2009 Hfx. No. 315567

SUPREME COURT OF NOVA SCOTIA

B E T W E E N:

ALBERT CARL SWEETLAND and BARBARA FONTAINE

Plaintiffs

- and -

GLAXOSMITHKLINE INC. and GLAXOSMITHKLINE LLC

Defendants

Proceeding under the *Class Proceedings Act*, S.N.S 2007, c. 28

PLAINTIFFS' BOOK OF AUTHORITIES RE:

MOTION FOR APPROVAL OF CLASS COUNSEL LEGAL FEES

HEARING DATE – JANUARY 29, 2019

Wagners
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1869 Upper Water Street
Halifax, NS B3J 1S9
Solicitors for the Plaintiffs
Filed: December 14, 2018

INDEX OF AUTHORITIES

Jurisprudence

1. *Baker Estate v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 (Ont. S.C.J.)
2. *Barwin v. IKO*, 2017 ONSC 3520
3. *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686
4. *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada*, [1998] O.J. No. 1891
5. *Elwin v. Nova Scotia Home for Colored Children*, 2014 NSSC 375
6. *Endean v. Canadian Red Cross*, [2000] B.C.J. No. 1254
7. *Farkas v. Sunnybrook & Women's College Health Sciences Centre* (2009), 82 C.P.C. (6th) 222, 2009 CarswellOnt 4962 (Sup. Ct.)
8. *Gagne v. Silcorp Ltd*. (1998), 167 D.L.R. (4th) 325 (Ont. C.A.)
9. *Helm v. Toronto Hydro-Electric System Ltd*., 2012 ONSC 2602
10. *Johnston v. Sheila Morrison Schools*, 2013 ONSC 1528
11. *Lang v. Bayer Inc*., (26 May 2016), London 60411 (ON. Sup. Ct.)
12. *Manuge v. R.*, 2013 FC 341
13. *Marchand v. Ford Motor Company*, 2018 ONSC 685
14. *Middlemiss v. Penn West Petroleum Ltd*., 2016 ONSC 3537
15. *O'Brien v. Bard Canada Inc*., 2016 ONSC 3076
16. *Parsons v. Canadian Red Cross*, [2000] O.J. No. 2374
17. *Quenneville v. Volkswagen*, 2017 ONSC 2448
18. *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911
19. *Rosen v. BMO Nesbitt Burns Inc*., 2016 ONSC 4752
20. *Shah v. LG Chem, Ltd*., 2018 ONSC 6101
21. *Sheridan Chevrolet v. Hitachi, Ltd*., 2017 ONSC 2803
22. *Smith Estate v. National Money Mart Co*., 2011 ONCA 233
23. *Sparvier v. Canada (Attorney General)*, 2006 SKQB 533(Sask. Q.B.), affirmed at 2007 SKCA 37 (Sask. C.A.)

INDEX OF AUTHORITIES

Secondary Sources

Legislation

Most Negative Treatment: Check subsequent history and related treatments.

2011 ONSC 7105
Ontario Superior Court of Justice

Baker Estate v. Sony BMG Music (Canada) Inc.

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The Estate of Chesney Henry "Chet" Baker et al., Plaintiffs/Moving Parties and Sony BMG Music (Canada) Inc. et al., Defendants/Respondents

G.R. Strathy J.

Heard: November 22, 2011
Judgment: November 30, 2011
Docket: CV-080036065100 CP

Proceedings: additional reasons at *Baker (Estate) v. Sony BMG Music (Canada) Inc.* (2011), 2011 CarswellOnt 1809, 2011 ONSC 1805 (Ont. S.C.J.)

Counsel: Paul Bates, Jonathan Foreman, for Plaintiffs / Moving Parties
Danielle Royal, for Defendant / Respondent, Universal Music Canada Inc.
Timothy Pinos, Casey M. Chisick, for Defendants / Respondents, CMRRA, SODRAC

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.iv Court approval of agreement for payment of fees and disbursements

Headnote

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Court approval of agreement for payment of fees and disbursements
Class action was brought by plaintiff estate on behalf of musicians who had not received royalty payments for their work by defendant music companies — Action was settled in 2011 for over $46 million, plus $600,000 for costs of class — Class counsel sought approval of fees and disbursements in approximate amount of $7.6 million — Several plaintiffs opposed fee request, stating that fees were excessive and would take away from return to songwriters and others — Estate moved for approval of fees — Motion granted — Counsel's fees met legal requirements and were actually voluntarily reduced by counsel upon settlement — Fee was reasonable as compared to other class actions and contingency-fee litigation as seen in personal injury field — Class counsel worked for smaller firms and were dealing with large, well-funded corporate defendants — Result achieved was excellent and this factor was more important than time spent in class litigation than in other actions — Considerable time was spent by experienced counsel and time was used efficiently — Matter was relatively complex, particularly in settlement with multiple defendants — Risk assumed by counsel was considerable and they were not paid for time during four-year litigation process — Had class members known what result would be before commencing litigation, it was clear that most of them would have been happy with settlement — Payment of honorarium to representatives was not approved — Although representatives acted commendably and did all that was expected of them, their engagement in litigation was not beyond call of duty.

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Ainslie v. Afexa Life Sciences Inc. (2010), 2010 ONSC 4294, 2010 CarswellOnt 5672 (Ont. S.C.J.) — considered

Andersen v. St. Jude Medical Inc. (2004), 28 C.P.C. (6th) 199, 2004 CarswellOnt 8144 (Ont. S.C.J.) — considered

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Cassano v. Toronto Dominion Bank (2009), 2009 CarswellOnt 4052, 79 C.P.C. (6th) 110, 98 O.R. (3d) 543 (Ont. S.C.J.) — referred to

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Garland v. Enbridge Gas Distribution Inc. (2006), 56 C.P.C. (6th) 357, 2006 CarswellOnt 9605 (Ont. S.C.J.) — considered

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Osmun v. Cadbury Adams Canada Inc. (2010), 97 C.P.C. (6th) 169, 2010 ONSC 2752, 2010 CarswellOnt 3350 (Ont. S.C.J.) — referred to

Parsons v. Canadian Red Cross Society (2000), 49 O.R. (3d) 281, 46 C.P.C. (4th) 236, 2000 CarswellOnt 2174 (Ont. S.C.J.) — referred to

Pichette v. Toronto Hydro (2010), 98 C.P.C. (6th) 96, 2010 ONSC 4060, 2010 CarswellOnt 5399 (Ont. S.C.J.) — referred to

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Robertson v. Thomson Canada Ltd. (2009), 2009 CarswellOnt 3660, 80 C.P.C. (6th) 77 (Ont. S.C.J.) — referred to

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Div.) — considered

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

s. 5 — considered

s. 32(2) — considered

s. 33 — considered

Copyright Act, R.S.C. 1985, c. C-42
Generally — referred to

MOTION by class counsel for approval of fees in settled class action, being additional reasons to *Baker Estate v. Sony BMG Music (Canada) Inc.* (2011), 2011 CarswellOnt 1809, 2011 ONSC 1805 (Ont. S.C.J.).

***G.R. Strathy J.*:**

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 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 cach 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.

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 carnest 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 scries 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.

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 expeditions,

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.

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.

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 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.

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 (Ont. 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.

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;

(c) 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.

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 (Ont. 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 (Ont. S.C.J.): 30%
- *Ainslie v. Afexa Life Sciences Inc.*, [2010] O.J. No. 3302 (Ont. S.C.J.): 19.4%
- *Robertson v. ProQuest Information & Learning Co.*, [2011] O.J. No. 2013 (Ont. S.C.J.) 24%
- *Osmun v. Cadbury Adams Canada Inc.*, [2010] O.J. No. 2093 (Ont. S.C.J.): 25%
- *Pichette v. Toronto Hydro*, [2010] O.J. No. 3185 (Ont. S.C.J.): 28.5%
- *Robertson v. Thomson Canada Ltd.*, [2009] O.J. No. 2650 (Ont. S.C.J.): 36%
- *Cassano v. Toronto Dominion Bank* (2009), 98 O.R. (3d) 543 (Ont. S.C.J.): 20%
- *Martin v. Barrett*, [2009] O.J. No. 3947 (Ont. S.C.J.) 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 (Ont. C.A.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (Ont. S.C.J.); *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (Ont. 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 *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (Ont. S.C.J.) 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 (B.C. S.C.); *Wamboldt v. Northstar Aerospace (Canada) Inc.*, [2009] O.J. No. 2583 (Ont. S.C.J.) at para. 33; *Smith Estate v. National Money Mart Co.*, [2011] O.J. No. 1321, 2011 ONCA 233 (Ont. C.A.).

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 (Ont. S.C.J.), 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 oncrous 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.

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.

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 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 (Ont. S.C.J.) at para. 20; *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Ont. Gen. Div.); *Tesluk v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 (Ont. S.C.J.); *Bellaire v. Daya*, [2007] O.J. No. 4819 (Ont. 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.* (Ont. S.C.J.) at para. 12. That said, 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 (Ont. 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 (Ont. C.A.), 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 (Ont. 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

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

Motion granted.

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2017 ONSC 3520
Ontario Superior Court of Justice

Barwin v. IKO

2017 CarswellOnt 9580, 2017 ONSC 3520, 280 A.C.W.S. (3d) 498, 4 C.P.C. (8th) 305, 65 C.L.R. (4th) 137

KEVIN BARWIN (Plaintiff) and IKO INDUSTRIES LTD, CANROOF CORPORATION INC. AND I.G. MACHINE & FIBERS LTD. (Defendants)

Baltman J.

Heard: May 9, 2017
Judgment: June 8, 2017
Docket: CV-09-00005758-CP

Counsel: Linda Visser, for Plaintiff
S. Gordon McKee, Jill Lawrie, for Defendants

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.iv Court approval of agreement for payment of fees and disbursements

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.f Miscellaneous

Civil practice and procedure
XVI Disposition without trial
XVI.7 Settlement
XVI.7.a General principles

Headnote

Civil practice and procedure --- Disposition without trial — Settlement — General principles
Nationally certified class action alleged that defendants manufactured and sold organic roofing shingles that were defective and prone to premature failing — Related class proceedings had been commenced in Quebec and Alberta, and litigation was being pursued on national basis in Ontario — Defendants agreed to pay all-inclusive sum of $7.5 million to settle action, and they would provide information collected through their warranty process to claims administrator to help with administration of settlement claims — Plaintiff brought motion to approve settlement — Motion granted — Affidavit evidence and history of case demonstrated that, absent court approved settlement, action involved substantial risks — Class action related to 32 brands of shingles sold over 31 year period and manufactured in six different facilities, design changed over time, and extensive testing and other investigation would be required to extrapolate results to all shingles — There would be prejudice arising from protected litigation, and courts had recognized that practical value of expedited recovery was important factor to consider — Response from class had been positive, with only very small percentage of objections, and objections lacked

recognition that settlement was compromise and they did not provide reason to refuse proposed settlement — Class counsel provided opinion that proposed settlement was fair, reasonable and in best interests of class members — Class counsel had pursued case with care and diligence — Settlement was fair, reasonable, was in best interests of class as whole, and was approved.

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Court approval of agreement for payment of fees and disbursements
Nationally certified class action alleged that defendants manufactured and sold organic roofing shingles that were defective and prone to premature failing — Related class proceedings had been commenced in Quebec and Alberta, and litigation was being pursued on national basis in Ontario — Defendants agreed to pay all-inclusive sum of $7.5 million to settle action, and they would provide information collected through their warranty process to claims administrator to help with administration of settlement claims — Plaintiff brought motion to approve settlement — Motion granted — Class counsel sought legal fees of $1,876,077.80 — Class action had been actively litigated and vigorously defended — Proposed fees were consistent with retainer agreement that provided for payment of 25 percent of recovery, and were below time actually docketed — Fees were consistent with amounts awarded by courts in other class actions — Fees should be approved but there should be holdback of $75,000 to be paid out after residual distribution of funds had been approved by court.

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Miscellaneous
Nationally certified class action alleged that defendants manufactured and sold organic roofing shingles that were defective and prone to premature failing — Related class proceedings had been commenced in Quebec and Alberta, and litigation was being pursued on national basis in Ontario — Defendants agreed to pay all-inclusive sum of $7.5 million to settle action, and they would provide information collected through their warranty process to claims administrator to help with administration of settlement claims — Plaintiff brought motion to approve settlement — Motion granted — Honorarium of $5,000 should be paid to representative plaintiff — Uncontested evidence was that representative plaintiff invested significant time and energy attending hearings and meetings and in being cross-examined on his affidavit.

Table of Authorities

Cases considered by *Baltman J.*:

Baxter v. Canada (Attorney General) (2006), 2006 CarswellOnt 7879, 83 O.R. (3d) 481, 40 C.P.C. (6th) 129 (Ont. S.C.J.) — referred to

CSL Equity Investments Ltd. v. Valois (2007), 2007 CarswellOnt 6571, 64 C.C.P.B. 90 (Ont. S.C.J.) — referred to

Dabbs v. Sun Life Assurance Co. of Canada (1998), 1998 CarswellOnt 5823 (Ont. Gen. Div.) — referred to

Dabbs v. Sun Life Assurance Co. of Canada (1998), 1998 CarswellOnt 3539, 165 D.L.R. (4th) 482, 113 O.A.C. 307, [1999] I.L.R. I-3629, 41 O.R. (3d) 97, 7 C.C.L.I. (3d) 38, 27 C.P.C. (4th) 243, 67 O.T.C. 80 (Ont. C.A.) — referred to

Ford v. F. Hoffmann-La Roche Ltd. (2005), 2005 CarswellOnt 1095, 74 O.R. (3d) 758, 12 C.P.C. (6th) 252 (Ont. S.C.J.) — referred to

Frohlinger v. Nortel Networks Corp. (2007), 2007 CarswellOnt 240, 2007 C.E.B. & P.G.R. 8233 (headnote only), 40 C.P.C. (6th) 62 (Ont. S.C.J.) — referred to

Helm v. Toronto Hydro-Electric System Ltd. (2012), 2012 ONSC 2602, 2012 CarswellOnt 5761, 40 C.P.C. (7th) 310 (Ont. S.C.J.) — considered

Kranjcec v. Ontario (2006), 2006 CarswellOnt 5535, 2006 C.E.B. & P.G.R. 8221 (headnote only), 33 C.P.C. (6th) 290, 57 C.C.P.B. 306 (Ont. S.C.J.) — referred to

Osmun v. Cadbury Adams Canada Inc. (2010), 2010 ONSC 2643, 2010 CarswellOnt 2813, 5 C.P.C. (7th) 341 (Ont.

S.C.J.) — referred to

Parsons v. Canadian Red Cross Society (1999), 1999 CarswellOnt 2932, 40 C.P.C. (4th) 151, 103 O.T.C. 161 (Ont. S.C.J.) — referred to

Wilson v. Servier Canada Inc. (2005), 2005 CarswellOnt 1020, 9 C.P.C. (6th) 83, 252 D.L.R. (4th) 742 (Ont. S.C.J.) — referred to

Winnipeg Condominium Corp. No. 36 v. Bird Construction Co. (1995), 18 C.L.R. (2d) 1, [1995] 1 S.C.R. 85, 23 C.C.L.T. (2d) 1, 43 R.P.R. (2d) 1, [1995] 3 W.W.R. 85, 100 Man. R. (2d) 241, 91 W.A.C. 241, 121 D.L.R. (4th) 193, 1995 CarswellMan 19, 176 N.R. 321, 1995 CarswellMan 249, 74 B.L.R. 1, 50 Con. L.R. 124 (S.C.C.) — considered

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
s. 29 — considered

MOTION by plaintiff to approve settlement of nationally certified class action.

***Baltman J.*:**

Introduction

1 This nationally certified class action alleges that the Defendants manufactured and sold organic roofing shingles that are defective and prone to premature failing. For a subclass of residents in five provinces, this action also advances claims based on the respective provincial consumer protection acts.

2 Related class proceedings have been commenced in Quebec and Alberta. The litigation is being pursued on a national basis in Ontario.

3 Parallel class actions are underway in the United States. The litigation there is proceeding slowly and has involved numerous motions and appeals. The outcome there remains uncertain.

4 The Canadian action was commenced in December 2009 and certified by me in June 2012, following a vigorously contested motion. Leave to appeal the certification decision was denied in June 2013. After prolonged discoveries and negotiations the parties reached a settlement in principle on May 28, 2016. Over subsequent months they negotiated the specific terms of the settlement, and executed an agreement on January 13, 2017.

5 The Defendants have agreed to pay an all-inclusive sum of $7.5 million to settle this action. They will also provide information collected through their warranty process to the Claims Administrator to help with the administration of settlement claims. The Plaintiff seeks approval of the proposed settlement and class counsel seek approval of their fees, disbursements and taxes.

6 I conducted the approval hearing on May 9th, 2017. The motion was supported by the Defendants and by Mr. Barwin, the representative plaintiff. Two representatives from RicePoint Administration Inc., the proposed administrator, also attended. Ten individuals raised objections, of whom five attended the hearing. The details of their objections are set out below.

7 After reviewing the evidence and hearing the submissions of counsel, I reserved my decision on both the settlement and fees. For the reasons that follow, I have now approved the proposed settlement and fee plan.

8 At various points in these reasons some of the submissions made by Class Counsel in their factum have been adopted and repeated, in whole or in part.

Factual Background

9 It is estimated that up to 5 million homes in Canada are covered with IKO's organic shingles. IKO stopped selling organic asphalt shingles in 2008 and there are no companies in the industry still making organic asphalt shingles; fibreglass shingles are now the preferred technology, believed to result in longer lasting and better performing shingles.

10 The plaintiff in this action alleged that the defendants provided negligently designed and manufactured shingles that, under normal conditions, fail prematurely. He claimed that he had to replace IKO shingles in order to avoid water penetration into the interior of his home. He asserted a claim under the warranty but was dissatisfied by IKO's refusal to cover the costs of labour.

11 Over the 30 years that IKO has been supplying shingles it has provided a warranty for manufacturing defects resulting in leaks. Approximately 1% of homeowners with IKO shingles - i.e. 50,000 people - have made a claim pursuant to the warranty. The warranty has two stages: an initial "iron clad" period (from 1-5 years, depending on the shingle and year of manufacture) during which IKO will pay for both the replacement shingles and the costs of labour to repair or replace them; thereafter, IKO will pay a pro-rated amount of the current value of the singles, with no contribution toward labour costs[1]. Under both scenarios, IKO only pays in respect of the shingles that are currently failing. If the homeowner acts proactively in replacing the entire roof, s/he bears the additional costs.

12 In order to obtain warranty benefits, a claimant must first release IKO from any and all claims. From 2006 onward the release expressly states that it is made without any admission of liability.

13 IKO administers a claims process for homeowners who have complaints about IKO shingles. When contacted by a claimant, IKO asks for proof of purchase to ensure the shingles complained of are actually IKO shingles. The homeowner is also asked to provide some limited information about the condition of his or her shingles. Although the warranty is expressly limited to defects that result in water leaks, the majority of claims do not involve a leaking roof, and a number relate to issues that are expressly excluded in the warranties (such as variations in colour).

14 The undisputed evidence is that IKO will accept coverage under the limited warranty if the warranty claim discloses a valid problem with the shingles and there is no obvious non-manufacturing cause for shingle failure. In many cases where homeowners have not established that there was a manufacturing defect resulting in a leak, IKO offers these homeowners various forms and amounts of compensation in full and final settlement of their claims relating to the shingles at issue. Compensation can include replacement shingles, cash settlements, cash to pay for the labour to replace the shingles, as well as unique offers based on individual facts.

15 In my ruling dated July 9, 2010, I stipulated that any release provided to a homeowner must notify him/her of the pending class action — for both materials and labour — and that if s/he accepts the compensation offered, s/he may give up the right to participate in the lawsuit. The homeowner was further invited to seek legal advice and given the toll free number for plaintiff's counsel.

The Settlement Terms

16 Based on sales and warranty information, plaintiff's counsel estimate that there will be 8,000-9,000 claims. The settlement provides for a settlement fund, net of legal fees and expenses, of approximately 4.72 million dollars, to be distributed through two rounds of payments and a possible third payment, as follows:

(a) An initial round of payments shortly after the settlement becomes effective;

(b) A final payment after the completion of the claims period (December 31, 2023); and

(c) To the extent that monies remain after the final payment, a "residual" payment will be made.

17 The initial payment fund and final payment fund will be distributed proportionally based on the claim value of the individual Class Member's claim as against the claim value of all approved claims. The exact amount to be paid to any individual Class member will depend on the number of claims filed and the value of the claims, and will therefore not be known until the end of the claims process.

18 The "claim value" will be based on the number of points assigned to the claim, subject to the maximum amounts for "released" claims and Interior Damage claims. Generally speaking, the number of points reflects whether the Class Member received warranty benefits and/or experienced qualifying damage. Qualifying damage includes water leakage, cracked shingles, or granular loss.

19 The dollar value of each point will be calculated by dividing the available funds by the number of points. If the dollar value per point in the final payment exceeds the dollar value of each point in the initial payment fund, the excess will be allocated to a residual payment fund for distribution to all eligible Class Members. The chart appended as Addendum #1 sets out the point allocation.

20 In sum, the exact amount payable to individual class members will depend on the number, nature and size of the claims filed. Importantly, many of the class members will have had use of their shingles for a number of years. Moreover, the premise underlying the settlement is that warranty benefits and settlement benefits supplement each other. As 70 per cent of the anticipated claims are by individuals who have already received compensation under the warranty plan, the majority of the payments will likely be relatively modest, i.e. in the range of several hundred dollars.

Eligibility Requirements

21 Broadly speaking, the settlement is designed to capture Class Members with stronger legal claims and larger uncompensated losses. Of particular importance are the following requirements:

(a) The claimant received an IKO Offer/Release or a Canadian court found s/he was entitled to warranty benefits. The requirement for an approved warranty claim serves to filter out claims that are not meritorious or adequately documented[23].

(b) The person falls within any of the following scenarios:

i. The person received an IKO Offer/Release before May 28/2016 (when a settlement in principle was achieved), did not receive warranty benefits and does not have qualifying damage;

ii. The person received an IKO Offer/Release before May 28, 2016, may or may not have received warranty benefits, but has qualifying damage;

iii. The person received an IKO Offer/Release on or after May 28, 2016 and has qualifying damage.

Claims Process

22 Class members can file claims in English or French. They will be encouraged to do so online but hardcopy claim forms will be available. It is expected that the vast majority of claims can be processed through a relatively brief and straightforward claim form.

23 As part of the settlement claims process, IKO must provide information about any warranty payments made and what they were based upon.

Law relating to Approval of a Settlement

24 Under s. 29 of the *CPA* the court must approve a class action settlement. 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, taking into account the claims and defences in the litigation and any objections to the settlement: *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643 (Ont. S.C.J.), at paras. 31-34; *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. Gen. Div.) (at para. 9, aff'd (1998), 41 O.R. (3d) 97 (Ont. C.A.); *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (Ont. S.C.J.) at para. 10.

25 A settlement does not have to be perfect or treat everybody equally. Nor is it necessary for the settlement to meet the demands of each class member. It need only fall within a zone of reasonableness: *Parsons v. Canadian Red Cross Society* [1999 CarswellOnt 2932 (Ont. S.C.J.)], para. 70; *Dabbs*, para. 11; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (Ont. S.C.J.) at para. 8.

26 The parties proposing the settlement bear the onus of satisfying the court that it ought to be approved. In determining whether to approve a settlement, the court may take into account factors such as:

a) the likelihood of recovery or success;

b) the amount and nature of discovery, evidence or investigation;

c) the proposed settlement terms and conditions;

d) the future expense and likely duration of litigation;

e) the recommendation of neutral parties, if any;

f) the number of objectors and nature of objections;

g) the presence of good faith, arms length bargaining and the absence of collusion;

h) the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation;

i) the recommendation and experience of counsel.

