discussion *supra*, this ch., sec. 3(a)(ii)a.

[399] See "Proposed Federal Consumer Class Action Legislation - II", (1975) 4 C.A.R. 342, §10; U.C.C.A., *supra*, note 185, §16; and O.I.A.J. Bill S. 3475, *supra*, note 198, §3027.

[400] See *Re Solicitors, supra*, note 29, where the relevant factors are listed.

[401] See Draft Bill, s. 42(4)(*a*). See, also, South Australia Draft Bill, *supra*, note 241, s. 3(8)(*b*).