27 The factors listed above are "guidelines rather than rigid criteria." In any particular case, some criteria may not be satisfied or some may be given more weight than others: see *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (Ont. S.C.J.) [hereinafter Vitapharm] at para. 117; *Frohlinger*, para. 8; *Parsons*, para. 73.

28 There is a strong initial presumption of fairness when a settlement is negotiated arms-length. Moreover, the court may give considerable weight to the recommendations of experienced counsel who have been involved in the litigation and are in a better position than the court or the class members to weigh the factors that bear on the reasonableness of a particular settlement: *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (Ont. S.C.J.), paras., 113-114 and 142; *CSL Equity Investments Ltd. v. Valois*, [2007] O.J. No. 3932 (Ont. S.C.J.) at para. 5; *Kranjcec v. Ontario*, [2006] O.J. No. 3671 (Ont. S.C.J.) at para. 11.

29 Before approving a settlement, the court must be assured that the class members will receive the promised benefits in a timely and efficient manner; moreover, the administrators of the settlement will be subject to the court's supervision and must be autonomous, independent, and neutral: *Baxter*, paras. 31-39.

30 Importantly, the court cannot modify the terms of a proposed settlement. The court can only approve or reject the settlement. Therefore, before deciding to reject a settlement, the court should consider whether doing so will derail the negotiations to the point that no settlement can be achieved. This would undermine the public interest of resolving difficult and protracted litigation in order to avoid the expense and uncertainty of a trial: *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643 (Ont. S.C.J.), para. 34.

31 I will examine below what I regard as the most important factors supporting approval of the settlement in this case.

a. Likelihood of Recovery or Success

32 Both the affidavit evidence and the history of this case to date demonstrate that absent a court approved settlement, the action involved substantial risks. These included:

• Whether a duty of care exists: the Defendants pleaded that any alleged failure or defect in IKO shingles did not create a real and substantial danger to persons or property (as stipulated in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85 (S.C.C.), paras. 35-43). Although I previously held that the cause of action requirement was met for certification purposes, the Defendants would likely raise this issue again at trial;

• Whether the standard of care was breached, i.e. were IKO's shingles defective? IKO's evidence in this action and the parallel U.S. litigation indicated that IKO's product specifications exceeded industry standards and that IKO produced in accordance with its product specifications. Moreover, IKO's historical warranty claims rate was approximately 1%. Defendants would likely rely on the low warranty claims rate to argue there was no systemic defect or failure;

• There are causation defences: the Defendants assert there are many factors that affect the ability of roofing shingles to shed water, including installation, ventilation, quality of roof decking and weather conditions. The need for individual class members to establish causation after the common issues trial may impede their recovery, particularly as some members will not have sufficient documentation to establish causation;

• Limits on the Damage award: Labour is the most significant expenditure not covered by the warranty and can vary significantly based on the size of the building, the number of slopes, and the pitch of the roof. Moreover, any amount claimed would have to be reduced to account for the number of years the Class Member had use of the shingles and the litigation risks. Finally, class members might only be able to recover for those portions of the roof that appeared defective;

• Whether class members released their claims through the warranty process: Approximately 70% of warranty claimants signed the IKO Offer/Release. They would have to prove either that the scope of the release does not cover the claims at issue in the class action or that the release should be void on the basis of unconscionability or some other grounds. Class members may not have evidence available to establish this;

• The relevance of the warranty period: One of the issues at trial would be whether the duration of the warranty is a representation that the shingles would provide protection for that specific period of time. IKO takes the position that it does not, and provided an expert opinion to that effect. The Canadian case law on this issue is very limited.

b. Amount and Nature of Discovery, Evidence or Investigation

33 The Defendants produced approximately 127,000 documents. A costly and time consuming review would be necessary in order to properly prepare for trial. Moreover, the early class period occurred before email was commonly used in offices; therefore, some relevant information would not be captured by the documents.

34 The class action relates to 32 brands of shingles sold over a 31-year period and manufactured in 6 different facilities. The design varied over time. Extensive testing and other investigation would be required to extrapolate the results to all IKO shingles. Even if the testing established the existence of defective shingles, it may reveal that only some brands were defective, or that the impugned shingles were defective for certain production years.

c. Proposed Settlement Terms and Conditions

35 The specific terms of the settlement are set out above and in the chart appended to these reasons. There will be no cy-près fund; any monies remaining after the final payment has been made will be distributed to the class members from the

residual fund.

36 As noted above, the eligibility criteria are designed to capture those class members with the greater uncompensated losses and stronger legal claims. In my view, the criteria are reasonable and properly take into account the litigation risk.

d. Future Expense and Likely Duration of Litigation

37 One important factor driving this settlement is the prejudice arising from protracted litigation. Seven years have passed since the litigation was commenced. It will likely take several more years to complete the discovery process, the common issues trial (and any appeals), and then determine the individual issues.

38 Courts have recognized that the practical value of an expedited recovery is an important factor for consideration. Aside from the legal and evidentiary risks, a settlement avoids the prospect of a case such as this one being litigated over many more years, including any potential appeals.

e. Degree and Nature of Communications with Class Members

39 Notice of this hearing was mailed or emailed to 38,200 addresses. In addition, Class Counsel also posted the Settlement Agreement on the website, so that Class members were able to review the draft Judgment and Distribution Plan, if they so desired.

40 The response has generally been positive. There were ten objections, which I describe more fully below. Finally, the representative Plaintiff and the plaintiffs in the parallel Alberta and Quebec actions support the Settlement Agreement.

f. Recommendation of Experienced Counsel

41 Class Counsel have opined that the proposed settlement is fair, reasonable and in the best interests of the Class Members. The Class Counsel serving this file have extensive experience in class action litigation. They have explained to the court their rationale and I am satisfied that they have exercised sound judgment in analyzing this case. Their recommendation therefore deserves substantial regard when assessing the proposed settlement.

g. Administration of the Settlement Fund

42 An independent third party Claims Administrator will be appointed to adjudicate settlement of the claims. The proposed Administrator is RicePoint Administration Inc. RicePoint has acted as claims administrator in many class actions and is able to provide services in English and French. The estimated total cost is between $110,000 and $130,000, plus disbursements. On that basis I am satisfied that the proposed system of administration is fair and efficient.

h. Number of Objectors and Nature of Objections

43 As noted above, the class includes approximately 5 million homeowners. Only ten objectors have emerged, five of whom attended the approval hearing. One of the objectors, Dianne Gould, was represented by counsel, Mr. Howard Winkler, who asserted that although he was attending on behalf of Ms. Gould his submissions relate to “all class members”.

44 Having regard to the number of persons who received the Notice of Hearing (approximately 38,000), the percentage of objections is very small. However, I have considered each of the objections, including any written submissions and the oral arguments made during the approval hearing.

45 The vast majority of the objections are from individuals whose actual or anticipated repair costs significantly exceed the amount they are likely to recover under this settlement. They cite, for example, that it will cost them over $10,000 to

replace their entire roof; even after allowing for the fact that in most cases they have had use of the roof for many years, they believe they should receive at least half of the replacement cost from the settlement.

46 Common to all these objections is the lack of recognition that a settlement is essentially a compromise. If the compromise here seems high that is because this particular case carries significant risks for the plaintiff. As I outlined above, there are real obstacles here in virtually every aspect of the litigation — liability, causation and damages. The defendant is a large, well-funded entity who is vigorously defending both the Canadian and U.S. litigation. Keeping in mind that the court has no power to amend the settlement terms, a refusal to approve settlement will mean that the litigation will continue. If a further agreement cannot be achieved, proceeding to a trial will entail several more years of litigation and huge expense, all for a very uncertain outcome. In sum, the plaintiff will be navigating a big ship through a narrow canal.

47 Mr. Winkler argued that this lawsuit was a "misadventure" wherein plaintiff's counsel "bit off more than they now wish to chew". He asserted that plaintiff's counsel seek to end the litigation at the point where their proposed fees roughly equal the time they have docketed. He criticized their failure to pursue mediation, even suggesting that should have asked me to "order" mediation. Finally, he alleged they had conducted inadequate discovery and failed to provide any economic rationale for the individual settlements, many of which will be well below $1,000.

48 I see no merit in these submissions. The parties negotiated over many years before reaching an agreement. The negotiations were at arm's length and adversarial, and conducted by seasoned and capable advocates on both sides. Presumably counsel concluded, with good reason, that a formal mediation was not needed. Ordering them to attend mediation in those circumstances is a waste of time and money.

49 Moreover, the record demonstrates that plaintiff's counsel have pursued this case with care and diligence, and sincerely believe that this settlement is in the best interests of the class. To the extent the fees they have incurred and will continue to incur have factored into the settlement, courts have repeatedly stated that the costs of litigation, while not a determining factor, are a proper consideration in assessing a settlement.

50 The allegation of inadequate discovery is also unfounded. Plaintiff's counsel gathered and reviewed over 127,000 documents produced by IKO, arranged for an expert to test unused shingles that counsel collected from class members, and retained a company to conduct on-site inspections of approximately 80 properties with IKO shingles.

51 As for the economics underlying the modest individual settlements, a large majority of the claimants have had the use of the impugned shingles for many years; Mr. Winkler's client (Dianne Gould) first noticed a problem with her shingles 15 years after installation. Moreover, many claimants have already received — or are eligible for - benefits under the warranty program. Any recovery in this action will supplement that.

52 For the reasons I have set out above, I find the settlement is in the best interests of the class as a whole, and conclude that none of the objections provide a reason to refuse the proposed settlement.

Fee Approval

53 Class counsel seek legal fees of $1,876,077.80, plus disbursements of $336,289.20 and applicable taxes.

54 As a general rule, Class Counsel's fees are to be fixed and approved on the basis of whether they are "fair and reasonable" in all of the circumstances. That assessment typically includes the following factors:

- the factual and legal complexities of the matters dealt with;
- the risks undertaken, including the risk that the matter might not be certified;
- the degree of responsibility assumed and the skill and competence demonstrated by class counsel;
- the monetary value of the matters in issue;

- the results achieved;
- the importance of the matter to the class members and to the public;
- the ability of the class to pay;
- the expectations of the class as to the amount of the fees; and
- the opportunity costs to class counsel in the expenditure of time in pursuit of the litigation and settlement.

55 See *Vitapharm*, para. 67; *Parsons*, paras. 16-17; *Wilson v. Servier Canada Inc.*, [2005] O.J. No. 1039 (Ont. S.C.J.) at para. 74.

56 This action was begun in December 2009. Since that time, the case has been actively litigated and vigorously defended. The parties have appeared in court on approximately 20 occasions for various case conferences and motions, including a contested certification motion, leave to appeal certification, and a motion relating to the effectiveness of the IKO Offer/Release. In addition, pursuant to a discovery protocol plan, the parties' experts attended to photograph and examine the shingles.

57 Beyond the litigation steps set out above, Class Counsel invested considerable time investigating the claims in issue (see paragraph 50 above), and in responding to class member inquiries, which to date number "tens of thousands"; since May 2012 the law firm has had a law clerk whose primary responsibility was to respond to class member inquiries.

58 The litigation also involved both legal and factual risks, including whether a valid cause of action exists in negligence; whether a widespread or systematic defect can be established; whether individual class members can establish causation; and whether class members who signed the IKO Offer/Release released their claims under the class action. Moreover, success on a class wide basis was important because given the amounts in issue, it would not have been economical for the persons affected to pursue individual actions.

59 The plaintiffs entered into a retainer agreement that contemplated the payment of 25 per cent of the recovery, plus applicable taxes and disbursements. The proposed fees of $1,876,077.80 are consistent with that amount, and are below the time counsel actually docketed ($2,014,256.50). The fees are also consistent with amounts awarded by courts in other class actions: a fee of 25 per cent is "a reasonably standard fee agreement in class proceedings litigation": *Helm v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602 (Ont. S.C.J.), para. 22.

60 As the proposed fees accord with that level, are supported by the representative plaintiff, and fairly reflect the factors listed above, I conclude that the fee should be approved, with one caveat: there shall be a holdback of $75,000, to be paid out after any residual distribution of the funds has been approved by the court.

61 Finally, I agree with counsel that an honorarium of $5,000 should be paid to Mr. Barwin, the representative plaintiff. The uncontested evidence is that he invested significant time and energy attending meetings and hearings, and in being cross-examined on his affidavit.

Conclusion

62 For the reasons set out above, I approve the proposed settlement and fees, and have issued a judgment reflecting those terms.

Addendum #1

Categorization of Class Members	***Point Value***	***Explanatory Notes***
Category 1 Class Members who received an IKO Offer/Release dated before May 28, 2016, did *not* receive warranty benefits, and do not have Qualifying Damage.	15 points per Approved Bundle	Claims are discounted to reflect that the Class Member did not experience Qualifying Damage.

Category 2 Class Members who received an IKO Offer/Release dated before May 28, 2016, did *not* receive warranty benefits, and have Qualifying Damage.	40 points per Approved Bundle	
Category 3 Class Members who received an IKO Offer/Release dated before May 28, 2016, received warranty benefits and have Qualifying Damage.	2.5 points per Approved Bundle, to a maximum of $100 per Eligible Settlement Claimant, to an aggregate maximum of $250,000	Claims are discounted to reflect the additional litigation risks associated with these claims.
Category 4 Class Members who received an IKO Offer/Release dated on or after May 28, 2016 and have Qualifying Damage.	25 points per Approved Bundle	The lower claim value relative to category 2 reflects that category 4 Class Members can receive warranty benefits in addition to their Settlement Benefits.
Interior Damage Available for Category 2 and 4 only	Any additional Claim Value will be determined by assigning one-half (1/2) point for every $1.00 in repair or replacement costs in connection with Interior Damage to a maximum of $500 per Eligible Settlement Claimant, and an aggregate maximum of $50,000 from each of the initial payment fund and final payment fund.	

Motion granted.

Footnotes

1 Until 1997, IKO also provided prorated labour.

2 The uncontroverted evidence is that approximately 80% of warranty claims are approved by IKO.

3 In limited circumstances, a person can apply for settlement benefits even if her/his warranty claim was denied; in that case, the person must satisfy the Claims Administrator that the denial was improper and the other eligibility criteria have been met.

End of Document

2013 ONSC 7686, 2013 CarswellOnt 17784, [2013] O.J. No. 5825, 236 A.C.W.S. (3d) 24

Most Negative Treatment: Check subsequent history and related treatments.

2013 ONSC 7686
Ontario Superior Court of Justice

Cannon v. Funds for Canada Foundation

2013 CarswellOnt 17784, 2013 ONSC 7686, [2013] O.J. No. 5825, 236 A.C.W.S. (3d) 24

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

Edward Belobaba J.

Heard: October 18, 2013
Judgment: December 19, 2013
Docket: CV-08-362807-CP

Counsel: Margaret Waddell, Samuel Marr, Andrew Lewis, for Plaintiff

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.iv Court approval of agreement for payment of fees and disbursements

Headnote

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Court approval of agreement for payment of fees and disbursements
Class action settlement was approved and class members received $28.2 million — Court previously approved 25 per cent of settlement for class counsel based on precedent, but invited supplementary submissions — Application by class counsel to vary order to allow full one-third contingency fee, which amounted to $9.4 million — Application allowed — Docketed time was irrelevant and only encouraged docket-padding and over-lawyering — There were obviously enormous risks taken by counsel in class actions, but risks could not be measured by court post hoc and in hindsight — This was all-cash settlement and contingency fee was fully understood and accepted by representative plaintiff, so was presumptively valid and enforceable — Representative plaintiff strongly supported awarded one-third contingency fee and no class members objected — One-third contingency fee was in line with percentages charged in personal injury area and was not unseemly.

Table of Authorities

Cases considered by *Edward Belobaba J.*:

Baker Estate v. Sony BMG Music (Canada) Inc. (2011), 2011 ONSC 7105, 98 C.P.R. (4th) 244, 2011 CarswellOnt 15453, 31 C.P.C. (7th) 320 (Ont. S.C.J.) — considered

Ford v. F. Hoffmann-La Roche Ltd. (2005), 12 C.P.C. (6th) 226, 2005 CarswellOnt 1094, [2005] O.T.C. 208 (Ont. S.C.J.) — referred to

Ironworkers Ontario Pension Fund (Trustee of) v. Manulife Financial Corp. (2013), 2013 CarswellOnt 15419, 2013 ONSC 6354 (Ont. S.C.J.) — considered

Rosen v. BMO Nesbitt Burns Inc. (2013), 2013 CarswellOnt 15428, 2013 ONSC 6356 (Ont. S.C.J.) — considered

APPLICATION by plaintiffs' counsel in class action suit to vary order to allow full one-third contingency fee.

***Edward Belobaba J.*:**

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? 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 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.

- 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.

Application granted.

Footnotes

[1] To borrow the language of Cumming J. in *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 12 C.P.C. (6th) 226, [2005] O.J. No. 1117 (Ont. S.C.J.) at para. 107.

[2] As Strathy J. noted in *Baker Estate v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105, 98 C.P.R. (4th) 244 (Ont. S.C.J.), 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.

[4] See the discussion in the opening pages of my costs awards in *Ironworkers Ontario Pension Fund (Trustee of) v. Manulife Financial Corp.*, 2013 ONSC 6354 (Ont. S.C.J.) or *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 6356 (Ont. S.C.J.). 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.)

1998 CarswellOnt 1896
Ontario Court of Justice, General Division

Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada

1998 CarswellOnt 1896, [1998] O.J. No. 1891, 160 D.L.R. (4th) 186, 21 C.P.C. (4th) 272, 40 O.R. (3d) 83, 62 O.T.C. 71, 79 A.C.W.S. (3d) 459

Maureen Bird and Robert J. Paul on behalf of the members of the class described as Crown Bay Hotel Limited Partnership, Crown Bay Suites Associates and Provo Club Villas Limited Partnership, Plaintiffs and Zurich Indemnity Company of Canada, Defendant

Winkler J.

Heard: March 25, 1998
Judgment: May 8, 1998
Docket: 95-CQ-59846

Counsel: *Morris Cooper*, for the plaintiffs.
Ronald Birken, for the defendant.

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Professions and occupations
IX Barristers and solicitors
IX.5 Fees
IX.5.b Agreements for fees
IX.5.b.iv Contingency fees
IX.5.b.iv.B Statutory provisions

Headnote

Barristers and solicitors --- Relationship with client — Fees — Agreements for fees — Contingency fees — Statutory provisions
Limited partnerships in defunct hotel construction project brought class action for recovery under performance bond — Agreement respecting fees and disbursements between plaintiffs and their counsel provided that legal fees would be based on contingency of success and comprise 20 per cent of total amount of any settlement or award inclusive of any costs or prejudgment interest which might be awarded — Action was settled and settlement was approved by court — Motion brought for approval of class counsel fee pursuant to percentage contingency fee agreement — Motion granted — Fee agreement was within contemplation of Class Proceedings Act — Settlement averted seven-to-ten day trial in matter that took four years to reach trial — Fee arrangements which reward efficiency and results should not be discouraged — Court not to approve fee arrangements until after judgment rendered on common issues or settlement concluded because only then would court have all relevant facts necessary for approval — Resourcefulness and tenacity of plaintiffs' counsel in investigating matter contributed greatly to successful resolution of action — Success of settlement was compelling in that class members would recover almost all of their initial investment net of fees — Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 32, 33.

Table of Authorities

Cases considered by *Winkler J.*:

Nantais v. Telectronics Proprietary (Canada) Ltd. (1996), 28 O.R. (3d) 523, (sub nom. *Nantais v. Telectronics Propriety (Canada) Ltd.)* 134 D.L.R. (4th) 470, 7 C.P.C. (4th) 189 (Ont. Gen. Div.) — applied

Nantais v. Telectronics Proprietary (Canada) Ltd. (1996), 28 O.R. (3d) 523n, 7 C.P.C. (4th) 206 (Ont. C.A.) — referred to

Serwaczek v. Medical Engineering Corp. (1996), 3 C.P.C. (4th) 386, 13 O.T.C. 63 (Ont. Gen. Div.) — considered

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — considered

s. 32 — considered

s. 32(1) — considered

s. 32(1)(b) — considered

s. 32(1)(c) — considered

s. 32(2) — considered

s. 33 — considered

s. 33(1) — considered

s. 33(2) — considered

s. 33(3) — considered

s. 33(4) — considered

s. 33(5) — considered

s. 33(7)(a) — considered

s. 33(7)(b) — considered

s. 33(8) — considered

Words and phrases considered

OTHERWISE

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 [*Class Proceedings Act, 1992*, S.O. 1992, c. 6]. In my view it falls within the ambit of section 32 of the Act, subject to approval by the court. The use of the term “otherwise” in clause (c) of subsection (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 section 32 of the legislation, to approve such a fee arrangement in the appropriate circumstances.

WHETHER CONTINGENT ON SUCCESS OR NOT

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 [*Class Proceedings Act, 1992*, S.O. 1992, c. 6]. In my view it falls within the ambit of section 32 of the Act, subject to approval by the court [. . .] 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 section 32 of the legislation, to approve such a fee arrangement in the appropriate circumstances.

MOTION for approval of percentage contingency fee agreement in class proceeding.

***Winkler J.*:**

1 This is a motion for approval of a class counsel fee as required by sections 32 and 33 of the Class Proceedings Act, 1992, S.O. 1992, c. 6.

2 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.

3 The Statement of Claim was issued on January 16, 1995, the Statement of Defense filed February 27, 1995 and subsequently amended by order of this court on December 4, 1995. The trial of the common issues was scheduled to commence on March 9, 1998 and was expected to last from seven to ten 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.

4 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 $5000. To this end the investment funds were held in escrow pending satisfaction of the terms of the offering memorandum by the developer.

5 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.

6 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 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% of the total amount of any settlement or award inclusive of any costs or prejudgement interest which may be awarded. This is the first instance in which a percentage contingency fee has come before this court for approval.

7 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,

(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

. . . . .

(8) In making a determination under clause (7) (a), the court shall allow only a reasonable fee.

8 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 section 32 of the Act, subject to approval by the court. The use of the term “otherwise” in clause (c) of subsection (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 section 32 of the legislation, to approve such a fee arrangement in the appropriate circumstances.

9 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.

10 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 addressed squarely by Brockenshire J. in *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1996), 28 O.R. (3d) 523 (Ont. Gen. Div.) leave to appeal to the Court of Appeal denied [(1996), 28 O.R. (3d) 523n, 7 C.P.C. (4th) 206 (Ont. C.A.)]. 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 527-8:

> 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.
>
> 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.

11 I agree with the reasoning of Brockenshire J.. The scheme of the CPA seems to envisage that sections 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.

12 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.).

13 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.

Motion granted.

2014 NSSC 375
Nova Scotia Supreme Court

Elwin v. Nova Scotia Home for Colored Children

2014 CarswellNS 777, 2014 NSSC 375, 1111 A.P.R. 363, 246 A.C.W.S. (3d) 763, 351 N.S.R. (2d) 363, 59 C.P.C. (7th) 80

June Elwin, Harriet Johnson and Deanna Smith, Plaintiffs v. The Nova Scotia Home for Colored Children, a body corporate and The Attorney General of Nova Scotia, representing Her Majesty the Queen in the right of the Province of Nova Scotia, Defendants

Arthur LeBlanc J.

Heard: September 17, 2014; October 6, 2014
Judgment: October 16, 2014
Docket: 343536

Counsel: Raymond Wagner, Q.C., Michael Dull, for Plaintiffs
No one for Defendant

Subject: Civil Practice and Procedure; Evidence; Public; Torts

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.iv Court approval of agreement for payment of fees and disbursements

Headnote

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Court approval of agreement for payment of fees and disbursements
Proceeding arose out of decades of systemic abuse of residents of institution — Counsel commenced class proceeding — Settlement was concluded and approved by court — Settlement total was $34 million — Motion was brought for approval of fees and disbursements of plaintiffs' counsel — Determination was made as to fees and disbursements — Reasonable class counsel fee in this case was 17 percent of total recovery — Reasonable amount of fees attributable to individual proceedings could be subsumed into class proceeding fees, although there was concern about potential repetition of work — Ultimate settlement was partly attributable to change in government policy — This allowed settlement to occur in course of certification stage, well short of trial — 20 percent of general office expenses were recoverable disbursements in class proceeding — Cost of production of medical records was allowed — Discovery costs were allowed in part, with exception of amounts relating entirely to individual proceedings — Discovery costs, out-of-court cross-examination of three plaintiffs, and in-court cross-examination of three plaintiffs were allowed in full — Travel costs of representative plaintiffs, including accommodation, were allowed — Cost of expert reports was not allowed, with exception of reports prepared for class proceeding — Cost of posting notices of settlement was allowed — Costs of leave application to Supreme Court of Canada, concerning dismissal of individual proceedings, were not recoverable.

Table of Authorities

Cases considered by *Arthur LeBlanc J.*:

Baker Estate v. Sony BMG Music (Canada) Inc. (2011), 2011 ONSC 7105, 98 C.P.R. (4th) 244, 2011 CarswellOnt 15453, 31 C.P.C. (7th) 320 (Ont. S.C.J.) — considered

Baxter v. Canada (Attorney General) (2006), 83 O.R. (3d) 481, 40 C.P.C. (6th) 129, 2006 CarswellOnt 7879 (Ont. S.C.J.) — referred to

Borden v. Nova Scotia (Attorney General) (2009), 2009 NSSC 132, 2009 CarswellNS 222 (N.S. S.C.) — referred to

Borden v. Nova Scotia (Attorney General) (2010), (sub nom. *R.L.B. v. Nova Scotia (Attorney General))* 288 N.S.R. (2d) 387, (sub nom. *R.L.B. v. Nova Scotia (Attorney General))* 914 A.P.R. 387, 2010 NSCA 15, 2010 CarswellNS 100 (N.S. C.A.) — referred to

Borden v. Nova Scotia (Attorney General) (2011), 2011 CarswellNS 216, 2011 CarswellNS 217 (S.C.C.) — referred to

Broome v. Prince Edward Island (2009), (sub nom. *Reference re: Broome v. Prince Edward Island)* 304 D.L.R. (4th) 384, 2009 CarswellPEI 3, 2009 PECA 1, 282 Nfld. & P.E.I.R. 61, 868 A.P.R. 61 (P.E.I. C.A.) — referred to

Broome v. Prince Edward Island (2010), 918 A.P.R. 24, 297 Nfld. & P.E.I.R. 24, [2010] 1 S.C.R. 360, 294 Nfld. & P.E.I.R. 24, 400 N.R. 148, 317 D.L.R. (4th) 218, 73 C.C.L.T. (3d) 1, 2010 CarswellPEI 20, 2010 CarswellPEI 21, 2010 SCC 11 (S.C.C.) — referred to

Buote Estate v. R. (2014), 2014 FC 773, (sub nom. *Estate of Buote v. Canada)* 2014 C.E.B. & P.G.R. 8091, 16 C.C.E.L. (4th) 1, 2014 CF 773, 2014 CarswellNat 2891, 2014 CarswellNat 2892 (F.C.) — considered

Cannon v. Funds for Canada Foundation (2013), 2013 CarswellOnt 17784, 2013 ONSC 7686 (Ont. S.C.J.) — followed

Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998), 160 D.L.R. (4th) 186, 1998 CarswellOnt 1896, 40 O.R. (3d) 83, 21 C.P.C. (4th) 272, 62 O.T.C. 71 (Ont. Gen. Div.) — followed

Doucette v. Eastern Regional Integrated Health Authority (2010), 294 Nfld. & P.E.I.R. 13, 908 A.P.R. 13, 2010 NLTD 29, 2010 CarswellNfld 39, 93 C.P.C. (6th) 266 (N.L. T.D.) — considered

Elwin v. Nova Scotia Home for Colored Children (2013), 1073 A.P.R. 35, 339 N.S.R. (2d) 35, 49 C.P.C. (7th) 238, 2013 NSSC 411, 2013 CarswellNS 969 (N.S. S.C.) — referred to

Elwin v. Nova Scotia Home for Coloured Children (2013), 2013 NSSC 196, 2013 CarswellNS 475, 1052 A.P.R. 35, 332 N.B.R. (2d) 35 (N.S. S.C.) — referred to

Gagne v. Silcorp Ltd. (1998), 113 O.A.C. 299, 1998 CarswellOnt 4045, 27 C.P.C. (4th) 114, 41 O.R. (3d) 417, 167 D.L.R. (4th) 325, 39 C.C.E.L. (2d) 253, 66 O.T.C. 400 (Ont. C.A.) — followed

Helm v. Toronto Hydro-Electric System Ltd. (2012), 40 C.P.C. (7th) 310, 2012 CarswellOnt 5761, 2012 ONSC 2602 (Ont. S.C.J.) — considered

Killough v. Canadian Red Cross Society (2007), 2007 BCSC 941, 2007 CarswellBC 1692, 74 B.C.L.R. (4th) 295, [2008] 2 W.W.R. 482 (B.C. S.C.) — considered

King v. Nova Scotia (Attorney General) (October 3, 2011), Doc. 321400 (N.S. S.C.) — considered

MacQueen v. Sydney Steel Corp. (2012), 2012 NSSC 461, 2012 CarswellNS 1072 (N.S. S.C.) — followed

Manuge v. R. (2013), 2013 CarswellNat 798, 2013 CarswellNat 799, 2013 FC 341, (sub nom. *Manuge v. Canada)* 430 F.T.R. 125 (Eng.) (F.C.) — considered

Milbury v. Nova Scotia (Attorney General) (2006), 248 N.S.R. (2d) 230, 789 A.P.R. 230, 2006 CarswellNS 456, 2006 NSSC 293 (N.S. S.C.) — referred to

Milbury v. Nova Scotia (Attorney General) (2007), 810 A.P.R. 181, 254 N.S.R. (2d) 181, 2007 NSCA 52, 2007 CarswellNS 199, 283 D.L.R. (4th) 449, 45 C.P.C. (6th) 103 (N.S. C.A.) — referred to

Morrison v. Nova Scotia (2012), 2012 NSSC 136, 2012 CarswellNS 243, 34 C.P.C. (7th) 214 (N.S. S.C.) — referred to

Murphy v. Mutual of Omaha Insurance Co. (2000), 2000 CarswellBC 2075, 2000 BCSC 1510, 80 B.C.L.R. (3d) 384, 47 C.P.C. (4th) 310 (B.C. S.C.) — considered

Parsons v. Canadian Red Cross Society (2000), 49 O.R. (3d) 281, 46 C.P.C. (4th) 236, 2000 CarswellOnt 2174 (Ont. S.C.J.) — considered

Rideout v. Health Labrador Corp. (2007), 270 Nfld. & P.E.I.R. 90, 822 A.P.R. 90, 2007 NLTD 150, 2007 CarswellNfld 268 (N.L. T.D.) — considered

Smith v. Nova Scotia (2009), 2009 CarswellNS 241, (sub nom. *L.A.S. v. Nova Scotia (Attorney General))* 277 N.S.R. (2d) 104, (sub nom. *L.A.S. v. Nova Scotia (Attorney General))* 882 A.P.R. 104, 2009 NSSC 137 (N.S. S.C.) — referred to

Smith v. Nova Scotia (2010), (sub nom. *L.A.S. v. Nova Scotia (Attorney General))* 288 N.S.R. (2d) 394, (sub nom. *L.A.S. v. Nova Scotia (Attorney General))* 914 A.P.R. 394, 2010 NSCA 14, 2010 CarswellNS 99 (N.S. C.A.) — referred to

Smith v. Nova Scotia (2011), 2011 CarswellNS 218, 2011 CarswellNS 219 (S.C.C.) — referred to

Smith Estate v. National Money Mart Co. (2011), 2011 CarswellOnt 1920, 331 D.L.R. (4th) 208, 3 C.P.C. (7th) 223, 276 O.A.C. 237, 106 O.R. (3d) 37, 2011 ONCA 233 (Ont. C.A.) — considered

Sparvier v. Canada (Attorney General) (2006), 2006 CarswellSask 765, 35 C.P.C. (6th) 110, 2006 SKQB 533, 290 Sask. R. 111 (Sask. Q.B.) — followed

Sparvier v. Canada (Attorney General) (2007), 2007 CarswellSask 148, 2007 SKCA 37, 39 C.P.C. (6th) 133, 293 Sask. R. 54, 397 W.A.C. 54, [2007] 7 W.W.R. 682 (Sask. C.A.) — referred to

White v. Canada (Attorney General) (2006), 2006 BCSC 561, 2006 CarswellBC 864 (B.C. S.C.) — followed

Statutes considered:

Class Proceedings Act, S.N.S. 2007, c. 28
Generally — referred to

s. 41 — considered

s. 41(1) — considered

s. 41(6) — referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

s. 33(7)(b) — considered

Freedom of Information and Protection of Privacy Act, S.N.S. 1993, c. 5
Generally — referred to

Legal Profession Act, S.N.S. 2004, c. 28
ss. 65-70 — referred to

Rules considered:

Civil Procedure Rules (1972), N.S. Civ. Pro. Rules
Generally — referred to

Federal Courts Rules, SOR/98-106
R. 334.4 — considered

MOTION for approval of fees and disbursements of plaintiffs' counsel in class proceeding.

***Arthur LeBlanc J.*:**

Introduction

1 This is a motion for approval of fees and disbursements of plaintiffs' counsel in a class proceeding following a settlement.

Background

2 This proceeding arises out of decades of systemic abuse of residents of the Nova Scotia Home for Colored Children. In the late 1990s, a number of former residents of the Home approached the eventual class counsel with their allegations. Between March 2001 and December 2004, counsel commenced individual proceedings on behalf of 62 former residents. The defendants included the Home, the Province of Nova Scotia, and various children's aid societies.

3 According to the materials filed with the court, counsel began filing individual proceedings in earnest in 2001 and 2002, as well as beginning to assemble information about the residents. Beginning in 2003 the various defendants began issuing and serving Demands for Particulars and Interrogatories, filing defences to the individual actions, and bring interlocutory applications, including a summary judgment motion in one proceeding that was eventually dealt with by the Court of Appeal. Ultimately, most claims in respect of the individual claimant were dismissed on limitations grounds, with the exception of breach of fiduciary duty: see *Milbury v. Nova Scotia (Attorney General)*, 2006 NSSC 293 (N.S. S.C.), varied at 2007 NSCA 52 (N.S. C.A.).

4 By 2007 counsel was preparing, filing, and serving lists of documents, and by 2008 counsel was seeking production of documents from the Home, and the defendants had begun conducting discovery examinations of former residents. Plaintiffs' counsel began discovery examinations of representatives of the various defendants beginning in 2009.

5 In 2009 the Home was successful in a summary judgment motion in respect of most causes of action in the claims of two residents. In each case, most claims were dismissed on the basis of a limitations bar, with the exception of breach of fiduciary duty. Appeals in both claims were dismissed, as were applications for leave to appeal to the Supreme Court of Canada: see *Borden v. Nova Scotia (Attorney General)*, 2009 NSSC 132 (N.S. S.C.), affirmed at 2010 NSCA 15 (N.S. C.A.), leave to appeal refused, (2011), [2010] S.C.C.A. No. 167 (S.C.C.); *Smith v. Nova Scotia*, 2009 NSSC 137 (N.S. S.C.), affirmed at 2010 NSCA 14 (N.S. C.A.), leave to appeal dismissed, (2011), [2010] S.C.C.A. No. 168 (S.C.C.). A motion for reconsideration by the Supreme Court of Canada was also dismissed: (2011), [2010] S.C.C.A. No. 168, 2011 CarswellNS 218 (S.C.C.).

6 In 2012 class counsel made a successful motion for production of documents in one of the individual proceedings, obtaining production by the Home of documents relating to alleged abuse of residents between 1954 and 1959 (the plaintiff had been a resident between 1955 and 1959): *Morrison v. Nova Scotia*, 2012 NSSC 136 (N.S. S.C.). Counsel also undertook historical research at the Nova Scotia Archives and obtained documents under the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5.

7 The *Class Proceedings Act*, S.N.S. 2007, c. 28 (the Act), came into force in June 2008. Counsel commenced the class

proceeding under the legislation in early 2011. The motion for certification was filed in February 2012.

8 After cross-examination on affidavits in March and April 2013, a settlement was concluded between the representative plaintiffs and the Home on April 10, 2013; that settlement was approved by the court by order dated July 11, 2013. After the settlement with the Home, the Province of Nova Scotia remained the only defendant. In April 2013 the Province moved to strike all or part of the record; after amendments were made, the court affirmed that some of the material in issue was admissible, while striking certain items: 2013 NSSC 196 (N.S. S.C.). The proceeding against the Province continued to a contested certification hearing over roughly two weeks in June and July 2013. The parties provided briefs on various issues, including certification criteria, proposed amendments to the statement of claim, the law respecting private statutes, declaratory relief, and non-delegable duty, admissibility of certain documentary evidence, and alleged vicarious liability of the Province for acts of children aid society officials. The certification motion was conditionally granted in part, with an adjournment to permit the plaintiffs to address alleged deficiencies in the pleadings and the litigation plan: 2013 NSSC 411 (N.S. S.C.).

9 The representative plaintiffs and the Province entered into settlement negotiations, leading to a settlement as to quantum and distribution being concluded on June 3, 2014, and approved by the court on July 7. No former residents have opted out of the class proceeding.

Issue

10 The issue on this motion is whether the fees and disbursements sought by class counsel are fair and reasonable.

Fees in class proceedings

11 This motion is governed by the Nova Scotia *Class Proceedings Act* and by the fee agreement between counsel and the representative plaintiffs. Section 41 of the Act sets out the requirements of agreements for fees and disbursements as between counsel and representative plaintiffs. Subsection 41(1) sets out the content of such an agreement:

> 41 (1) An agreement respecting fees and disbursements between a solicitor and a representative party must be in writing and shall (a) state the terms or conditions 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; (c) where interest is payable on fees or disbursements referred to in clause (a), state the manner in which the interest will be calculated; and (d) state the method by which payment is to be made, whether by lump sum or otherwise.

12 Such an agreement requires court approval for enforceability:

> (2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the application of the solicitor. (3) An application under subsection (2) may (a) unless the court otherwise orders, be made without notice to any other party; or (b) where notice to any other party is required, be made on the terms or conditions that the court may order respecting disclosure of the whole or any part of the agreement respecting fees and disbursements. (4) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award. (5) Where 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 that a taxation be conducted in accordance with the Civil Procedure Rules; or (c) direct that the amount owing be determined in any other manner.

13 Sections 65-70 of the *Legal Profession Act*, S.N.S. 2007, c. 28, governing taxation of fees and lawyers' right to sue for their accounts, do not apply to fee agreements in class proceedings: s. 41(6).

14 There is as yet no Nova Scotia written decision dealing with a claim of fees and disbursements by class counsel at the conclusion of a class proceeding. Murphy J. did deal with class counsel's fees in *King v. Nova Scotia (Attorney General)* [(October 3, 2011), Doc. 321400 (N.S. S.C.)], Hfx. No. 321400, where he allowed counsel's fees at the level of 15 percent

upon a settlement. The contingency agreement provided for a fee of 30 percent plus disbursements and applicable taxes if the matter settled or went to trial, and 35 percent if it went to appeal. Counsel had reduced the fee requested to between 15 and 20 percent, depending on the percentage of class takeup. Murphy J.'s order does not reference the takeup rate. It should be noted that the defendant also paid costs of $450,000.00. The total settlement agreement was valued at some $22,443, 750.00. Class counsel's submissions to the court indicated that "hundreds of hours" had been spent, pursuing both settlement and litigation tracks.

15 Counsel submits, based on caselaw from other provinces, that class counsel is typically allowed a premium on fees for taking on meritorious but difficult matters. This, it is argued, is consistent with the objectives of the legislation, which depend on rewarding counsel for assuming the risk of a class proceeding. Counsel submits that the general test, as noted in *Gagne v. Silcorp Ltd.* (1998), 167 D.L.R. (4th) 325, 1998 CarswellOnt 4045 (Ont. C.A.), is whether the fees sought are "fair and reasonable" (para. 26). I note that the Ontario *Class Proceedings Act*, S.O. 1992, c. 6, included that exact language. Specifically, s. 33(7)(b) permits the court, having determined a base fee under a fee and disbursement agreement, to "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..."

16 Counsel cites the remarks of Winkler J. (as he then was) in *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281, [2000] O.J. No. 2374 (Ont. S.C.J.), at para. 13:

> ... If the CPA is to achieve the legislative objective of providing enhanced access to 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...

17 And further, at para. 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 by 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 foes may accompany a class proceeding...

18 In *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, [2011] O.J. No. 1321 (Ont. C.A.), the Ontario Court of Appeal referred to a number of relevant considerations, quoting the motions judge's summary as follows, at para 80:

> 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 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.

19 Counsel submits that "the trend in Canada is to award fees based on a percentage basis and ... placing emphasis on the quality of representation and the benefit conferred on the class." The authority cited for this is *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada* (1998), 160 D.L.R. (4th) 186, [1998] O.J. No. 1891 (Ont. Gen. Div.), where Winkler J. made the following comments after reviewing the specific fee-determination provisions of the Ontario *Class Proceedings Act*:

> ... The scheme of the CPA seems to envisage that sections 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 v. Telectronics Proprietary (Canada) Limited et al.* (1996), 28 O.R. (3d) 523 (Gen. Div.)], 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.

20 Counsel goes on to submit that "[r]ecent decisions" have called for upholding the validity of class counsel fees of 33 percent; the authority cited is *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, [2013] O.J. No. 5825 (Ont. S.C.J.), where Belobaba J. said, at paras. 4-8:

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

21 Counsel says the fee requested falls within the range of reasonableness set out by the existing authorities. In *Baker Estate v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105, [2011] O.J. No. 5781 (Ont. S.C.J.), Strathy J. stated that "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" (para. 63). In *Helm v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602, [2012] O.J. No. 2081 (Ont. S.C.J.), the contingency fee agreement between class counsel and the representative plaintiffs called for a fee of 25 percent of the recovery, plus disbursements and taxes; Strathy J. called this "a reasonably standard fee agreement in class proceedings litigation" (para. 22). While the amount sought constituted "a significant premium over what

the fee would be based on time multiplied by standard hourly rates", Strathy J. commented, in approving the fee, that the class counsel "are serious, responsible, committed and effective" and would "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" (para. 26).

22 Counsel also cites the Newfoundland decisions in *Rideout v. Health Labrador Corp.*, 2007 NLTD 150, [2007] N.J. No. 292 (N.L. T.D.), where the court approved a settlement agreement and allowed class counsel to recover fees equivalent to 31.29 percent of the total recovery (paras. 151, 172-173), and *Doucette v. Eastern Regional Integrated Health Authority*, 2010 NLTD 29, [2010] N.J. No. 46 (N.L. T.D.), where counsel sought approval of fees amounting to just under 30.5 percent of the recovery; in both cases, the fee agreements provided for recovery of up to 33.3 percent, but counsel applied for the lower amount. In *Doucette*, Thompson J. noted that "[t]he technical evidentiary issues, the uncertainty of liability, the defences available, the time required to advance the case, the patient claims that would ultimately have to be assessed on an individual basis and the financial exposure of class counsel would have made this less than attractive to counsel and presented a daunting undertaking" (para. 82). Accordingly, the court found that there were "no features presented by which I can conclude that the contingency fee historically used in this Province in individual proceedings and accepted by this Court in a class proceeding in *Rideout* ... and within the range accepted nationally and internationally in class proceedings should be reduced in this case" (para. 84).

23 In *Manuge v. R.*, 2013 FC 341, [2013] F.C.J. No. 363 (F.C.), Barnes J. determined fees under Rule 334.4 of the Federal Court Rules, which provides that "[n]o 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." He said:

> 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] O.J. No. 2374... 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 B.C.J. No. 1254 [*Endean*].

24 Barnes J. accepted that a contingency fee agreement between "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" (para. 43). He noted that the fee agreement (for 30 percent of the recovery) was made before it was known the certification issue would reach the Supreme Court of Canada, that liability would be decided on agreed evidence, and that the respondent would abandon a partial limitations defence in settlement negotiations (para. 44).

25 Barnes J. concluded that the contingency fee agreement was not significant, as counsel and the representative plaintiff had essentially abandoned it and were now requested approval of fees amounting to about 7.5 percent of the gross value of the settlement, which was valued at some $887 million (paras. 7 and 45). He went on to consider the relevance of percentages and multipliers, stating that their use "is appropriate, but mainly to test their reasonableness and not to determine absolute entitlement" (para. 47). He cited, *inter alia*, the comment from *Killough v. Canadian Red Cross Society*, 2007 BCSC 941, [2007] B.C.J. No. 1486 (B.C. S.C.), that "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" (*Killough* at para. 48). Counsel notes (citing *Gagne* at para. 14) that a percentage-based fees and multiplier-based fees may be cross-checked against one another, depending on which approach is being used.

26 In *Manuge* Barnes J. rejected the defendant's submission that the "relatively low value of professional time expended by class counsel" called for a "typical multiplier of 1.5 to 3.5"; he described this as "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" (para. 49). He concluded, at para.

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 of amounts recovered fall at the bottom of the scale of costs awarded in percentage terms: see *Baxter v Canada (Attorney General)*, [2006] O.J. No. 4968, 83 OR (3d) 481; *Endean*, above, and *Killough*, above. These comparable decisions do not support an award of costs in this case of approximately 7.5% or, in financial terms, $65 million.

27 Ultimately, Barnes J. allowed fees at "in an amount equal to eight percent of the retroactive refunds payable to class beneficiaries", which was approximately four percent of the total value of the settlement (para. 51).

28 Barnes J. considered class counsel fees again in approving a settlement in *Buote Estate v. R.*, 2014 FC 773, [2014] F.C.J. No. 804 (F.C.). In that case the court approved a settlement in the amount of about $70 million. Justice Barnes approved fee deduction of eight percent on the retroactive refund portion of the settlement, which appears to have been something under half of the total. Barnes J. commented that "[g]enerally speaking, in very large or megafund settlements, the greater the amount recovered the lower the percentage that will be justified for legal fees. Notwithstanding the substantially lower amount recovered in this case on behalf of the Class, counsel propose a legal fee recovery that is consistent with the amount approved in *Manuge*" (para. 21). After referencing the approach to the determination of whether fees were fair and reasonable that he had described in *Manuge*, he approved the fees and disbursements as requested. There was "no serious opposition to the proposed fees. Class counsel assumed considerable risk by taking this case on and have worked hard and ably to obtain a generous recovery on behalf of the Class. They are entitled to a reasonable recovery for their efforts particularly where the impact of legal fees on the recoveries payable to members will not be disproportionate" (para. 23).

29 As between the presumption suggested by Cannon J., and the less deferential approach suggested by Barnes J., I prefer the latter. As Barnes J. explained, when the fee agreement is made, it is not known how matters will develop. That is not to say that the fee agreement is not a significant consideration, nor that it is not the starting point in the analysis. However, the Act makes it clear that such an agreement is unenforceable without court approval. Moreover, by its nature, where fee approval follows a settlement, and counsel's recovery will be out of the settlement fund, there is no party to oppose it. This is not an adversarial proceeding like a motion for determination of costs as between parties. As such I interpret the Act as imposing upon the court a duty to ensure that fees and disbursements are fair and reasonable, in view of the objectives and purposes of the Act and in view of the fee agreement with the representative plaintiffs.

Evidence on fees

30 In his affidavit, Mr. Wagner recounts the evolution of the various proceedings. After being approached by outside counsel in respect of some former residents in early 1998, Mr. Wagner says, he considered the viability of the claims and eventually took carriage of them. There followed several years of preparatory work: meeting with the former residents, preparing pleadings, researching the legal basis for potential claims, and, beginning in late 2000, filing Notices of Intended Action and commencing the individual actions. He suggested that he considered a representative action under the *Civil Procedure Rules (1972)* as early as 2001.

31 The preparatory work during the years when class counsel was commencing the individual actions included responding to interrogatories and demands for particulars from the defendants, including travelling to meet clients, and responding to summary judgment applications. Around 2004 Mr. Wagner and other lawyers in his firm discussed the possibility of advancing test cases, and began gathering information respecting potential test case clients to that end, including assembling medical, educational and employment histories. He also contacted potential medical, psychological, and psychiatric experts. Dealing with pleadings, particulars, and the possibility of test cases (an idea which was ultimately dropped) occupied a good deal of time.

32 Mr. Wagner's affidavit reconstructs the work done on the various individual proceedings up to the end of 2006. He

goes on to say that between 1998 and the present, "our pursuit of the claims of the former residents ... has been a strain on the firm's limited resources," adding that "we have turned down a large number of cases due to the fact that our resources were pushed to the limit working on the claims of the former residents." This work was done without knowing whether the firm would ever receive any remuneration.

33 In support of the claim for fees, Class counsel have provided an affidavit by Michael Dull, a lawyer with the Wagners firm. Mr. Dull sets out the background of Mr. Wagner and his firm as class proceeding practitioners in Nova Scotia. There is no question that Mr. Wagner and his firm have gained significant experience in this area. Mr. Dull states that the time records indicate that class counsel has been providing legal services to former residents of the Home since January 7, 1998. Mr. Dull's affidavit includes as an exhibit the contingency fee agreement between the firm and the individual plaintiff Tracey Dorrington-Skinner, dated March 31, 2003.

34 Mr. Dull's affidavit recounts, in a general way, the work undertaken on the various individual claims and the class proceeding: commencing the various proceedings, gathering documentation and preparing lists of documents, interviewing former residents of the Home in order to address demands for particulars and interrogatories, responding to an application to strike and three summary judgment proceedings, receipt and review of defences and defence lists of documents, conducting discoveries and assisting former residents through defence discoveries, date assignment conferences, advancing motions for production, and dealing with the unsuccessful Supreme Court of Canada proceeding. In addition, he notes, class counsel undertook the research, preparation work and dealings with clients that would be expected in the circumstances.

35 Mr. Dull expresses the belief that "the substantial work done between ... 1998 and 2012 (both by Class Counsel and the individual former resident [*sic*] who came forward early to file actions) laid the groundwork for the class proceeding and the eventual settlement. Stated another way, I do not believe that a settlement would have been achieved but for those early efforts. The work performed on the individual actions is subsumed by the class action." Neither the settlement agreement with the Home (which was approved July 11, 2013), nor that with the Province, provided for the fees and disbursements arising from individual proceedings to be subsumed into the class proceeding.

36 Upon filing of the proposed class proceeding in February 2011 and, a year later, the motion for certification, class counsel undertook additional historical research. The eventual certification hearing involved multiple days of hearings, leading to the decision of December 2013, followed by the negotiations with the provincial government that led to the 2014 settlement. Mr. Dull confirms that notice of the proposed settlement has been given to the class members, and that none of the former individual plaintiffs have opted out of the class proceeding, nor have any other former residents. There have been no opt-outs. There was no formal notice of this fee approval proceeding given to the class.

37 Mr. Dull's affidavit includes as exhibits the contingency fee agreements concluded between class counsel and the three representative plaintiffs between 2011 and 2013. He notes that counsel undertook the work on a contingency basis notwithstanding the risk of never being paid. The agreements with the representative plaintiffs provide for fees to be calculated on the following scale: a fee of 25 percent of the first $10 million of a settlement, 20 percent of the second $10 million, and $15 percent of any remainder. Applying this scale to the total settlement of $34 million, this amounts to total fees of $6.6 million, representing 19.4 percent of the total settlement.

38 Mr. Dull's affidavit includes a list of the personnel involved with the proceedings over time; this includes some ten lawyers, two paralegals, a legal analyst, an articled clerk, and a summer student. He also states his belief that the reasonableness of the fee sought is supported by time records. This is problematic.

39 Class counsel substantially relied on hours worked and unbilled fees for the period 1998 to 2006, in combination with recorded hours and unbilled fees between 2007 and 2014, in representing to the court that the fees requested represented 1.2 times the total of the hours and unbilled fees. I refer specifically to paras. 35-46 of Mr. Dull's affidavit, and the various references to the issue in class counsel's submissions.

40 Mr. Wagner subsequently indicated that there were, in fact, "reconstructed" time records available for the period 1998 to 2006, which had not been prepared prior to Mr. Dull's affidavit. It is agreed that Mr. Dull did not refer to these reconstructed time records. As I understand it, these reconstructed time records consisted of a review of the various individual client files and assignment of time values for the various matters appearing therein..

41 There are serious gaps and deficiencies in the materials offered to verify class counsel's claims about the specific numbers of hours worked on the individual actions. According to Mr. Dull's original affidavit, between the beginning of work on proceedings involving former residents in January 1998 and late 2007, counsel kept no time records, with the exception of one lawyer, Fiona Imrie, Q.C. Her records span January 1999 to December 2008. Mr. Dull extrapolated the overall time spent by counsel from Ms. Imrie's records, a "review of the work product generated and procedures undertaken (and by whom)", and conversations with the lawyers on the file at that time. He stated that he reviewed the records kept from 2007 forward and believed them to be "fairly accurate," though he believed that "if anything, the records understate the time actually spent..." Like Mr. Dull, Anna Marie Butler, another lawyer who worked on the file and who provided an affidavit, believes that the chart probably underestimated her time, in her case by upwards of 100 hours per year.

42 Mr. Dull estimated the actual time spent on the file, in terms of total fees between 1998 and 2014, at about $5.4 million. Attached to his affidavit is a chart showing the estimated hours spent by each lawyer on, year-by-year, beginning in 1998. Individual lawyers are indicated by initials (which can be checked against the list of their names that appears earlier in the affidavit). The chart indicates the number of hours and the total fees for each lawyer each year, though it does not indicate hourly rates. Thus, for instance, for 1998 the chart shows as follows:

LAWYER	**HOURS**	**AMOUNT**
RFW	153.7	$61,480.00
SLH	300	$60,000.00
TOTAL	453.7	$121,480.00

43 Based on the names listed elsewhere in the affidavit, RFW would be Mr. Wagner, while SLH would be Sarah L. Harris. The fees appear to be calculated on a scale of $400.00 per hour for Mr. Wagner, and $200.00 per hour for Ms. Harris. Mr. Wagner's own affidavit indicates that this was indeed his hourly rate between January 1998 and March 2006. Similarly, Ms. Harris's own affidavit indicates that her hourly rate as an associate at the firm was $200.00 (she left the firm in 2008). However, Ms. Harris also states that she commenced articling at the firm in 2001, and was called to the bar in June 2002; this begs the question of why class counsel's fee estimates show Ms. Harris working on this matter for a total of 1800 hours between 1998 and 2001, with total fees estimated at $360,000.00. During these years Ms. Harris was obviously not a lawyer at the firm. Such an error illustrates the unreliability of counsel's time estimates.

44 Another inconsistency arises in relation to Ms. Imrie's time records. As noted above, Mr. Dull states that Ms. Imrie's time records commence on January 18, 1999. The chart attached to his affidavit shows her working 23.9 hours in 1999, 1.2 hours in 2000, 19 hours in 2001, and 406.4 hours in 2002, a total of 450.5 hours, with total billables of $220,200.00. This works out to about $488.00 per hour. However, Ms. Imrie's own affidavit indicates that she began working for Mr. Wagner's firm in May 2002, and that until April 2007 the firm billed her time to clients at $400.00 per hour. She attaches her own contemporaneous time records respecting work performed on behalf of former residents (records referred to in Mr. Dull's original affidavit, but not attached as an exhibit). These records commence with entries for January 9, 2003. Thus there are inconsistencies respecting when Ms. Imrie worked at the firm, when she worked on the residents' files, and her hourly rate.

45 After these discrepancies were raised in the hearing, counsel checked firm records and reported that Ms. Harris in fact spent the summers of 2000 and 2001 at the firm as a summer student (given her call to the bar in June 2002, she would actually have been an articled clerk in the summer of 2001, as indicated by her affidavit). Counsel also suggested that Ms. Imrie appeared to have started at the firm "informally" (whatever that might mean) around June 2002. In each case, where the lawyer's affidavit contradicts the information provided by class counsel as to when the lawyer joined the firm, I accept the lawyer's evidence. In neither case does the new information offer much assistance in addressing the questions raised by the information originally provided by counsel.

46 Additionally, where there are discrepancies as to hourly rates being charged between the contingency fee agreements and the affidavits (as there are in some cases), I would rely upon the rates in the agreements. Ms. Harris was at the firm as a summer student in 2000, an articled clerk in 2001, and an associate in 2002. The figures provided indicate that she was being billed at $200.00 in each of those years. I note that in Ms. Dorrington-Skinner's 2003 fee agreement, her rate is indicated as $125.00. In the period 2006 to 2014, hourly rates at the Wagner firm increased twice. In the case of Mr. Wagner, in 2006 his rate increased to $600.00, and in 2013 to $750.00. Other lawyers in the firm also saw increases, though not at this level, given

that they would have less experience.

47 I have already described my view as to the broad parameters of how the court should approach a determination of whether class counsel's fees are fair and reasonable. In supplemental submissions, Mr. Wagner has provided argument in support of his position that the fee sought is fair and reasonable. He frames the relevant considerations as they were set out in *Sparvier v. Canada (Attorney General)*, 2006 SKQB 533, [2006] S.J. No. 752 (Sask. Q.B.), affirmed at 2007 SKCA 37 (Sask. C.A.). In that case, Ball J., operating under a provision of the Saskatchewan legislation similar to s. 41 of the Nova Scotia *Class Proceedings Act*, said, at para. 44:

> Fees payable to plaintiffs' counsel in class actions are determined by reference to factors established by judicial authorities. Those factors are often said to be:
>
> (a) time expended by the solicitor;
>
> (b) the legal complexity of the matters;
>
> (c) the degree of responsibility assumed by the solicitor;
>
> (d) the monetary value of the matters at issue;
>
> (e) the importance of the matter to the client;
>
> (f) the degree of skill and competence demonstrated by the solicitor;
>
> (g) the results achieved and the contribution of counsel to the result;
>
> (h) the ability of the client to pay; and
>
> (i) the client's expectations as to the amount of the fees.

48 In terms of time actually spent, class counsel points the various affidavits which collectively indicate that lawyers in the firm worked more than 14,000 hours over some 16 years. Of this amount, some 7200 hours are post-2007, when class counsel began to keep more reliable time records. Further, even if the hitherto unrecorded pre-2007 time — which counsel subsequently indicated was in fact reviewable in reconstructed records — receives no weight, the fees requested would amount to a multiple of 1.65 compared to the records. This, it is argued, would be within the range of reasonable multiples. (I note that the original time estimates were submitted in support of a fee claim in a multiple of 1.2.)

49 As will be clear from the comments above, the time actually spent by counsel is a matter of some concern to the court in this case. There can be no question that the class proceeding (as well as the predecessor individual proceedings) involved a great deal of effort by multiple lawyers over an extended time. I am reluctant to place as much reliance on the records as Mr. Wagner initially suggested I should, but I am prepared to accept that thousands of hours were spent by Mr. Wagner and others in his firm in the course of the class proceeding and the predecessor individual proceedings. I would add that such material was not originally sought by the court. Class counsel provided specific time estimates for individual lawyers with the first set of submissions. It was these estimates that raised concerns, which were exacerbated by the affidavits provided later.

50 Having relied on specific claims of numbers of hours worked and hourly rates, counsel is in no position to object when the court scrutinizes it, particularly when it is found to contain inaccuracies, and improbabilities (such as significant time attributed to lawyers who were not with the firm at the time). Counsel has referred me to, *inter alia*, *Murphy v. Mutual of Omaha Insurance Co.*, 2000 BCSC 1510, [2000] B.C.J. No. 2046 (B.C. S.C.), where class counsel had not kept contemporaneous time records, and instead attempted to reconstruct the time spent. Holmes J. commented that "absent some basis to suggest impropriety or other unusual circumstance regarding the evidence as to the claimed time expended, it should not be necessary for counsel to produce their detailed time records to the opposing party" (para. 42). Counsel has not, however, cited the next two paragraphs, where the court said:

> 43 That said however, class counsel could reveal more general information summarized from their time records that would assist the Court in considering the complexity of their work, the seniority and abilities of counsel providing services, the nature of the services undertaken, hourly rates, efficiency of time expended and like matters. That would not breach any privilege nor unfairly require disclosing sensitive information to an opponent.
>
> 44 Showing the proposed fee to be reasonable is upon the applicant and a failure of helpful detail will in the end result be to the disadvantage of the applicant who bears that onus of proof.

51 Generally speaking, I have some difficulty with the notion that specific records of time actually spent on the file are of more than marginal interest in assessing the reasonableness of a contingency fee agreement. I find myself in agreement with Murphy J. in *MacQueen v. Sydney Steel Corp.*, 2012 NSSC 461 (N.S. S.C.), where class counsel sought to recover costs of $1.5 million from two defendants after a mainly successful certification motion. This amount was 50 percent of counsel's estimate of the actual value based on hourly rates for lawyers and staff working on the file. Justice Murphy declined to award costs on the basis of hourly rate-based calculations. Noting that class counsel were actually being compensated on the basis of a contingency fee agreement, rendering the hourly rates a "fiction" (para. 24). Further, he said, at para. 26,

> And the final reason why I am not proceeding on the basis of the formula put out by the plaintiffs is that the hourly rates are unrealistic in my view for fixing costs in this case. They're beyond any amount which I'm aware has been approved by this Court; they're beyond what the Ontario Rules Committee sets as ranges for costs submissions; in fact, in some places they're more than double those amounts. I have to say, I find it disingenuous for the plaintiffs to continually invoke the 'access to justice' argument as a reason for certification and in support of class proceedings — as really the guiding principle that the Court should apply in assessing whether a class action is the preferred procedure — and then suggest that the time devoted to accessing justice warrants compensation up to $775 an hour. I recognize that there are clients in this country who are prepared to pay such amounts for certain legal services and look, I'm not critical of that. But I'm not going to determine reasonable party/party costs using those sorts of rates in a case involving damages that allegedly were suffered by the people of Sydney, Nova Scotia. I just don't think that's an appropriate scale on which to assess costs payable by opposing parties.

52 Justice Murphy ultimately awarded lump sum costs of $400,000.00. I am mindful that the legal and procedural context was quite different in *MacQueen*; that case involved a costs order against a different party, not recovery of fees out of a settlement fund. However, I believe Justice Murphy's comments about reliance on actual fees is relevant here.

53 There is an additional concern, on a more purely legal question. It is not clear that the fees and disbursements authorized by the *Class Proceedings Act* automatically subsume the fees and disbursements incurred in the forerunner individual proceedings. Counsel argues, essentially, that the dismissal (without costs) of the individual proceedings leads directly to the inclusion of their related fees and disbursements in those of the class proceeding. Nothing in the settlement documents (with either defendant) appears to contemplate that this would occur; there are no terms of conditions giving any indication of what occurs with respect to fees and disbursements arising in the individual proceedings. The settlement agreements permitted class counsel to have fees and disbursements settled by the court, but there was no specific provision for retaining jurisdiction over the individual actions.

54 There is precedent for a large-scale settlement to encompass fee recovery for individual actions alongside those of the class proceeding; see, for instance, *Sparvier v. Canada (Attorney General)*, 2006 SKQB 533 (Sask. Q.B.), affirmed at 2007 SKCA 37 (Sask. C.A.), and *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481, [2006] O.J. No. 4968 (Ont. S.C.J.). In these cases, of course, the relevant settlement agreements specifically contemplated that those fees would be taken into account. That is not the case here. I note also *White v. Canada (Attorney General)*, 2006 BCSC 561 (B.C. S.C.), where a class action settlement included the extinguishment of other claims and causes of action. The court permitted the inclusion of disbursements from corresponding individual actions (para. 25). Unlike the present case, it appears that the individual proceedings in *White* were still active. In *Sparvier*, it appears, counsel ultimately opted not to pursue disbursements specifically, and instead took a lump sum representing fees and disbursements collectively.

55 I am prepared to accept in principle that the fees incurred in the parallel individual proceedings — which were provided to the court in supplementary filings — may be taken into account in assessing the global claim made by class

counsel.

56 As noted above, in this case, counsel has not pointed to any contractual basis for incorporating fees from the various individual actions into the global amount for the class proceeding. That being said, I am satisfied that the work done in those individual proceedings would have contributed to the eventual certification of the class action, and to the settlement. I am convinced that it would be an injustice to deny recovery of a reasonable proportion of fees relating to the individual proceedings, or rather, to refuse to consider those amounts in determining whether the fee claimed is fair and reasonable. I am concerned, however, that there is likely to be a certain amount of duplication of effort in that multiplicity of proceedings. In considering what constitutes a reasonable fee it may be necessary to discount certain amounts out of a concern about excessive duplication of effort between the individual and class proceedings.

57 I will now consider the various factors set out in *Sparvier* (having already addressed the consideration of time expended by class counsel):

Complexity of issues

58 As to the complexity of the legal issues, counsel submits that the litigation was contentious and that it raised complex legal issues. In particular, the fact that the Home was a private institution, rather than a government-run one, complicated the legal issues (although I would query the suggestion that this situation was unique in the caselaw; see, for instance, *Broome v. Prince Edward Island*, 2009 PECA 1 (P.E.I. C.A.), affirmed at 2010 SCC 11 (S.C.C.)). Additionally, counsel was required to address such issues as declaratory relief against the Crown for equitable claims, vicarious liability, non-delegable duty, and the application and interpretation of private statutes. The legal issues were made more complex by the passage of decades since the relevant events occurred. Class counsel were required to undertake a significant amount of historical research in addition to conventional legal research. Moreover, the Province strongly resisted certification prior to the decision to negotiate a settlement.

Responsibility assumed by counsel

59 There appears to be no dispute that class counsel assumed all responsibility for the proceeding, funding all disbursements and working on a contingency fee basis. Counsel also guaranteed a third-party loan in order to obtain a lower interest rate. Counsel also signed an indemnity agreement with the representative plaintiffs, indemnifying them against any award of costs.

Monetary value

60 Counsel submits — and I accept — that the settlement total of $34 million is a significant monetary value for the class, and that it would not have been achieved but for class counsel assuming significant risk. It appears that the number of former residents who can claim compensation numbers in the hundreds, certainly under 1000. By comparison, counsel points to another recently-settled institutional abuse case, relating to the Huronia Regional Centre, where a class action with some 3700 living former residents was settled for $35 million.

Skill, competence, counsel's contribution, and results achieved

61 I further accept that class counsel skilfully navigated this class proceeding, involving certain novel points of law and strong opposition from the Province throughout most of its duration, through to a successful settlement, with the attendant possibility that the matter might have gone to a contested trial. Counsel was essential to achieving a result that was highly favourable to the class. I take judicial notice that there was a change in government policy which also played a role in bringing about the negotiated settlement with the Province; I note the comments in *Endean* to the effect 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" (para. 41). This does not nullify counsel's role, but it is a relevant part of the background to the eventual settlement.

Importance to the client, client expectations, and ability to pay

62 I am satisfied that Mr. Wagner and his team of lawyers professionally and competently negotiated settlements with both the Home and the Province. This matter was of profound importance to class counsel's clients, the former residents of the Home. I accept that they would not have been able to fund the proceeding on their own. As to the clients' expectations of the amount of fees, it is clear that the plaintiffs would be aware of the contents of the contingency fee agreement. It is also accurate to say that there is no evidence of any complaints from plaintiffs about the fees sought. Indeed, several plaintiffs provided post-hearing affidavits in support of class counsel's request for fees. With respect, however, that is not the decisive consideration. Counsel acknowledges that the fee must be approved by the court as being fair and reasonable. That said, the analysis is not one of determining in the abstract what would be a fair and reasonable fee, but rather whether the fee sought is fair and reasonable.

Conclusion on fees

63 In this case, the requested fee of $6.6 million amounts to 19.4 percent of the total recovery. Counsel submits that none of the factors reviewed above point to the conclusion that the fee requested is not fair and reasonable. I am satisfied that the percentage of fees requested is close to an appropriate range. I note, for instance, as a comparator, the fees of 15 percent approved in *King* and the eight percent in *Buote*. I have also accepted that a reasonable amount of the fees attributable to the individual proceeding could be subsumed into the class proceeding fees; I do have some concerns about potential repetition of work. Further, the ultimate settlement was, as previously mentioned, partly attributable to a change in government policy; this allowed a settlement to occur in the course of the certification stage, well short of trial. In view of all of these considerations, I conclude that a reasonable class counsel fee in this case is 17 percent of the total recovery.

Disbursements

64 In addition to fees, class counsel seeks recovery of various disbursements out of the settlement funds. Counsel have submitted two affidavits of Richard Crossman, a paralegal and accounting assistant with their firm, in support of the disbursement claim. Counsel seeks to recover disbursements totalling $502,479.00, consisting of $457,831.53 plus applicable HST of $44,647.47. These disbursements relate to the class proceeding as well as the individual proceedings.

65 The specifics of disbursements claimed for general administration and supplies are as follows:

Disbursement	**Amount claimed**
Postage	$4,047.84
Couriers	$2,240.40
Prints (black and white + colour)	$1,729.10
Photocopies	$11,373.20 (113,732 pp. at 10 cents per page)
Faxes	$1,259.50
HST at 15% on items above	$3,097.51
Filing fees and Law Stamp charges (62 individual actions + class proceeding)	$13,499.07 ($11,687.82 fees + $1,575.00 law stamp + $236.25 HST at 15%)
Service fees for individual actions and class proceeding	$963.81 ($838.10 + $125.71 HST at 15%)
Investigative services	$5,613.48 ($4,881.29 + $732.19 HST at 15%)
Search fees	$414.00 ($360.00 + $54.00 HST at 15%)
Contracted legal services (e.g. swearing out-of-province affidavits in support of certification motion)	$453.77 ($394.59 + $59.18 HST at 15%)
Production of medical records	$7,609.82 ($6,617.24 + $992.58 HST at 15%)
Discovery costs (court reporters and transcripts)	$6,126.07 ($5,327.02 + $799.05 HST at 15%)
Total (general administration and supplies)	**$58,427.57**

66 Counsel also claims extensive disbursements related to witnesses' attendance at discovery and cross-examination, both in-court and out-of-court. These expenses include costs related to travel and accommodation for five plaintiffs, in-court and

out-of-court cross-examination of several plaintiffs, consultations of four plaintiffs with a psychiatrist, Dr. G.E. Robinson, and one plaintiff's consultation with Sandra Preeper, a rehabilitation consultant. These consultations, it appears, were found to be necessary for some plaintiffs to allow them to come forward and take part in the proceeding. A partial, though incomplete, breakdown is as follows:

Disbursement	**Amount claimed**
Discovery costs (travel and accommodation costs for five plaintiffs)	$8,171.56 ($5,345.70 air fare + $2,825.86 hotels)
Out-of-court cross-examination of three plaintiffs	$5,845.31 ($3,551.87 air fare + $2,293.44 hotels)
In-court cross-examination of three plaintiffs	$5,109.53 ($2,525.87 air fare + $2,583.66 hotels)
Consultations with Dr. G.E. Robinson (psychiatrist) (four plaintiffs)	$3,679.51 ($2,784.68 air fare + $894.83 hotels)
Consultation with Sandra Preeper (Rehabilitation consultant) (one plaintiff)	$1,785.09 ($1,001.59 air fare + $783.50 hotel)
Total	**$24,591.00**
Total of all relevant invoices as per counsel's affidavit	**$39,801.84**

67 The specific figures cited here are derived from Mr. Crossman's first affidavit. In his second affidavit, Mr. Crossman goes on to state that in addition to these expenses, counsel paid additional travel, meal, and accommodation expenses for plaintiffs. However, in Mr. Crossman's second affidavit, he attaches copies of invoices that he says total $36,074.49, plus applicable HST of $3,727.35, for a total of $39,801.84. This is a lower figure than the overall total stated in the first affidavit.

68 Counsel also claims various disbursements related to retaining and obtaining the assistance of experts (this is in addition to the services provided by Dr. G.E. Robinson and Sandra Preeper referred to above).

Disbursement	**Amount claimed**
Dr. Charles Hayes (psychologists) (six invoices)	$40,822.50 ($29,022.50 + $10,000.00 retainers on four invoices + $1,800 "additional fee" on one invoice)
Sandra Scarth (expert in child welfare standards) (seven invoices)	$35,925.62
Sandra Preeper (rehabilitation consultant) (two invoices)	$6,953.85
Dr. G.E. Robinson (psychiatrist) (one invoice)	$8,575.00
Jessie Gmeiner (actuary) (one invoice)	$9,960.00
Total (experts)	**$117,572.51 ($102,236.97 + $15,335.54 HST at 15%)**

69 Other expenses for which counsel seeks recovery include the following:

Disbursement	**Amount claimed**
Jane Earle (counselling services)	$18,400.00 ($16,000.00 + $2,400 HST at 15%)
Expenses for appeals to SCC (*Borden* and *Smith*)	$73,906.50 ($64,266.53 + $9,639.97 HST at 15%)
Translation of decision for SCC leave application	$3,220.00 ($2,800.00 + $420.00 HST at 15%)
Costs paid to defendants after unsuccessful appeals	$12, 343.75 ($12,100.62 + $243.13 HST at 15%)
Interest (18%) on Bridgepoint Financial Services loans taken out on 12 individual claims between November 2008 and September 2011 in the total amount of $130,201.25	$126,788.31
Posting notices of settlement in four newspapers	$52,018.53 ($45,233.51 + $6,785.02 HST at 15%

70 As I indicated in the hearings, I have given considerable thought to the possibility of including all the disbursements, including those incurred in the individual proceedings. I was skeptical of my jurisdiction to do so. Based on what has been put before the court, I am unable to agree with class counsel that these disbursements are simply subsumed in the class action.

71 Regrettably, the settlement agreements reached between the representative plaintiffs and the Home, as well as that between the plaintiffs and the Attorney General, provided for the dismissal with cause and without costs of all of the

individual proceedings. These are no longer live actions before the court. Any disbursements incurred in them would be attributable to those individual actions, not the class proceeding.

72 It is evident that that many of costs claimed as disbursements were costs incurred before and after commencement of the class proceeding. They were not incurred in the class proceeding. They were specific to the individual proceedings. Costs incurred in the class proceeding are indeed recoverable, and I am prepared to order their payment, plus appropriate taxes.

73 I know that some of the costs, such as general office expenses (e.g. postage, couriers, prints, photocopies, faxes, and search fees, are mixed between the class and individual proceedings. I am prepared to allocate 20 percent of this total as recoverable disbursements in the class proceeding. Filing fees, service fees, and contracted legal services will similarly be allowed at 20 percent, unless I am provided with satisfactory evidence or authority that this should be allowed at a higher rate. I also allow the cost of production of medical records. Discovery costs are allowed in part, with the exception of amounts relating entirely to the individual proceedings.

74 The discovery costs, out-of-court cross-examination of three plaintiffs, and in-court cross-examination of three plaintiffs are allowed in full. Costs associated with Dr. G. Robinson and consultations with Sandra Preeper are recoverable if they relate to the class proceeding. Travel costs of the representative plaintiffs, including accommodation, are allowed on the same grounds.

75 The cost of expert reports are not allowed, with the exception of reports prepared for the class proceeding. Costs relating to services provided by Ms. Earle, and the costs of the leave application to the Supreme Court of Canada are not recoverable. Interest on the Bridgepoint Financial loan is not recoverable as a disbursement, as it related to 12 individual claims. The cost of posting notices of the settlements is allowed.

76 All allowable disbursements also permit recovery of applicable HST.

77 Those are my determinations on disbursements on the basis of the material before me. Should counsel wish to provide further legal argument with respect to the recoverability of the disbursements incurred in the individual proceedings, I will accept submissions in writing within two weeks.

78 Counsel suggested that the individual plaintiffs would have been left with personal responsibility for disbursements in those proceedings if I did not allow them to be included. I wish to make clear that class counsel should not seek to recover these expenses from the class members. It should not be the client's responsibility if counsel fails to ensure that the relevant fee agreements allow for inclusion of those disbursements.

Conclusion

79 Accordingly, class counsel's fees and disbursements are approved in the amounts and on the terms set out above.

80 Class counsel has undertaken to carry out any further work on the file without charge; this may include, for instance, assisting in the ongoing assessment and payout processes. As security against any unforeseen circumstances that might make class counsel unavailable or unable to carry out such duties, class counsel will be required to hold $150,000.00 in a trust account. This may be reduced by $50,000.00 at the conclusion of the common experience payment process, and the remaining $100,000.00 may be released upon the final report of the claims adjudicator being approved by the court. Any interest accumulating on these funds shall be to the credit of class counsel.

81 This court will retain supervisory jurisdiction to determine any disputes arising from the interpretation or enforcement of the settlement agreements.

Order accordingly.

Most Negative Treatment: Check subsequent history and related treatments.

2000 BCSC 971
British Columbia Supreme Court

Endean v. Canadian Red Cross Society

2000 CarswellBC 1298, 2000 BCSC 971, [2000] 8 W.W.R. 294, [2000] B.C.W.L.D. 872, [2000] B.C.J. No. 1254, [2000] B.C.T.C. 436, 45 C.P.C. (4th) 39, 78 B.C.L.R. (3d) 28, 97 A.C.W.S. (3d) 550

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

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

Smith J.

Heard: December 8-9, 1999, January 18-20, 2000
Judgment: June 22, 2000
Docket: Vancouver C965349, A981187

Counsel: *J.J. Camp, Q.C.*, *David P. Church*, *Sharon D. Matthews* and *Bruce W. Lemer*, for Plaintiff Anita Endean.
Marvin R.V. Storrow, Q.C., and *David E. Gruber*, for Plaintiff Christopher Forrest Mitchell.
Gordon Turriff, *D. Clifton Prowse* and *Keith Johnston*, for Defendant/Third Party Her Majesty the Queen In Right of the Province of British Columbia.
Gordon Turriff and *John R. Haig, Q.C.*, for Defendant The Attorney General of Canada and Third Party Her Majesty the Queen In Right of Canada.

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
  V.2 Representative or class proceedings under class proceedings legislation
    V.2.e Costs, fees and disbursements
      V.2.e.iii Agreements respecting fees and disbursements

Civil practice and procedure
XXIII Practice on appeal
  XXIII.1 General principles

Professions and occupations
IX Barristers and solicitors
  IX.5 Fees
    IX.5.b Agreements for fees
      IX.5.b.iv Contingency fees
        IX.5.b.iv.C Fair and reasonable requirement

2000 BCSC 971, 2000 CarswellBC 1298, [2000] 8 W.W.R. 294, [2000] B.C.W.L.D. 872...

Public law
I Crown
I.5 Practice and procedure involving Crown in right of Canada
I.5.j Miscellaneous

Public law
I Crown
I.6 Practice and procedure involving Crown in right of province
I.6.j Miscellaneous

Headnote

Barristers and solicitors --- Relationship with client — Fees — Agreements for fees — Contingency fees — Fair and reasonable requirement
Class actions were commenced on behalf of residents of Canada infected with Hepatitis C virus by Canadian blood supply — Settlement was reached between class plaintiffs and government — Counsel for plaintiffs had contingent fee contracts with representative plaintiff providing for lump-sum payment and disbursements — Counsel brought application for approval of fees and disbursements — Application granted — Contingent fee contracts were fair at time they were made and fees were reasonable — Equitable sharing of fees by recipients of settlement and causal relationship between efforts of counsel and benefits conferred on class claimants through recovery were proper considerations in assessing reasonableness of fee — Gravity and difficulty of task that counsel faced was of highest order — Scope of services rendered by counsel extended far beyond what was normally encountered — Risk of no recovery was substantial and did not diminish over course of retainer — Efforts of counsel were material cause of result achieved to extent that full credit in their fees for outcome was warranted.

Table of Authorities

Cases considered by *Smith J.*:

Campbell v. Flexwatt Corp. (February 22, 1996), Doc. Victoria 95 2895 (B.C. S.C.) — referred to

Commonwealth Investors Syndicate Ltd. v. Laxton (1990), 50 B.C.L.R. (2d) 186, 74 D.L.R. (4th) 260, [1991] 1 W.W.R. 315 (B.C. C.A.) — applied

Commonwealth Investors Syndicate Ltd. v. Laxton (1994), 94 B.C.L.R. (2d) 177, 117 D.L.R. (4th) 382, 48 B.C.A.C. 206, 78 W.A.C. 206 (B.C. C.A.) — applied

Commonwealth Investors Syndicate Ltd. v. Laxton (1995), 120 D.L.R. (4th) vii (S.C.C.) — referred to

Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998), 160 D.L.R. (4th) 186, 40 O.R. (3d) 83, 21 C.P.C. (4th) 272 (Ont. Gen. Div.) — considered

Doyer v. Dow Corning Corp. (September 1, 1999), Doc. Montreal 500-06-000013-934 (C.S. Que.) — considered

Endean v. Canadian Red Cross Society, 148 D.L.R. (4th) 158, 11 C.P.C. (4th) 368, 37 C.C.L.T. (2d) 242, 36 B.C.L.R. (3d) 350, [1997] 10 W.W.R. 752 (B.C. S.C.) — referred to

Endean v. Canadian Red Cross Society, 157 D.L.R. (4th) 465, 106 B.C.A.C. 73, 172 W.A.C. 73, [1998] 9 W.W.R. 136, 48 B.C.L.R. (3d) 90, 42 C.C.L.T. (2d) 222 (B.C. C.A.) — referred to

Endean v. Canadian Red Cross Society (1998), 235 N.R. 400 (note), 120 B.C.A.C. 158 (note), 196 W.A.C. 158 (note) (S.C.C.) — referred to

Endean v. Canadian Red Cross Society (1999), 68 B.C.L.R. (3d) 350, [2000] 1 W.W.R. 688, 36 C.P.C. (4th) 362 (B.C. S.C.) — referred to

Fischer v. Delgratia Mining Corp. (December 7, 1999), Doc. Vancouver C974521 (B.C. S.C.) — considered

Harrington v. Dow Corning Corp. (1999), 29 C.P.C. (4th) 14, 64 B.C.L.R. (3d) 332 (B.C. S.C.) — applied

Harrington (Guardian ad litem of) v. Royal Inland Hospital (1995), 14 B.C.L.R. (3d) 201, 131 D.L.R. (4th) 15, 45 C.P.C. (3d) 105, *(*sub nom. *MacLeod v. Harrington)* 69 B.C.A.C. 1, *(*sub nom. *MacLeod v. Harrington)* 113 W.A.C. 1 (B.C. C.A.) — distinguished

Honhon c. Canada (Procureur général) (21 septembre 1999), no C.S. Montréal 500-06-000016-960 (C.S. Que.) — referred to

Lindy Bros. Builders Inc. of Phila v. American Radiator & Standard Sanitary Corp. (1973), 487 F.2d 161 (U.S. 3rd Cir. Pa.) — considered

Nantais v. Telectronics Proprietary (Canada) Ltd. (1996), 28 O.R. (3d) 523, *(*sub nom. *Nantais v. Telectronics Propriety (Canada) Ltd.)* 134 D.L.R. (4th) 470, 7 C.P.C. (4th) 189 (Ont. Gen. Div.) — considered

Parsons v. Canadian Red Cross Society (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.) — referred to

Pelletier v. Baxter Health Care Co. (July 9, 1999), Doc. Montreal 500-06000005-955 (Ont. S.C.) — considered

Prudential Ins. Co. of America Sales Practices Litigation, Re (1998), 148 F.3d 283, 41 Fed. R. Serv. 3d 596 (U.S. 3rd Cir. N.J.) — applied

Richardson (Guardian ad litem of) v. Low, 23 B.C.L.R. (3d) 268, [1996] 10 W.W.R. 523 (B.C. S.C.) — considered

Sawatzky v. Société Chirurgicale Instrumentarium Inc. (1999), 71 B.C.L.R. (3d) 51, 37 C.P.C. (4th) 163 (B.C. S.C.) — considered

Sutherland v. Canadian Red Cross Society (1994), 21 C.P.C. (3d) 137, 112 D.L.R. (4th) 504, 17 O.R. (3d) 645 (Ont. Gen. Div.) — referred to

Swedish Hosp. Corp. v. Shalala (1993), 1 F.3d 1261, 62 U.S.L.W. 2101 (U.S. D.C. Cir. Ct.) — considered

Yule v. Saskatoon (City) (1955), 17 W.W.R. (N.S.) 296, 1 D.L.R. (2d) 540 (Sask. C.A.) — considered

Statutes considered:

Barristers and Solicitors Act, R.S.B.C. 1979, c. 26
s. 99 — considered

Class Proceedings Act, S.B.C. 1995, c. 21
Generally — referred to

Class Proceedings Act, R.S.B.C. 1996, c. 50
Generally — considered

s. 38 — considered

s. 38(1) — considered

s. 38(2) — considered

s. 38(7) [rep. & sub. 1998, c. 9, s. 96] — considered

Class Proceedings Act, 1992, S.O. 1992, c. 6
s. 33(1) — considered

s. 33(3) “multiplier” — considered

s. 33(3)-33(8) — considered

s. 33(4)-33(8) — considered

Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Infants Act, R.S.B.C. 1996, c. 223
Generally — considered

Legal Profession Act, S.B.C. 1998, c. 9
s. 66 — considered

s. 66(2) — considered

s. 68(2) — considered

s. 68(6) — considered

APPLICATION by counsel for plaintiffs in class actions for approval of fees and disbursements.

***Smith J.*:**

1 This application raises the question of the proper approach to the compensating of plaintiffs’ counsel in class actions brought in British Columbia.

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 (B.C. S.C.), rev’d in part 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 (B.C. C.A.), leave to appeal granted(1998), 235 N.R. 400 (note) (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 (B.C. S.C.), the decision of Winkler J. in *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.), and the decision of Morneau J. in *Honhon c. Canada (Procureur général)* (21 septembre 1999), no C.S. Montréal 500-06-000016-960 (C.S. Que.).

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.

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.

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).

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.

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."

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 (Ont. Gen. Div.) and *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 (Ont. 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 (U.S. D.C. Cir. Ct., 1993). In that case, the Court observed, at pp. 1265-66, that the percentage-of-the-fund method of calculating fees was the 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].

15 The Court recounted that, in *Lindy Bros. Builders Inc. of Phila v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (U.S. 3rd Cir. Pa., 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 *Prudential Ins. Co. of America Sales Practices Litigation, Re*, 148 F.3d 283 (U.S. 3rd Cir. N.J., 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....

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-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.

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 (B.C. 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*.

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 × reasonable hourly rates × (earnings equivalent multiplier × 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 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.

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.

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 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.

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 (B.C. 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 No. 1* case, reported as *Commonwealth Investors Syndicate Ltd. v. Laxton* (1994), 94 B.C.L.R. (2d) 177 (B.C. C.A.), app. for leave to appeal dis'd, *Commonwealth Investors Syndicate Ltd. v. Laxton* (1995), 120 D.L.R. (4th) vii (S.C.C.), 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 (City)* (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.

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 approval of class counsel fees in British Columbia. In *Harrington v. Dow Corning Corp.* (1999), 64 B.C.L.R. (3d) 332 (B.C. 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.* (1999), 71 B.C.L.R. (3d) 51 (B.C. S.C.) at para. 8 and by Williamson J. in *Fischer v. Delgratia Mining Corp.* (December 7, 1999), Doc. 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 *Prudential Ins. Co. of America Sales Practices Litigation, Re*, *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 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.

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 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.

(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, 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 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.

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.

(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.

(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.

(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.

(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.

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 described this enterprise during his submission as "bet-your-firm-litigation."

(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 *Prudential Ins. Co. of America Sales Practices Litigation, Re*, *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.

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 (Ont. 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 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 to give them less than full credit for the result in the assessment of the reasonableness of their proposed fees.

(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 (B.C. 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 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.* (February 22, 1996), Doc. Victoria 95 2895 (B.C. S.C.), and *Fischer v. Delgratia Mining Corp.*, *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 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.

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.* (September 1, 1999), Doc. Montreal 500-06-000013-934 (C.S. Que.) a percentage of 20% was approved yielding a fee of $10,400,000. In *Pelletier v. Baxter Health Care Co.* (July 9, 1999), Doc. Montreal 500-06000005-55 (Ont. 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 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.

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.

(l) 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.

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 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 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 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 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 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 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 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.

Application granted.

Most Negative Treatment: Check subsequent history and related treatments.

2009 CarswellOnt 4962
Ontario Superior Court of Justice

Farkas v. Sunnybrook & Women's College Health Sciences Centre

2009 CarswellOnt 4962, [2009] O.J. No. 3533, 179 A.C.W.S. (3d) 764, 82 C.P.C. (6th) 222

GEORGE FARKAS (Plaintiff) and SUNNYBROOK & WOMEN'S COLLEGE HEALTH SCIENCES CENTRE (Defendant)

Perell J.

Heard: August 24, 2009
Judgment: August 25, 2009
Docket: 03-CV-259655CP

Counsel: R. Douglas Elliott, Alexandra Carr for Plaintiff
Barry Glaspell, Tanya Goldberg for Defendant
James H. Turner for himself

Subject: Civil Practice and Procedure; Public

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.d Orders, awards and related procedures
V.2.d.iii Termination of proceedings

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.iv Court approval of agreement for payment of fees and disbursements

Headnote

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Orders, awards and related procedures — Termination of proceedings
Hospital discovered disinfecting procedure for rectally-inserted device had been substandard for several years — About 913 patients were notified of very small risk of viral infection — Only patient JT was found to have viral infection that might have been contracted from device — Type of virus was unknown and incurable and JT was unable to work due to pain — Patient GF brought action against hospital for damages for negligence — Action was certified as class proceeding — About 165 patients opted out of class proceeding though none of them brought separate actions — Parties reached settlement consisting of, inter alia, payment of $739,000 to class members, $355,000 to class counsel, and $5,000 to GF as honorarium — GF brought motion for order approving settlement — Motion granted — Settlement was fair, reasonable, and in best interests of class — Settlement was reached by experienced counsel after vigorously contested proceedings — Both sides confronted reasonably strong cases and difficult legal question about scope of recovery for psychological harm — Settlement appeared to satisfy policy imperatives of Class Proceedings Act, 1992 of access to justice, judicial economy, and behaviour

modification — Design of settlement was creative and socially responsible — Only JT objected to settlement, and only insofar as it applied to his circumstances — Settlement was fair as against JT even if unknown virus was assumed to have been contracted from device — JT could have opted out and he could still seek extension of time to opt out.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Court approval of agreement for payment of fees and disbursements
Hospital discovered disinfecting procedure for rectally-inserted device had been substandard for several years — About 913 patients were notified of very small risk of viral infection — Only patient JT was found to have viral infection that might have been contracted from device — Type of virus was unknown and incurable and JT was unable to work due to pain — Patient GF brought action against hospital for damages for negligence — Action was certified as class proceeding — About 165 patients opted out of class proceeding though none of them brought separate actions — Parties reached settlement consisting of, inter alia, payment of $739,000 to class members, $355,000 to class counsel, and $5,000 to GF as honorarium — GF brought motion for order approving settlement — Motion granted — Counsel fee in this case was earned and should be approved — Legal work performed by class counsel had been necessary and it was performed competently and professionally — Fee of $360,000 less honorarium was substantially below amount based on hours of work class counsel expended — Class counsel's exposure to risk of no recovery under contingency fee agreement was substantial given uncertainty of law and tenacity of hospital's defence — Representative plaintiff had carried out his responsibilities in diligent and responsible way and it was appropriate that he receive suggested honorarium.

Table of Authorities

Cases considered by *Perell J.*:

Baxter v. Canada (Attorney General) (2006), 83 O.R. (3d) 481, 40 C.P.C. (6th) 129, 2006 CarswellOnt 7879 (Ont. S.C.J.) — referred to

Dabbs v. Sun Life Assurance Co. of Canada (1998), 1998 CarswellOnt 5823 (Ont. Gen. Div.) — referred to

Dabbs v. Sun Life Assurance Co. of Canada (1998), 40 O.R. (3d) 429, 22 C.P.C. (4th) 381, 5 C.C.L.I. (3d) 18, [1998] I.L.R. I-3575, 1998 CarswellOnt 2758 (Ont. Gen. Div.) — referred to

Dabbs v. Sun Life Assurance Co. of Canada (1998), 165 D.L.R. (4th) 482, 113 O.A.C. 307, 7 C.C.L.I. (3d) 38, 27 C.P.C. (4th) 243, 1998 CarswellOnt 3539, [1999] I.L.R. I-3629, 41 O.R. (3d) 97 (Ont. C.A.) — referred to

Dabbs v. Sun Life Assurance Co. of Canada (1998), 235 N.R. 390 (note), 118 O.A.C. 399 (note), 41 O.R. (3d) 97n (S.C.C.) — referred to

Endean v. Canadian Red Cross Society (2000), 45 C.P.C. (4th) 39, [2000] 8 W.W.R. 294, 78 B.C.L.R. (3d) 28, 2000 BCSC 971, 2000 CarswellBC 1298 (B.C. S.C.) — referred to

Ford v. F. Hoffmann-La Roche Ltd. (2005), 12 C.P.C. (6th) 226, 2005 CarswellOnt 1094 (Ont. S.C.J.) — referred to

Ford v. F. Hoffmann-La Roche Ltd. (2005), 74 O.R. (3d) 758, 12 C.P.C. (6th) 252, 2005 CarswellOnt 1095 (Ont. S.C.J.) — referred to

Frohlinger v. Nortel Networks Corp. (2007), 2007 CarswellOnt 240, 40 C.P.C. (6th) 62, 2007 C.E.B. & P.G.R. 8233 (Ont. S.C.J.) — referred to

Kelman v. Goodyear Tire & Rubber Co. (2005), 5 C.P.C. (6th) 161, 2005 CarswellOnt 154 (Ont. S.C.J.) — referred to

Lam v. Ajinomoto U.S.A. Inc. (2004), 2004 CarswellBC 1088, 2004 BCSC 651, 47 C.P.C. (5th) 122 (B.C. S.C.) — referred to

Mura v. Archer Daniels Midland Co. (2003), 18 B.C.L.R. (4th) 194, 2003 BCSC 1164, 2003 CarswellBC 1850 (B.C. S.C.) — referred to

Mustapha v. Culligan of Canada Ltd. (2008), 55 C.C.L.T. (3d) 36, 375 N.R. 81, 293 D.L.R. (4th) 29, [2008] 2 S.C.R. 114, 2008 CarswellOnt 2824, 2008 CarswellOnt 2825, 2008 SCC 27, 238 O.A.C. 130, 92 O.R. (3d) 799 (note) (S.C.C.) — considered

Parsons v. Canadian Red Cross Society (1999), 1999 CarswellOnt 2932, 40 C.P.C. (4th) 151, 103 O.T.C. 161 (Ont. S.C.J.) — referred to

Ritchie-Smith Feed, Inc. v. Rhône-Poulenc Canada Inc. (2005), 2005 BCSC 583, 2005 CarswellBC 890 (B.C. S.C. [In Chambers]) — referred to

Tesluk v. Boots Pharmaceutical PLC (2002), 2002 CarswellOnt 1266, 21 C.P.C. (5th) 196 (Ont. S.C.J.) — referred to

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

s. 29 — pursuant to

s. 29(2) — considered

Family Law Act, R.S.O. 1990, c. F.3
Generally — referred to

Solicitors Act, R.S.O. 1990, c. S.15
s. 28.1(8) [en. 2002, c. 24, Sched. A, s. 4] — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 21 — referred to

MOTION by representative plaintiff for order approving settlement of class proceeding.

***Perell J.*:**

Introduction

1 In this action, which has been certified as a class action, the Representative Plaintiff, George Farkas, makes a motion under s. 29 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 for an order approving the settlement of the class action. He also moves for an order approving Class Counsels' fee agreement.

2 The motion for approval of the settlement is supported by the Defendant Sunnybrook & Women's College Health Sciences Centre ("Sunnybrook").

3 Mr. James H. Turner, one of the class members, appeared in person at the approval hearing, and he objected to the settlement in so far as it affected him and any others similarly situated.

4 For the reasons that follow, I approve the settlement and Class Counsel's fee.

5 As I will explain, in all the circumstances the settlement is fair, reasonable, and in the best interests of the class. While I have sympathy and respect for Mr. Turner, his objection involves a personal matter outside of the class action or it raises a question of whether the time for him to opt out of the class action might be extended. In any event, his objection does not

provide a reason for not approving the settlement for the class.

Factual Background

6 I shall describe the general factual background, and then I shall describe the factual circumstances of Mr. Turner's objection.

7 In 2003, as a result of an internal audit of its infection control practices, the defendant Sunnybrook & Women's College Health Sciences Centre ("Sunnybrook") discovered that between December 3, 1999 and August 5, 2003, equipment used in its Urology Clinic to perform Trans Rectal Ultra Sound biopsies of the prostate had not been disinfected to the degree required by Health Canada and the manufacturer's guidelines.

8 The biopsy procedure administered at the Urology Clinic is a diagnostic technique to detect prostate cancer, and the procedure involves the insertion of an ultrasound wand and needle through the rectum. After each procedure, the needle is discarded, but the ultrasound wand is reused, and it must be disinfected to prevent any transmission of diseases, including HIV, Hepatitis B, and Hepatitis C.

9 Having determined that better disinfection techniques had not been used, Sunnybrook decided to change its practices for future patients and to give notice to past patients. By letter dated November 17, 2003, Sunnybrook advised approximately 861 patients that the method used to clean the biopsy equipment might have been inadequate to eliminate the transmission of viruses such as Hepatitis B and C and HIV. Patients were told that the risk of hepatitis was less than 1 in 100,000 and the risk of HIV was virtually zero. The patients were also advised that no cases of infection from transmission had been reported and they were being notified out of an abundance of caution. The patients were offered expedited and prompt blood testing.

10 A further 48 patients were later identified and given notice, bringing the total notified to 913 patients.

11 One of the patients notified was Mr. Farkas. He is now a 77-year old retired engineer who is married with an adult child. Most class members are elderly gentleman.

12 On November 28, 2003, an anonymous representative plaintiff, Dr. Doe, who was later replaced by Mr. Farkas, had issued a statement of claim in a proposed class action against Sunnybrook.

13 The action proceeded toward certification, but Sunnybrook sought leave to bring a motion to challenge Mr. Farkas' cause of action as not being reasonable. Justice Cullity directed that this issue would be dealt with as part of the certification motion.

14 The action continued to move toward a certification hearing, but by letter dated November 26, 2004, Sunnybrook informed Mr. Farkas that it no longer intended to proceed with a Rule 21 motion to challenge the cause of action and instead would consent to certification.

15 Sunnybrook's consent to certification, however, was not a consent for settlement purposes. Rather, Sunnybrook proposed to defend the class action vigorously. It was its position that Mr. Farkas had not suffered a compensable loss. It was Sunnybrook's position that in the absence of a diagnosed psychiatric injury, anxiety, stress, and worry are not compensable injuries under tort law. Further, Sunnybrook submitted that in the absence of a physical injury, a diagnosed psychiatric injury is reasonably foreseeable only if persons of reasonable robustness and fortitude would be likely to suffer the disorder. Sunnybrook denied that its notification program caused any reasonably foreseeable psychiatric injury. And, it advanced a policy argument against liability arguing that it would be contrary to public policy and would significantly increase the cost of public health to taxpayers if liability was imposed for distress caused by its notification program.

16 On February 4, 2005, Justice Cullity certified the action as a class proceeding.

17 Class Counsel is comprised of the law firms of Koskie Minsky LLP and Roy Elliott O`Connor LLP ("REO").

18 As a result of some patients exercising their right to opt-out, the class consists of 749 patients,as well as, their spouses

who advance *Family Law Act* claims. Of the 165 patients who opted out, none commenced an action against Sunnybrook.

19 Fortunately, with the possible exception of Mr. Turner, none of the class members were infected as a consequence of the prostate biopsy, and class member claims are based on the psychological distress associated with receiving the news that they might have been infected with a lethal virus and that they might have passed that virus on to their wives or partners.

20 In November 2006, the parties attended a mediation session before the Honourable George W. Adams, Q.C., which was unsuccessful.

21 In late May and early June of 2007, the parties exchanged affidavits of documents and examinations for discovery were scheduled but later postponed.

22 In or around the summer of 2008, after Sunnybrook advised that it intended to bring a motion for summary judgment, Justice Cullity directed that both the summary judgment motion and the examinations for discovery proceed on parallel tracks, and I was appointed to hear the summary judgment motion.

23 At a case conference on February 12, 2009, I scheduled the hearing of the summary judgment motion for January 2010.

24 A few months later, Sunnybrook made an offer for settlement in the all-inclusive amount of $1.2 million. Counter-offers and negotiations followed, and the parties eventually signed a settlement agreement.

25 The structure of the proposed settlement is as follows:

- Sunnybrook creates a fund of $1.2 million.

- $739,000 is allocated for patient class members and spousal class members. Each patient class member will receive at least $943.85, depending on how many make claims. Each spousal class member will receive approximately $100.

- Patient and spousal class members may donate all or 50% of their compensation to either: (1) The University of Toronto Centre for Patient Safety; or (2) to the support of prostate cancer patient care and research funded by the Sunnybrook Health Sciences Centre Foundation. If they do so, they will receive a tax receipt in the amount of the donation. (The University of Toronto Centre for Patient Safety fosters novel research and education projects aimed at improving patient safety both locally and internationally.)

- If 70% or more of the 748 patient class members submit claims on the Settlement Fund, whether to take money or to donate, the residue will be split 50:50 as between the patient and *FLA* Class Members and the University of Toronto Patient Safety Centre. If fewer than 70% of the 748 patient Class Members submit claims on the Settlement Fund, then the entire residue shall go to the University of Toronto Patient Safety Centre.

- $360,000 is allocated for counsel fees, which includes a $5,000 honourarium for Mr. Farkas. (Settlement approval, however, is not contingent on approval of the counsel fee.)

- $42,000 of the fund is payable to the Ontario Ministry of Health and Long-term Care ("OHIP") in exchange for a release of its claim for expenses to provide health services

- $30,000 of the fund is allocated for loss of income claims for class members that can prove to an arbitrator that they suffered a loss of income. If the amount of income loss claims exceed $30,000, the compensation will be paid proportionally.

- $30,000 of the fund is allocated for the costs of administration of the settlement, which sum is payable to REO LLP, a member firm of Class Counsel

- Sunnybrook will provide a single education session involving an infectious diseases expert, to class members and their spouses/partners.

• Sunnybrook will receive a release of "subject claims" in favour of Sunnybrook Hospital, and its affiliates, subsidiaries and related bodies corporate, and past, present and future officers, directors, employees, staff physicians, agents, insurers, predecessors, successors and assigns.

• "Subject Claims" means all claims or other proceedings at law, in equity or under a statute including declaratory or subrogated claims, all causes of action for damages (actual, compensatory, punitive, exemplary, or treble), losses, injuries, contribution, indemnity and other relief over, and all claims for interest, costs, disbursements, expenses, taxes including GST, penalties and lawyers' fees, known or unknown, that a Settling Person ever had, now has, or hereafter can, shall or may have to the date hereof and into the future which arise specifically from the facts pleaded in the Actions, and without limiting the generality of the foregoing, Subject Claims includes all claims made arising from the pleaded facts, or which could have been made, in the Actions.

26 Sunnybrook supports the settlement. It indicated that if the settlement is not approved that it will vigorously defend the action in light of the significant duty of care, forseeability, causation, and remoteness issues. It views the settlement as being in the overall public interest and for charitable purposes.

27 Mr. Farkas supports the settlement. Although a compromise, he finds it to be a creative resolution to the litigation because the settlement allows class members to make donations to health care charities involved in prostate cancer and other health issues.

28 Class Counsel are experienced class action and personal injury litigators. Class Counsel have acted in various class proceedings for both plaintiffs and defendants. Douglas Elliott, in particular, has unique experience and expertise in litigation relating to HIV, Hepatitis C and other blood borne illnesses. Class Counsel recommended the settlement as being reasonable, fair, and in the best interests of the class. In assessing the reasonableness of the settlement, it was Class Counsels' opinion:

• that although a strong case could be made that Sunnybrook was negligent and breached its fiduciary duties to the class, the delay and expense associated with the continued litigation including the pending summary judgment motion, any appeals, and the trial of the common issues and any appeals presented significant risks if the action proceeded

• that the primary risk was liability because Sunnybrook continues to dispute that the class suffered any compensable loss

• given that absence of authorities, that there was a risk that the range of compensation might be between $100 and $3,500 for each class member

• that the settlement had the benefits of: (a) certain recovery; (b) timely recovery; (c) the option of donating to charity; (d) the class member education session; and (e) behaviour modification to similar future defendants.

29 If the settlement is not approved and the action continues, the legal costs will be substantial. Since certification, Koskie Minsky and REO (and its predecessors) have fees of $722,942.30. It would take considerable additional time to prepare for and carry forward examinations for discovery, pre-trial motions, as well as to respond to Sunnybrook's summary judgment motion and prepare for trial, depending on the outcome of the summary judgment motion.

30 The class was notified of the proposed settlement via direct mail, e-mail, and by Class Counsel posting the court-approved notice on its website.

31 In response to the notification of the settlement approval hearing, Class Counsel received five responses from class members. Three of the responses favoured the settlement. One response is from Mr. Turner, which I will discuss below, and one response opposed Sunnybrook having to pay anything. That response stated:

I feel that this class action suit is totally unnecessary due to the result of NO infections. The fact that the hospital made a huge mistake as is reason for future concern, the fact is our health care system and hospitals can ill afford these lawsuits. However, in the event that this action is approved, I'll opt for the tax receipt, so the money can be put back into the system for badly needed research and development. I was given first class care during my procedure, and believe that

the hospital has learned from this mistake

32 As part of the notice, class members were provided with the option of completing a claim form to indicate their intention as to whether they would accept the payment of cash compensation or donate some or all of their compensation to charity.

33 Class Counsel received 383 claim forms from the patient class indicating that 297 would accept compensation in cash, 44 would donate their compensation to charity and 36 would accept part of their compensation in cash and donate part to charity.

34 Class Counsel received 289 spousal claims indicating that 222 would accept compensation in cash, 50 would donate their compensation to charity and 7 did not indicate a preference.

35 Six class members indicated that they would make loss of income claims in the amounts of $55,200, $30,000, $18,000; $800, $250, and unspecified.

Mr. Turner's Objection

36 Mr. Turner attended at the settlement approval hearing. He was self-represented and he made oral submissions. He was not sworn, and for present purposes I will simply assume the truth of what he said without making any findings of fact.

37 To put Mr. Turner's submissions in context, it is necessary to recall that the class action concerns biopsies performed at Sunnybrook's Urology Clinic between December 3, 1999 and August 5, 2003. During this period, Mr. Turner had two biopsies, which were followed by successful treatment to cure prostate cancer. It is also necessary to recall that the action was certified as a class action in February 2005 and Mr. Turner had an opportunity to opt-out, which he did not exercise.

38 In 2004, he attended the Cancer Ward, and was diagnosed as suffering from an unidentified virus in the prostrate.

39 The unidentified virus was not Hepatitis or HIV. However, it has persisted from 2004 until this day and, unfortunately, so far, the virus has proven to be incurable. Mr. Taylor has only been able to work part time and not at all for the last year due to pain and associated conditions.

40 The original source of the unidentified virus is presently unknown and whether it is related to Mr. Taylor's treatment at Sunnybrook is unknown.

41 During his oral submissions, Mr. Taylor said that he had no objection to the settlement as it applied to other class members but he objected to the settlement on the basis that his case and any similar cases should be dealt with differently in some unspecified way.

Settlement Approval

42 I turn now to the matter of the settlement approval.

43 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: *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. Gen. Div.) at para. 9; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Ont. S.C.J.) at paras. 68-73.

44 In determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (Ont. S.C.J.) at para. 10.

45 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 expenses 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, arm's 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 Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.), at 440-44, aff'd (1998), 41 O.R. (3d) 97 (Ont. C.A.), leave to appeal to S.C.C. refused Oct.22, 1998 [(1998), 41 O.R. (3d) 97n (S.C.C.)]; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Ont. S.C.J.) at paras. 71-72.; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (Ont. S.C.J.) at para. 8; *Kelman v. Goodyear Tire & Rubber Co.*, [2005] O.J. No. 175 (Ont. S.C.J.) at paras. 12-13; *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (Ont. S.C.J.) at para. 117; *Tesluk v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 (Ont. S.C.J.) at para. 10.

46 Under s. 29 (2) of the *Class Proceedings Act, 1992*, it is the court's responsibility to approve or disapprove a settlement, and given that each case is different, this is a more or less difficult responsibility depending on the circumstances of the particular case. The settlements easiest to approve are perhaps those where the court can conclude that the class's recovery from the settlement approaches the optimum recovery after a trial. The settlements easiest to disapprove are those where there is the suspicion that class counsel or the Representative Plaintiff were incompetent or were acting for their own interests and not in the best interests of the class.

47 In the case at bar, there is no evidence and no reason to suspect that in recommending the settlement, Mr. Farkas and Class Counsel were incompetent or were not acting in the best interests of the class, so this is not an easy case to reject the settlement, but given the uncertainty in the law about compensation for psychological harm, the case at bar is also not one where it is easy to approve the settlement and it is necessary to consider the various factors defined by the case law on settlement approvals.

48 The affidavit material filed on the motion for settlement canvassed most of the factors that the court must consider in determining whether to approve or disapprove a settlement, and while I have considered all this material, to my mind among the more important factors are that the settlement agreement was reached by experienced counsel after vigorously contested proceedings in which both sides confronted reasonably strong cases and a difficult legal question about the scope of recovery for psychological harm from nervous shock and about the quantum of compensable damages, if any.

49 A motion for approval of a settlement is not the place to interpret or apply the law about the recovery for psychological harm and all that can or perhaps need be said is that the Supreme Court of Canada's decision in *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114 (S.C.C.) is grounds for debate about the law on compensation for psychological harm. This decision, which was released some years after the action was commenced, perhaps, presents more problems for the success of the class members' case but both sides were confident in their cases and they have now reached a settlement without conceding the merits of their opponent's position.

50 Another important factor is that with the exception of Mr. Turner, no objections were made to the settlement. Three objectors favoured the settlement and the last objector's comments do not speak to the merits of the settlement but rather to whether a class proceeding against Sunnybrook was appropriate at all.

51 I also regard as important factors that the settlement appears to satisfy the policy imperatives of the *Class Proceedings Act, 1992* of access to justice, judicial economy, and behaviour modification, of which only the last matter requires some comment.

52 The policy of behaviour modification imparts that there is an element of social engineering in class proceedings with the exposure to liability encouraging proper conduct and discouraging misbehaviour. In my opinion, it is, however, not necessary or appropriate in the context of a settlement approval to achieve this social engineering by assuming that the defendant is liable or by making a villain of the defendant to be condemned or punished. To do so is to discourage settlements because it compels the defendant to refuse to settle in order to vindicate its reputation.

53 Therefore, I simply say that in my opinion, as a matter of behaviour modification, the payment of $1.2 million and the

design of the settlement in the case at bar is a creative and socially responsible act by Sunnybrook without any admission of liability.

54 Putting aside for the moment, Mr. Turner's objection, in my opinion, the settlement is fair, reasonable, and in the best interests of the class.

Mr. Turner's Objection

55 At the time when Mr. Turner had an opportunity to opt-out of the class action, he was not suffering from Hepatitis or from HIV, but he had been diagnosed as suffering from a viral infection of the prostate. He did not know and it remains unknown whether this infection was caused by the biopsies performed at Sunnybrook. With this state of knowledge, Mr. Turner decided not to opt out, and thus he placed his claim for compensation in with the claims of other class members who did not opt out.

56 As a class member, it would be quite proper for Mr. Turner to object that the settlement is unfair, unreasonable, or not in the best interests of the class but Mr. Turner does not do that. Rather, he objects to the settlement being applicable to his particular case and any similar cases (of which there does not appear to be any).

57 In my opinion, Mr. Turner's objection should be rejected as a reason to refuse to approve the settlement for three reasons;

- First, if Mr. Turner did not wish to be bound by the class action because his circumstances were different from class members, he ought to have opted-out. At this juncture, his recourse is not to object to the settlement but to seek an extension of time for opting-out, which may or may not be granted.

- Second, given that it is possible that the biopsies were not the cause of Mr. Turner's current infection, his claim, if any, may be outside the "subject claims" that are being settled and thus the settlement does not affect his claim.

- Third, and this is the most important reason, if it assumed that the biopsies were the cause of his infection, then the compensation he will receive under the settlement including a possible loss income claim remains fair, reasonable and in the best interests of the class of which he is a member. A settlement does not have to be perfect, and in determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in *the best interests of the class as a whole* having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (Ont. S.C.J.) at para. 10.

58 I, therefore, conclude that Mr. Turner's objection does not provide a reason to refuse to approve the settlement and therefore I approve the settlement pursuant to the *Class Proceedings Act, 1992*.

Fee Approval

59 I turn to the matter of the approval of Class Counsel's fee.

60 Factors relevant in assessing the reasonableness of the fees of any 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 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: *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (Ont. S.C.J.) at para. 67; *Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254 (B.C. S.C.); *Mura v. Archer Daniels Midland Co.*, [2003] B.C.J. No. 1751 (B.C. S.C.); *Lam v. Ajinomoto U.S.A. Inc.*, [2004] B.C.J. No. 985 (B.C. S.C.); *Ritchie-Smith Feed, Inc. v. Rhône-Poulenc Canada Inc.*, [2005] B.C.J. No. 857 (B.C. S.C. [In Chambers]).

61 Mr. Farkas signed a contingency fee retainer agreement. He approves the fee for Class Counsel. He believes that the fee is reasonable in the circumstances and suitable compensation for the efforts of Class Counsel.

62 The original retainer agreement provided that legal fees should only be paid in the event of a successful judgment or a successful settlement, calculated in one of two ways: (1) compute a base fee, using the usual hourly rate of legal professionals working on a file, and then apply a "multiplier"; or (2) 25% of class recovery after certification plus the fee portion of any party and party costs

63 A new retainer agreement was executed by REO and Mr. Farkas on March 6, 2009 to modify the agreement to reflect section 28.1(8) of the *Solicitors Act*, R.S.O. 1990, C. S.15, which requires that court approval is required if a contingency fee agreement provides that lawyers receive part of a costs award. The new current agreement does not provide for a "multiplier" approach and provides for a contingency fee of 30% of class recovery after certification but before a trial of the action.

64 Under the terms of REO's agreement with OHIP, Class Counsel is to receive 25% of OHIP's recovery.

65 The legal work performed by class counsel has been necessary, and it has been performed competently and professionally.

66 The fee of $360,000 is substantially below the amount of hours of work that Class Counsel have expended for this class proceeding.

67 Given the uncertainly of the law and the tenacity of Sunnybrook's defence, Class Counsel's exposure to the risk of no recovery under the contingency fee agreement was substantial.

68 Put simply, in my opinion, the Counsel Fee in the case at bar was earned. I conclude that the fee should be approved.

69 Finally it is proposed that Mr. Farkas receive an honourarium to be deducted from the Counsel Fee. In his affidavit for the settlement approval hearing, he stated:

> I understand that class counsel has proposed a modest honourarium for me of $5,000. I was pleasantly surprised when I learned of this and would be grateful if the court approved it. It would recognize the amount of time I have devoted to this action, especially in travelling downtown on several occasions to meet with class counsel and for the time spent in the mediation. While I was happy to be involved in this case, it did cause a certain amount of stress in my life. It would be nice to use the sum to take a small vacation with my wife, to celebrate the action coming to a conclusion.

70 Mr. Farkas has carried out his responsibilities as Representative Plaintiff in a diligent and responsible way and it is appropriate that he receive the suggested honourarium.

Conclusion

71 For the above reasons, I approve the settlement and the Class Counsel fee.

72 I have signed the order approving the counsel fee.

73 If necessary, the parties should schedule a case conference to settle the terms of the formal court order approving the settlement.

Motion granted.

Most Negative Treatment: Check subsequent history and related treatments.

1998 CarswellOnt 4045
Ontario Court of Appeal

Gagne v. Silcorp Ltd.

1998 CarswellOnt 4045, [1998] J.Q. No. 4182, [1998] O.J. No. 4182, 113 O.A.C. 299, 167 D.L.R. (4th) 325, 27 C.P.C. (4th) 114, 39 C.C.E.L. (2d) 253, 41 O.R. (3d) 417, 66 O.T.C. 400, 83 A.C.W.S. (3d) 125

Sherrie B. Gagne, Plaintiff and Silcorp Limited, Defendant

Charron, Rosenberg and Goudge JJ.A.

Heard: May 27, 1998
Judgment: October 21, 1998
Docket: CA C28348

Proceedings: reversing in part (1997), 14 C.P.C. (4th) 269 (Ont. Gen. Div.)

Counsel: *Paul S.A. Lamek, Q.C.*, for the appellant solicitors.
McGowan & Associates and Jeff Burtt, advocate.

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Professions and occupations
IX Barristers and solicitors
IX.5 Fees
IX.5.b Agreements for fees
IX.5.b.iv Contingency fees
IX.5.b.iv.G Miscellaneous

Headnote

Barristers and solicitors --- Relationship with client — Fees — Agreements for fees — Contingency fees — General
Plaintiffs brought wrongful dismissal class action proceeding against corporation after they were terminated during merger of convenience store chains — Consortium of solicitors represented plaintiffs on contingency basis — Agreement between consortium and plaintiffs stated that consortium could seek court approval for a multiplier to be applied to base fee — Action was settled successfully shortly after being commenced — Consortium brought motion for approval of agreement for base fee and multiplier for solicitor's fees, and pro rata division of fees among class members — Motions judge held that multiplier not appropriate as consortium did not face material risk in accepting retainer — There was no serious issue as to liability in action — Base fee and pro rata division of fees among class members approved — Appeal by consortium allowed in part — Section 33(7)(b) of Class Proceedings Act provided judge with discretion whether to apply multiplier or not — Motions judge erred in exercise of his discretion by failing to give weight to relevant risk and success considerations — Risk that class action would not be certified was material, and ought to have been given weight — Motions judge failed to recognize that consortium achieved immediate, partial success in extracting commitment from corporation to comply with Employment Standards Act — Motions judge gave little consideration to fact that ultimate settlement was achieved quickly — Consideration of success of action should also have recognized that settlement provided creative and effective process resulting in speedy resolution of individual claims — Motions judge was correct in not considering views of class members as to whether multiplier should be applied — Appropriate multiplier in circumstances was two — Class Proceedings Act, 1992, S.O. 1992, c. 6 ss. 7(b), 33(1), (4), and (7)(b) — Employment Standards Act, R.S.O. 1990, c. E.14.

Table of Authorities

Cases considered by *Goudge J.A.*:

Dabbs v. Sun Life Assurance Co. of Canada (September 14, 1998), Doc. CA C30326, M22971, M23028 (Ont. C.A.) — considered

Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 2 W.W.R. 193, [1992] 1 S.C.R. 3, 3 Admin. L.R. (2d) 1, 7 C.E.L.R. (N.S.) 1, 84 Alta. L.R. (2d) 129, 88 D.L.R. (4th) 1, 132 N.R. 321, 48 F.T.R. 160 (S.C.C.) — applied

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

s. 25 — referred to

s. 29 — referred to

s. 33 — considered

s. 33(2) — considered

s. 33(3) "base fee" — considered

s. 33(7)(b) — considered

s. 33(9) — considered

Employment Standards Act, R.S.O. 1990, c. E.14
Generally — referred to

APPEAL from judgment reported at (1997), 14 C.P.C. (4th) 269, 35 O.R. (3d) 501, 42 O.T.C. 62 (Ont. Gen. Div.), denying consortium's request to increase base fee by multiple of three.

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 × 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 × 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 Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (S.C.C.) 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 Co. of Canada*, a judgment of the Ontario Court of Appeal, released (September 14, 1998), Doc. CA C30326, M22971, M23028 (Ont. C.A.) 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.

Appeal allowed in part.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Dominguez v. Northland Properties Corp. | 2013 BCSC 468, 2013 CarswellBC 707, 227 A.C.W.S. (3d) 24, [2013] B.C.W.L.D. 3583 | (B.C. S.C., Mar 19, 2013)

2012 ONSC 2602
Ontario Superior Court of Justice

Helm v. Toronto Hydro-Electric System Ltd.

2012 CarswellOnt 5761, 2012 ONSC 2602, [2012] O.J. No. 2081, 214 A.C.W.S. (3d) 352, 40 C.P.C. (7th) 310

Christian Helm, Plaintiff/Moving Party Toronto Hydro-Electric System Limited, Defendant/Respondent

G.R. Strathy J.

Heard: April 30, 2012
Judgment: May 8, 2012
Docket: CV-10-415780

Counsel: Charles Wright, Daniel Bach, for Plaintiff / Moving Party
Kelly Friedman, for Defendant / Respondent

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency; Public

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.d Orders, awards and related procedures
V.2.d.iii Termination of proceedings

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.iv Court approval of agreement for payment of fees and disbursements

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.vi Miscellaneous

Headnote

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Orders, awards and related procedures — Termination of proceedings
Settlement — Plaintiff in proposed class action alleged that defendant breached s. 4 of Interest Act by failing to inform its customers of effective annual rate of interest it charged on overdue accounts — Motion brought for approval of settlement

reached by parties, approval of fees of class counsel, and approval of "honorarium" of $2,500 to representative plaintiff — Motion granted in part — Settlement approved — Significant compromise was warranted, on both sides, and resulting settlement was well within zone of reasonable outcomes — Settlement was result of good faith, arm's length negotiations in which parties were attempting to reach resolution that was fair to class members, workable and reasonable — Settlement came with recommendation of experienced and highly reputable counsel, on both sides, and they had fulfilled their duties to their clients and to court in negotiation of settlement and resolution of this litigation — It was of significance that there had been no objections to settlement — Every settlement involved compromise, and this settlement was no exception — Some compromises had to be made as practical matter to ensure that costs of administration of settlement did not become disproportionate to amount actually paid to class members — Settlement, which included not only direct payments to refund-eligible class members, but also forgiveness of arrears and cy pres distribution, was fair and reasonable.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Court approval of agreement for payment of fees and disbursements
Plaintiff in proposed class action alleged that defendant breached s. 4 of Interest Act by failing to inform its customers of effective annual rate of interest it charged on overdue accounts — Motion brought for approval of settlement reached by parties, approval of fees of class counsel, and approval of "honorarium" of $2,500 to representative plaintiff — Motion granted in part — Fee agreement complied with requirements of Class Proceedings Act, 1992 and was approved, and counsel fee was approved — Amount of settlement was substantial — Leaving aside monetary benefit to refund eligible class members, there were direct benefits to all class members through cancellation of excess interest charges, there was substantial cy pres payment and actual behaviour modification had been achieved — Proceeding was funded entirely by class counsel, and there was significant risk to class counsel in taking on this case — Proceeding was conducted in efficient, imaginative and cost-effective manner — Proposed fee represented significant premium over what fee would be based on time multiplied by standard hourly rates — Plaintiff's counsel were serious, responsible, committed and effective class action counsel, and they were entrepreneurial — They would likely take on some cases they would lose, with significant financial consequences, and they would take on other cases where they would not be paid for years — They should be generously compensated when they produced excellent and timely results, as they had done here.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — General principles
Honorarium for representative plaintiff — Plaintiff in proposed class action alleged that defendant breached s. 4 of Interest Act by failing to inform its customers of effective annual rate of interest it charged on overdue accounts — Motion brought for approval of settlement reached by parties, approval of fees of class counsel, and approval of "honorarium" of $2,500 to representative plaintiff — Motion granted in part on other grounds — Honorarium not awarded — Court had jurisdiction to award honorarium — Court had discussed issue of compensation or honoraria for representative plaintiffs at some length in certain other case law and had noted that compensation should be reserved to those cases where, considering all circumstances, contribution of plaintiff had been exceptional — This was not exceptional case — Decision not to award honorarium should not be perceived by representative plaintiff as lack of appreciation for what he had accomplished in commencing this action and in bringing it to successful conclusion.

Table of Authorities

Cases considered by *G.R. Strathy J.*:

Dabbs v. Sun Life Assurance Co. of Canada (1998), 1998 CarswellOnt 5823 (Ont. Gen. Div.) — followed

Farkas v. Sunnybrook & Women's College Health Sciences Centre (2009), 82 C.P.C. (6th) 222, 2009 CarswellOnt 4962 (Ont. S.C.J.) — referred to

Helm v. Toronto Hydro-Electric System Ltd. (2012), 2012 CarswellOnt 5761, 2012 ONSC 2602 (Ont. S.C.J.) — considered

Parsons v. Canadian Red Cross Society (1999), 1999 CarswellOnt 2932, 40 C.P.C. (4th) 151, 103 O.T.C. 161 (Ont. S.C.J.) — referred to

Pysznyj v. Orsu Metals Corp. (2010), 2010 ONSC 1151 (Ont. S.C.J.) — referred to

Robinson v. Rochester Financial Ltd. (2012), 2012 ONSC 911, 2012 CarswellOnt 1368 (Ont. S.C.J.) — distinguished

Smith Estate v. National Money Mart Co. (2011), 2011 CarswellOnt 1920, 331 D.L.R. (4th) 208, 3 C.P.C. (7th) 223, 276 O.A.C. 237, 106 O.R. (3d) 37, 2011 ONCA 233 (Ont. C.A.) — referred to

Wilson v. Servier Canada Inc. (2005), 252 D.L.R. (4th) 742, 2005 CarswellOnt 1020, 9 C.P.C. (6th) 83 (Ont. S.C.J.) — referred to

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

Interest Act, R.S.C. 1985, c. I-15
Generally — referred to

s. 4 — considered

MOTION for approval of settlement reached by parties, approval of fees of class counsel, and approval of "honorarium" of $2,500 to representative plaintiff.

***G.R. Strathy J.*:**

1 This is a motion for: (a) approval of a settlement reached by the parties; (b) approval of the fees of Class Counsel; and (c) approval of an "honorarium" of $2,500.00 to the representative plaintiff.

2 The plaintiff in this proposed class action alleges that Toronto Hydro-Electric System Limited ("Toronto Hydro") breached s. 4 of the *Interest Act*, R.S.C. 1985, c. I-15, by failing to inform its customers of the effective annual rate of interest it charged on overdue accounts.

3 Section 4 of the *Interest Act* states that where a written or printed contract provides for interest to be paid at a rate or percentage for any period less than a year, and does not express the equivalent annual rate, the collection of interest is limited to 5% per year. The rate actually charged by Toronto Hydro was 19.56% per annum. This rate was set out in its tariff, which had been approved by the Ontario Energy Board ("OEB"). However, Toronto Hydro's invoices to its customers referred only to a 1.5% monthly late payment interest charge and made no reference to the effective annual rate of interest.

4 The plaintiff claims, among other things, that Toronto Hydro's invoice did not comply with the *Interest Act*. He alleges that he and other Class Members have been charged more than the limit permitted by law and that Toronto Hydro has thereby been unjustly enriched.

5 On June 16, 2011, I heard a summary judgment motion brought by Toronto Hydro and a cross motion for judgment brought by the plaintiff. While my decision was under reserve, I was advised that counsel were pursuing settlement discussions. I agreed that my decision would not be released if the parties were able to reach a settlement. Settlement discussions continued, with counsel keeping the court advised of their progress, in the hope of reaching a settlement that would form a proper framework for the resolution of the litigation.

(a) Settlement Approval

6 The parties have executed a Settlement Agreement that, subject to the approval of the court, resolves the claims of the Class Members for the total sum of CAD$5,835,882.00.

7 On February 8, 2012, there was a preliminary motion to certify this action as a class proceeding for the purposes of

settlement and to establish a procedure for the dissemination of a notice of this settlement hearing and an opt-out form. The opt-out period expired on April 16, 2012 and there have been no opt outs. Nor have there been any objections to the proposed settlement.

8 The basic terms of the settlement are as follows:

(a) The Defendant will consent to certification of a class proceeding for the purposes of settlement. The Class will consist of:

> All persons that were customers (retail, commercial or otherwise) of the Defendant, who were billed at some time within the period from July 1, 2000 through to and including December 8, 2010, and who paid interest on an unpaid account billed during that period.

(b) The Common Issue will be:

> Did the Defendant breach the *Interest Act* by charging interest on unpaid customer accounts at a monthly rate which equated to more than 5% per annum without disclosing the equivalent annual rate on its bills dated between July 1, 2000 and December 8, 2010, inclusive?

(c) The Defendant will provide CAD$5,835,882.00 in compensation to the Class, to be distributed as follows:

> (i) The Defendant will make repayment, less applicable court-approved Class Counsel Fees, by mailed cheque or account credit, of interest paid in excess of 5% per annum (”Excess Interest”) to Class Members who, between December 7, 2008 and June 29, 2011, paid an amount equal to or greater than $30.00 in Excess Interest in respect of a bill issued on or before December 8, 2010 (”Refund Eligible Class Members”).
>
> (ii) The Defendant will pay any residual funds, less Class Counsel Fees, to *cy près* recipient charities in proportions to be approved by the court.

(d) The Defendant will take all reasonable steps, including instructing third party collection agencies, within sixty (60) business days of the Approval Order to cancel all Excess Interest currently owed by Class Members that was assessed prior to December 9, 2010. The amount of accounts receivable to be cancelled and the benefit to the class in this regard is approximately $184,224.00. To the extent that any currently owed Excess Interest is collected before the *cy près* payment is made, and to the extent that such funds can reasonably be identified as Excess Interest, they will be paid to the *cy près* recipient charities in the same manner as the residual funds addressed above.

(e) The Defendant will achieve a final resolution of this matter and will not be required to admit liability for the allegations advanced in the Plaintiff’s Claim. The action will be settled and dismissed on the merits with prejudice and without costs.

9 The Refund-Eligible group is limited to Class Members who, between December 7, 2008 and June 29, 2011, paid an amount equal to or greater than $30.00 in Excess Interest. This was done for two primary reasons.

10 First, Customer data for the portion of the Class Period prior to December 7, 2008 and after April 30, 2002, is stored on a different database than the one currently used by Toronto Hydro. It would have been disproportionately expensive and time-consuming to access this data. As well, Customer data for the beginning of the Class Period until April 30, 2002 is archived. Creating a structure to access this data and to convert it to manageable form would have been expensive and time-consuming. Moreover, logistical difficulties would have been created due to difficulties in locating former Customers of the defendant who are no longer Customers.

11 Second, the estimated cost of distributing the Settlement Amount to Refund-Eligible Class Members is approximately $4.00 per Class Member. Nearly 60% of the Class Members paid less than $5.00 in Excess Interest. It would have been

manifestly uneconomical to spend $4.00 to put $5.00 in the hands of a Class Member. By restricting refund entitlements to Class Members who paid at least $30.00 in Excess Interest, chronic late payers are compensated. Such chronic late payers have suffered the most from the alleged wrongdoing. It would further allow these individuals to benefit without compromising the parties' ability to achieve a meaningful settlement due to costs concerns.

12 The *Cy Près* recipients are listed below, and were selected for the following reasons:

(a) United Way Centraide Canada, was selected because of its dedication to community-building and poverty-relief initiatives, as well as its ability to distribute *cy près* funds to numerous meritorious projects;

(b) Second Harvest, was selected because of its work toward supplying fresh, nutritious food to low income communities in the Toronto region; and

(c) Red Door Family Shelter, was selected because of its efforts in assisting Toronto families in crisis by providing them with transitional housing facilities.

13 The plaintiff proposes, and I agree, that the *cy près* distribution ought to be split among the three recipients equally.

14 In order to approve a settlement, the court must be satisfied that it is fair, reasonable and in the best interests of the class. The leading authority is *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. Gen. Div.), which identifies the following factors that a court should take into account in approving a settlement;

(a) its likelihood of success;

(b) the amount and nature of discovery, evidence or investigation required to prosecute the action;

(c) its terms and conditions;

(d) the recommendation and experience of counsel;

(e) the future expense, and likely duration of litigation and risk;

(f) the recommendation of neutral parties, if any;

(g) the number of objectors and nature of objections;

(h) the presence of good faith, arms-length bargaining and the absence of collusion;

(i) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation; and

(j) the degree and nature of communications by counsel and the representative plaintiff with Class Members during the litigation.

15 It is well understood, however, that these factors are only guides and that their relative importance will vary from case to case. In any particular case, some factors will have greater significance than others and weight should be attributed accordingly: *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.).

16 As a result of having heard the summary judgment motion on the merits, I am in a rather unique position. A judge on a settlement approval motion rarely has the benefit of such an intensive, merits-based analysis on agreed facts. Having had this benefit, I am able to form my own independent view of whether the settlement is fair, reasonable and in the best interests of the class.

17 In this case, having had that perspective, I am satisfied that significant compromise was warranted, on both sides, and that the resulting settlement is well within the zone of reasonable outcomes. I am also satisfied, from my own observations,

that the settlement was the result of good faith, arm's length negotiations in which the parties were attempting to reach a resolution that was fair to Class Members, workable and reasonable. The settlement comes with the recommendation of experienced and highly reputable counsel, on both sides and I am fully satisfied that they have fulfilled their duties to their clients and to the court in the negotiation of the settlement and resolution of this litigation. It is of significance, as well, that there have been no objections to the settlement.

18 Every settlement involves compromise. This settlement is no exception. Some compromises had to be made as a practical matter to ensure that the costs of administration of the settlement did not become disproportionate to the amount actually paid to Class Members. I am satisfied, however, that the settlement, which includes not only direct payments to the Refund-Eligible Class Members, but also the forgiveness of arrears and the *cy près* distribution, is fair and reasonable.

19 For these reasons, the settlement is approved.

(b) Class Counsel Fee Approval

20 Class Counsel also move for an order: (a) approving the retainer agreement entered into with Christian Helm; and (b) approving Siskinds LLP's legal fees ("Class Counsel Fees") in the amount of $1,458,970.50, plus applicable taxes.

21 Class Counsel seeks a fee of 25% of the recovery, namely $1,458,970.50 plus HST in the amount of $189,666.16. Under the terms of the settlement, the defendant is responsible for paying the first $10,000.00 in "reasonable" disbursements. The parties have agreed to a payment of $7,678.29 (inclusive of taxes, as applicable). Class Counsel is writing off the balance of the disbursements as well as all disbursements incurred after April 19, 2012. I should also note that under the terms of the settlement, the defendant agreed to pay the costs of giving notice of the settlement approval motion.

22 Mr. Helm entered into a retainer agreement that provided that Class Counsel's compensation should be 25% of the recovery obtained in the action, plus disbursements and taxes. This is a reasonably standard fee agreement in class proceedings litigation. Mr. Helm supports Class Counsel's legal fee request. The fee agreement complies with the requirements of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (*C.P.A.*) and it is approved.

23 Since the commencement of the action, Class Counsel have financed disbursements totalling $10,741.37 (including taxes as applicable and as of April 19, 2012). In addition, as of April 19, 2012, Class Counsel had docketed time of $203,669.50.

24 There are some particular aspects of this case that should be taken into account in assessing whether the fee is fair and reasonable:

- the amount of the settlement is substantial, particularly having regard to the legal difficulties associated with recovery of the claim;
- leaving aside the monetary benefit to Refund Eligible Class Members, there are direct benefits to all Class Members through the cancellation of Excess Interest charges, there is a substantial *cy près* payment and actual behaviour modification has been achieved;
- the proceeding was funded entirely by Class Counsel and no application to the Class Proceedings Fund was required;
- there was significant risk to Class Counsel in taking on this case, in which liability was hotly contested and the outcome difficult to predict; and
- the proceeding was conducted in an efficient, imaginative and cost-effective manner.

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.

(c) Honorarium for Representative Plaintiff

28 Counsel requests an honorarium of $2,500.00 for Mr. Helm, to be paid out of the settlement fund. They note that Mr. Helm carried out his responsibilities in a diligent and proper manner, providing assistance in the litigation leading to the settlement. They say that were it not for Mr. Helm's willingness to represent the class despite his small personal stake in the action, there would have been no settlement. Mr. Helm's efforts resulted in nearly immediate behaviour modification: the defendant brought its invoices into compliance with law shortly after the filing of the claim. Counsel says that Mr. Helm's accomplishments in this action far exceed his individual interest, which is only about $70.00, and that some modest payment is in order to recognize his accomplishment and to provide some indemnity for the time and effort he has put into the case.

29 I accept that I have jurisdiction to award an honorarium: *Wilson v. Servier Canada Inc.*, 2005 CarswellOnt 1020 (Ont. S.C.J.) at para 95; *Pysznyj v. Orsu Metals Corp.*, [2010] O.J. No. 1994 (Ont. S.C.J.) at para 31; *Farkas v. Sunnybrook & Women's College Health Sciences Centre*, 2009 CarswellOnt 4962 (Ont. S.C.J.) at paras 69-70; *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233 (Ont. C.A.) at paras 133-136.

30 I discussed the issue of compensation or honoraria for representative plaintiffs at some length in my settlement approval decision in *Robinson v. Rochester Financial Ltd.*, [2012] O.J. No. 534, 2012 ONSC 911 (Ont. S.C.J.). I noted in that case, at para. 43, that "compensation should be reserved to those cases, where, considering all the circumstances, the contribution of the plaintiff has been exceptional". In my view, this is not an exceptional case.

31 My decision not to award an honorarium should not be perceived by Mr. Helm as a lack of appreciation for what he has accomplished in commencing this action and in bringing it to a successful conclusion. Mr. Helm can take some satisfaction from the fact that this case, his case, *Helm v. Toronto Hydro-Electric System Ltd.* [2012 CarswellOnt 5761 (Ont. S.C.J.)], has accomplished the goals of the *Class Proceedings Act, 1992* — it has brought access to justice to thousands of Toronto Hydro customers; it has actually achieved behaviour modification by causing Toronto Hydro to change its invoices; and it has resulted in judicial economy. The settlement puts real money into the hands of many Toronto Hydro customers and the *cy près* award will bring assistance to others in need. Mr. Helm can be justly proud of these accomplishments and he should be commended for them.

32 In closing, I express the court's appreciation to counsel on both sides for the efficient manner in which this action has proceeded and has been brought to a satisfactory conclusion.

Motion granted in part.

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2013 ONSC 1528
Ontario Superior Court of Justice

Johnston v. Sheila Morrison Schools

2013 CarswellOnt 2807, 2013 ONSC 1528, [2013] O.J. No. 1126, 226 A.C.W.S. (3d) 655, 37 C.P.C. (7th) 417

Greg Johnston and Tim Williamson, Plaintiffs and The Sheila Morrison Schools and Scott Morrison, Defendants

Perell J.

Heard: March 12, 2013
Judgment: March 12, 2013
Docket: 09-CV-379550CP

Counsel: Celeste Poltak, Jonathan Bida, for Plaintiffs
Elizabeth Bowker, for Defendants

Subject: Civil Practice and Procedure; Torts

Related Abridgment Classifications

Civil practice and procedure
XVI Disposition without trial
XVI.7 Settlement
XVI.7.e Miscellaneous

Headnote

Civil practice and procedure --- Disposition without trial — Settlement — Miscellaneous
School was co-educational residential day school for children and youths who experienced learning disabilities and behaviour problems — Representative plaintiffs students alleged students were physically, sexually, emotionally, and psychologically abused at school — Representative plaintiffs commenced class action against school and headmaster for damages for negligence and breach of fiduciary duties — Parties agreed to settle matter for $4 million, with class counsel to receive $1 million exclusive of disbursements and taxes and representative plaintiffs to receive $5,000 each as honorarium — Net amount available for payment to some 400-600 class members was $2,302,562.77 — Representative plaintiffs brought motion for order approving settlement — Motion granted — Settlement was fair, reasonable, and in best interests of class members — Having regard to very substantial risk factors and considerable difficulties associated with recovering insurance proceeds, settlement achieved was very good result for class members — Proposed distribution scheme appeared to be good one — Requested fee for class counsel was consistent with success achieved and risks undertaken and was more than reasonable and fair — Honorarium payments for representative plaintiffs were appropriate in light of their significant involvement.

Table of Authorities

Cases considered by *Perell J.*:

Corless v. KPMG LLP (2008), 2008 CarswellOnt 4708 (Ont. S.C.J.) — referred to

Fantl v. Transamerica Life Canada (2009), 2009 CarswellOnt 4710 (Ont. S.C.J.) — referred to

Farkas v. Sunnybrook & Women's College Health Sciences Centre (2009), 82 C.P.C. (6th) 222, 2009 CarswellOnt 4962 (Ont. S.C.J.) — referred to

Fischer v. IG Investment Management Ltd. (2010), 9 C.P.C. (7th) 444, 2010 ONSC 7147, 2010 CarswellOnt 9886 (Ont. S.C.J.) — referred to

Johnston v. Sheila Morrison Schools (2010), 97 C.P.C. (6th) 313, 2010 CarswellOnt 3882, 2010 ONSC 3334 (Ont. S.C.J.) — referred to

Parsons v. Canadian Red Cross Society (2000), 49 O.R. (3d) 281, 46 C.P.C. (4th) 236, 2000 CarswellOnt 2174 (Ont. S.C.J.) — referred to

Smith Estate v. National Money Mart Co. (2010), 2010 ONSC 1334, 2010 CarswellOnt 1238, 94 C.P.C. (6th) 126 (Ont. S.C.J.) — referred to

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
s. 29(2) — considered

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B
Generally — referred to

MOTION by representative plaintiffs for order approving settlement in class action proceedings.

***Perell J.*:**

I. Introduction

1 Greg Johnston and Tim Williamson are the Representative Plaintiffs in a certified class action against The Shelia Morrison Schools and Scott Morrison.

2 The Plaintiffs bring a motion for an order that the court (a) approve the $4 million settlement of the action; (b) approve Class Counsel's fees of $1 million, (exclusive of disbursements and tax); (c) approve an honorarium payment of $5,000 for each Plaintiff; and (d) dismiss the action without costs.

3 For the reasons that follow, I grant the relief requested.

II. Factual and Procedural Background

4 Mr. Morrison was the headmaster of the Sheila Morrison School, which was a co-educational, residential, and day school located near to the City of Barrie for children been 10-18 years of age who suffered from learning disabilities and behaviour problems. The school operated from 1977 until, after the commencement of this action, it was closed for the 2009-10 academic year.

5 Messrs. Johnston and Williamson, who were students at the school, commenced this action in May 2009.

6 In the action, it is alleged that the Defendants were negligent and in breach of their fiduciary obligations to the students at the school. The Plaintiffs allege that the students were physically, sexually, emotionally, and psychologically abused at the school. They allege that the students were deprived, endangered, exploited, and kept captive and isolated at the school. They allege that the funding for the school was inadequate to meet the needs of the students who resided at the school. They allege that as a result of the defendants' conduct, they and the other class members suffered abuse. The Statement of Claim seeks $20 million in compensatory damages and $10 million in punitive damages.

7 On June 23, 2009, the Defendants, who were then represented by Redway & Butler LLP, filed a Notice of Intent to Defend.

8 On August 18, 2009, the Defendant Scott Morrison was granted leave to represent himself and the Sheila Morrison School.

9 In February 2010, although not initially formally retained, Stieber Berlach LLP, became involved in this action for the Defendants. In April 2010, Stieber Berlach LLP was formally retained to defend the Defendants.

10 By order dated June 7, 2010, on consent, Messrs. Johnston's and Williamson's action was certified as a class proceeding. See *Johnston v. Sheila Morrison Schools*, 2010 ONSC 3334 (Ont. S.C.J.).

11 Koskie Minsky, LLP is Class Counsel. The action was supported by the Class Proceedings Fund.

12 The Defendants denied liability. They asserted that they took all reasonable steps to ensure that students were provided with a safe and secure learning environment. They assert that they took reasonable precautions to ensure each employee was properly trained. They also asserted that the claims are barred by the *Limitations Act*, *2002* and that, in any event, the damages claimed are unforeseeable, excessive and too remote to be recovered.

13 Both Defendants are impecunious, and the recovery of any judgment has been a matter of concern to the Plaintiffs from the outset of the proceedings. The only source of recovery is insurance funds, and the availability of insurance coverage has been unclear.

14 An adequate assessment of available insurance did not occur until after Steiber Berlach LLP became involved, and it was not until April 2012 that Class counsel gained its current understanding of what insurance might be responsive to the claims alleged.

15 An analysis of the coverage reveals that the Defendants have gaps in their insurance coverage. There are four different insurers, and the insurance limits for insured years fluctuate, from $1 million in some years to $10 million in others. The insurance limit for one year and for one insurer cannot be used to pay for insured events occurring in other years. It seems to be the case that the Defendants' insurers will only respond for incidents that occurred during the policy periods for which they provided insurance coverage. This means there will be little or no recovery for incidents of abuse that occurred in the eight uninsured years (i.e. 25% of the class period).

16 Further, Temple Insurance has taken an off-coverage position, and the other insurers have defended pursuant to reservation of rights. Further still, significantly, the policies have various exclusions for abuse claims. Accordingly, depending on the wording of the particular policies, there may be additional years for which there is no insurance. The availability of insurance coverage might have to be litigated if this proceeding is not resolved by settlement.

17 After the certification, the parties began preparation for the trial of this action, including preparation for documentary production and examinations for discovery. Class Counsel received thousands of documents in some 30 bankers' boxes containing documents of the defendants spanning approximately 32 years.

18 The examinations for discovery took place over the course of three days in August 2011. Both Greg Johnston and Tim Williamson were examined and answered detailed questions about their personal experiences at the Sheila Morrison School and the abuse they alleged they suffered. This was a difficult experience for both Representative Plaintiffs.

19 The action was set down for trial in March 2012, potential witnesses were contacted, will-say statements were prepared, and four experts were retained by the Plaintiffs.

20 The Plaintiffs' experts opined on: (a) the standards for the management, operation and supervision of a private school; (b) the appropriate conditions for the residence and care of persons with developmental disabilities, including learning disabilities and behavioural difficulties; (c) the sort of damages students would suffer from abuse; and (d) the methodology by which damages could be assessed on an aggregate basis.

21 Whether an aggregate assessment was available was a contentious issue, and in the absence of an aggregate assessment, the common issues trial would have to be followed by individual assessments.

22 The Defendants responded with several expert reports, leading to a reply report by the Plaintiffs' damages experts.

23 On December 17, 2012, the parties attended a mediation before Justice John C. Murray.

24 At the mediation (which the Plaintiffs attended along with the damages experts), all parties engaged in lengthy discussions with the mediator. The mediation resulted in a settlement in principle whereby the Defendants will pay $4 million in full settlement of the action, without any reversion of settlement funds to the Defendants and without the Defendants' involvement in structuring the claims process.

25 On February 7, 2013, the parties signed the Settlement Agreement. The highlights of the settlement are as follows:

- The Defendants will pay $4 million to settle all claims in the action, class counsel fees, notice and administration costs, and taxes.

- If there is any residual following the distribution of the settlement fund, there is no reversion to the Defendants.

- The settlement fund is distributed in accordance with a claims process that is similar to the process approved by the court in *Baxter v. Canada*, [2006] O.J. No. 4698 (S.C.J.).

    - The proposed claims process is designed to provide a balance between: (i) compensating class members for their experiences; (ii) ensuring the claims process is efficient, timely and cost effective; and (iii) recognizing that all former students, regardless of personal experiences, ought to receive some compensation for exposure to the adverse environment at the school.

    - Class members file a claim setting out how long they attended the school, whether they stayed in residence, and detailing their experiences, including any alleged abuse by staff or students.

    - The claims administrator will allocate points according to a points allocation system that corresponds to the students' report about their time at the school.

    - Once the claims administrator has determined the points for each claim, it will distribute the settlement funds in proportion to the points awarded, subject to certain restrictions.

    - The claims process excludes claims for a person who was a student at the school for a short period of time (less than two months during the regular school year or less than 4 weeks during the summer) and who does not claim that he or she suffered any abuse.

    - The claims process limits compensation to a maximum of $50,000. This maximum is meant to recognize that the class members had common experiences in attending the school that may not be easily quantified.

    - This maximum may be increased to up to $100,000 as part of a second allocation if there is a residual amount remaining after the initial allocation among class members.

- Any settlement funds remaining following the initial allocation and the second allocation will be paid equally among: (a) the Hincks-Dellcrest Centre; (b) the Aisling Discovery Child and Family Centre; and (c) the William J. McCordic School; and (d) the Learning Disabilities Association of Ontario, to be used for charitable purposes.

- The Plaintiffs choose these organizations because they provide services similar to the services that the Sheila Morrison School was meant to provide; visualize:

    - The Hincks-Dellcrest Treatment Centre provides mental health services to more than 8,000 infants, children,

youth and their families.

• Aisling Discoveries Child and Family Centre is a United Way Member Agency and is accredited by Children's Mention Health Ontario. Aisling provides free services to children who are experiencing or are at risk of developing social, emotional or behavioural problems.

• The William J. McCordic School is a special education school in the Toronto District School Board for students with developmental disabilities.

• The Learning Disabilities Association of Ontario (LDAO) is a registered charity dedicating to improving the lives of children, youth and adults with learning disabilities.

• There is a full release and provisions that bar proceedings against third parties that may claim over from the Defendants.

• The parties will not comment publicly on the action or settlement in a manner that casts the conduct of any party in a negative light.

• Class Counsel's Legal fees, the Class Proceedings Fund Levy of ten percent, the costs of notice and the costs of administration of the claims process are paid out of the settlement funds.

26 The following chart summarizes the net recovery of the class.

Deductions from Gross Settlement	***Amount***	***Balance***
		$ 4,000,000.00
Reimburse CPC-paid disbursements	$ 163,228.57	$ 3,836,771.43
Unpaid disbursements	$ 4,548.35	$ 3,832,223.08
Counsel Fees (x1.39)	$ 1,000,000.00	$ 2,832,223.08
Tax on fees	$ 130,000.00	$ 2,702,223.08
Administration costs	$ 133,820.00	$ 2,568,403.08
Honorarium to Rep. Plaintiffs	$ 10,000.00	$ 2,558,403.08
Statutory CPC Levy (10% of net)	$ 255,840.31	$ 2,302,562.77
	Net funds to class:	*$ 2,302,562.77*

27 Class counsel understands that there are likely less than 600 former students of Sheila Morrison School, and it is possible there are as few as 400. Accordingly, the settlement is equal to an average of approximately $7,500 to $10,000 per student.

28 The claims process provides estimates of compensation. Using four examples: (1) a class member who claimed no abuse at all would receive estimated net compensation of $3,833; (2) a class member who suffered physical assaults without either serious or observable injury would receive estimated net compensation in the range of $7,513 to $13,647; (3) a class member who suffered a serious injury such as a broken arm would receive estimated net compensation of $12,573 to $20,240; and (4) a class member who suffered a sexual assault (level 3 out of 4) would receive estimated net compensation of $20,240 to $24,840.

III. Settlement Approval

29 Section 29(2) of the *Class Proceedings Act*, *1992* provides that a settlement of a class proceeding is not binding unless approved by the court. 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 the class: *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (Ont. S.C.J.) at para 57; *Farkas v. Sunnybrook & Women's College Health Sciences Centre*, [2009] O.J. No. 3533 (Ont. S.C.J.), at para. 43.

30 In determining whether a settlement is reasonable and in the best interests of the class the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arms-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and, (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation. See: *Fantl v. Transamerica Life Canada*, *supra* at para 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (Ont. S.C.J.), at para. 38; *Farkas v. Sunnybrook & Women's College Health Sciences Centre*, *supra* at para. 45.

31 In the case at bar, the Plaintiffs submit that the settlement is fair, reasonable and in the best interests of the class. They submit that a payment of $4 million represents a substantial recovery for class members that is more certain and timely than any judgment on the common issues or subsequent individual assessments.

32 The Plaintiffs submit that continuing the litigation includes the risks that: (a) liability would not be established; (b) proven damages would be similar to or less than the settlement amount; and (c) there would be little or no recovery because the defendants are impecunious, there is limited insurance, and the insurers may ultimately deny coverage.

33 In my opinion, having regard to the various criteria set out above, the outcome of this class action is fair, reasonable, and in the best interests of the Class Members.

34 Indeed, in my opinion, having regard to very substantial risk factors and the considerably difficulties associated with recovering insurance proceeds, the settlement achieved is a very good result for the class members. The distribution scheme proposed appears to be a good one.

IV. Fee and Honorarium Approval

35 Turning to the matter of Class Counsel's fee request, 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 lawyer in conducting the litigation and the degree of success or result achieved: *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (Ont. S.C.J.), at para 13; *Smith Estate v. National Money Mart Co.*, [2010] O.J. No. 873 (Ont. S.C.J.), at paras 19-20; *Fischer v. IG Investment Management Ltd.*, [2010] O.J. No. 5649 (Ont. S.C.J.), at para 25.

36 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 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: *Smith Estate v. National Money Mart Co.*, *supra*, at paras. 19-20; *Fischer v. IG Investment Management Ltd.*, *supra*, at para 28.

37 Class Counsel has prosecuted this action on behalf of the class and without compensation to the point of the pre-trial and common issues trial. It has incurred 1,701.8 hours in time in prosecuting this action as of February 28, 2013. The total fees docketed as of February 28, 2013 are $720,228 (exclusive of tax).

38 Class counsel, Koskie Minsky LLP, seeks fees of $1.0 million based on four years of litigation and a base fee of more than $720,000. The requested counsel fees represent 25% of the gross settlement proceeds, or a multiplier of less than 1.4.

39 The requested fee, representing 25% of recovery and a 1.39 multiplier, is consistent with the success achieved and risks undertaken.

40 The Representative Plaintiffs, who were actively involved in this litigation, support class counsel's fee request.

41 In my opinion, Class Counsel's fee request is more than reasonable and fair and should be approved as asked. Class

Counsel are to be commended for taking on the risk of this class action for a small group and seeing the action to a fair settlement.

42 Class counsel seek honorarium payments of $5,000 for each of Greg Johnston and Tim Williamson.

43 The honorarium payments are appropriate. Mr. Johnston and Mr. Williamson committed a significant amount of time to directing this litigation. They were involved through pleadings, certification, examinations for discovery, preparation for trial and mediation. In this case, Mr. Johnston and Mr. Williamson were the face of this action, and their personal experiences became public record. Mr. Johnston and Mr. Williamson were required to describe the abuse they allege in the statement of claim, to swear affidavit evidence in support of certification (exposing themselves to potential cross-examination), to discuss that abuse in examinations for discovery and, if the matter proceeded to trial, to give testimony in front of one of their alleged abusers. The honorarium is not an award but a recognition that the representative plaintiffs meaningfully contributed to the class members' pursuit of access to justice.

V. Conclusion

44 For the above reasons, I grant the relief requested.

Motion granted.

JEFFREY LANG, et al. and *BAYER INC., et al.*
Plaintiffs Defendants

Court File No. 60411 CP

May 26/16

The settlement of this class action has been approved in a separate endorsement of today's date. The plaintiffs seek approval of counsel fees. Those fees are $255,000 plus disbursements and associated expenses for a total of $445,441.56. The plaintiffs in this & the Quebec actions seek an honorarium to recognize their involvement in the proceedings.

The action was prosecuted pursuant to a retainer agreement which provided for a recovery of up to 25% of any settlement plus taxes. Given to relatively modest

2910546.1

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at LONDON
Proceeding under the *Class Proceedings Act, 1992*

MOTION RECORD OF THE PLAINTIFFS
(Fee Approval)
(Returnable May 24, 2016)

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amount of the settlement, the fees gave me pause. However, counsel had docketed time in excess of $400,000 up to May 6/16 and the firm had financed the disbursements which approached $125,000. I should note that I was provided with a detailed breakdown of time docketed, which was helpful.

The fact is that class actions would not be possible without contingency fee agreements. They are important to access to justice. Counsel do not seek anything more than is provided for in their contractual arrangement with their clients.

The issue of whether honoraria should be paid in the context of a cy-près distribution. With respect to those who have a contrary view, I see no principled reason why honoraria are not available in those circumstances. I have considered the factors outlined by Abrath J. (as he

then was) in Robinson v. Rochester Financial Ltd., 2012 ONSC 911 and have determined that a modest honorarium is warranted. I remain of the view, previously expressed, that it is important to encourage plaintiffs to have real & meaningful involvement in a proceeding.

Ms Ramacieri (the plaintiff in the Quebec action) seeks $10,000 based on her 510 hours of work. The Ontario plaintiffs seek $5000 (Ms Lang $5000 and the Zerebeckis together $5000) for their approximately 50 hours of time. Some distinction between the Quebec plaintiff and the others seems warranted to recognize their different levels of time spent. I would allow Ms Ramacieri $7500.

and Ms Lang $2000.
and the Zerebeckis $2000.
An order can be sent to me for signature.

Helen Rady

2013 FC 341
Federal Court

Manuge v. R.

2013 CarswellNat 798, 2013 CarswellNat 799, 2013 FC 341, [2013] F.C.J. No. 363, 227 A.C.W.S. (3d) 637, 430 F.T.R. 125 (Eng.)

Dennis Manuge, Plaintiff and Her Majesty the Queen, Defendant

R.L. Barnes J.

Heard: February 14, 2013
Judgment: April 4, 2013
Docket: T-463-07

Counsel: Peter J. Driscoll, Dan Wallace, Ward K. Branch, for Plaintiff
Paul B. Vickery, Lori Rasmussen, Travis Henderson, for Defendant

Subject: Civil Practice and Procedure; Corporate and Commercial; Income Tax (Federal); Public

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.d Orders, awards and related procedures
V.2.d.iii Termination of proceedings

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.iii Agreements respecting fees and disbursements

Headnote

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Orders, awards and related procedures — Termination of proceedings
Action was certified as class action — It was determined that defendant's interpretation of applicable service income security insurance plan long term disability policy and practice of deducting monthly Pension Act disability benefits from long term disability income payable to disabled class members was unlawful — Parties undertook extensive negotiations to work out financial implications of judgment — Parties negotiated settlement of class action — Central component of proposed settlement was full recovery by approximately 7,500 class members or families of all amounts unlawfully deducted or that would have been deducted in future from long term disability income — Parties had also negotiated interest — Parties agreed to establish $10 million bursary fund to be administered over 15 years — Settlement also provided for appointment of monitor — Parties brought motion for approval of negotiated settlement — Motion granted — There was strong support for settlement by vast majority of class members who made submissions — Settlement was generous, complete and thoughtful resolution of issues that were raised in litigation — It would provide substantial financial assistance to thousands of disabled Canadian Forces veterans and families — Terms of settlement were product of extensive negotiations between parties — Settlement represented fair and reasonable compromise that was in best interests of class as whole.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Agreements respecting fees and disbursements
Action was certified as class action — It was determined that defendant's interpretation of applicable service income security insurance plan long term disability policy and practice of deducting monthly Pension Act disability benefits from long term disability income payable to disabled class members was unlawful — Parties undertook extensive negotiations to work out financial implications of judgment — Parties negotiated settlement of class action — Central component of proposed settlement was full recovery by approximately 7,500 class members or families of all amounts unlawfully deducted or that would have been deducted in future from long term disability income — Parties also negotiated interest — Parties agreed to establish $10 million bursary fund to be administered over 15 years — Settlement also provided for appointment of monitor — Class counsel brought motion for approval of legal fees payable from proceeds of settlement — Motion granted — Class counsel provided excellent legal representation that resulted in successful settlement — Litigation risk assumed by class counsel was substantial and it exceeded tolerance level of others — Out-of-pocket expenses approached $200,000 — This was very important litigation that dealt with long-standing contractual grievance involving thousands of disabled veterans — Having regard to all relevant factors, legal fees were approved in amount equal to 8 per cent of retroactive refunds payable to class beneficiaries, which represented approximately 4 per cent of total value of settlement — Deduction of amount equal to 0.079 per cent of refunds payable to class beneficiaries as indemnity for out-of pocket expenses was approved — Class counsel was also authorized to deduct taxes from refunds payable to class members and remit amounts — Recovery of legal costs was in keeping with fees approved in comparable cases — It represented sufficient incentive to counsel to take on high-risk class litigation without unduly impacting on recovery to disabled veterans.

Table of Authorities

Cases considered by *R.L. Barnes J.*:

Baxter v. Canada (Attorney General) (2006), 83 O.R. (3d) 481, 40 C.P.C. (6th) 129, 2006 CarswellOnt 7879 (Ont. S.C.J.) — referred to

Bodnar v. Cash Store Inc. (2010), 2010 BCSC 145, 2010 CarswellBC 252, 84 C.P.C. (6th) 49 (B.C. S.C.) — referred to

Châteauneuf c. R. (2006), 2006 CarswellNat 741, 2006 CarswellNat 518, 2006 CF 286, 2006 FC 286, 54 C.C.P.B. 47 (F.C.) — considered

Dabbs v. Sun Life Assurance Co. of Canada (1998), 1998 CarswellOnt 5823 (Ont. Gen. Div.) — referred to

Endean v. Canadian Red Cross Society (2000), 45 C.P.C. (4th) 39, [2000] 8 W.W.R. 294, 78 B.C.L.R. (3d) 28, 2000 BCSC 971, 2000 CarswellBC 1298 (B.C. S.C.) — considered

Ford v. F. Hoffmann-La Roche Ltd. (2005), 12 C.P.C. (6th) 226, 2005 CarswellOnt 1094, [2005] O.T.C. 208 (Ont. S.C.J.) — referred to

Helm v. Toronto Hydro-Electric System Ltd. (2012), 2012 CarswellOnt 5761, 2012 ONSC 2602 (Ont. S.C.J.) — considered

Killough v. Canadian Red Cross Society (2007), 2007 BCSC 941, 2007 CarswellBC 1692, 74 B.C.L.R. (4th) 295, [2008] 2 W.W.R. 482 (B.C. S.C.) — considered

Manuge v. R. (2008), 2008 CF 624, 2008 CarswellNat 2779, (sub nom. *Manuge v. Canada)* 329 F.T.R. 167 (Eng.), 71 C.C.P.B. 112, (sub nom. *Manuge v. Canada)* [2009] 1 F.C.R. 416, 2008 CarswellNat 1495, 2008 FC 624 (F.C.) — considered

Manuge v. R. (2009), 73 C.C.P.B. 1, (sub nom. *Manuge v. Canada)* [2009] 4 F.C.R. 478, (sub nom. *Manuge v. Canada)* 384 N.R. 313, 2009 FCA 29, 2009 CAF 29, 2009 CarswellNat 160, 2009 CarswellNat 161 (F.C.A.) — referred to

Manuge v. R. (2010), (sub nom. *Manuge v. Canada)* 410 N.R. 113, (sub nom. *Manuge v. Canada)* 327 D.L.R. (4th) 602, (sub nom. *Manuge v. Canada)* [2010] 3 S.C.R. 672, 222 C.R.R. (2d) 1, 2010 C.E.B. & P.G.R. 8417, 2010 CarswellNat

4838, 2010 CarswellNat 4839, 2010 SCC 67, 86 C.C.P.B. 159, 13 Admin. L.R. (5th) 144 (S.C.C.) — referred to

Manuge v. R. (2012), 2012 FC 499, 2012 CF 499, [2012] I.L.R. I-5279, 2012 CarswellNat 1207, 2012 CarswellNat 1208, 99 C.C.P.B. 206, 350 D.L.R. (4th) 235 (F.C.) — referred to

Parsons v. Canadian Red Cross Society (2000), 49 O.R. (3d) 281, 46 C.P.C. (4th) 236, 2000 CarswellOnt 2174 (Ont. S.C.J.) — considered

Slater Vecchio LLP v. Cashman (2013), 2013 BCSC 134, 2013 CarswellBC 229 (B.C. S.C.) — referred to

Statutes considered:

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

Pension Act, R.S.C. 1985, c. P-6
Generally — referred to

Rules considered:

Federal Courts Rules, SOR/98-106
Generally — referred to

R. 334.29 [en. SOR/2007-301] — considered

R. 334.39 [en. SOR/2007-301] — referred to

R. 334.4 [en. SOR/2007-301] — considered

MOTION by parties for approval of settlement of class action; MOTION by class counsel for approval of legal fees payable from proceeds of settlement.

***R.L. Barnes J.*:**

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. R.*, 2008 FC 624, [2008] F.C.J. No. 787 (F.C.). That decision was appealed by the Defendant and on February 3, 2009 the Federal Court of Appeal set aside my certification Order: see *Manuge v. R.*, 2009 FCA 29, [2009] F.C.J. No. 73 (F.C.A.). 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. R.*, 2010 SCC 67, [2010] 3 S.C.R. 672 (S.C.C.).

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. R.*, 2012 FC 499, [2012] F.C.J. No. 512 (F.C.). That determination was not appealed and the parties undertook extensive negotiations with a view to working out the financial implications of my judgment.

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. Cash Store Inc.*, 2010 BCSC 145 (B.C. S.C.) at para 17, [2010] B.C.J. No. 192 (B.C. S.C.). In *Châteauneuf c. R.*, 2006 FC 286 (F.C.) at para 7, [2006] F.C.J. No. 363 (F.C.), 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.

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] O.J. No. 1598 (Ont. Gen. Div.) 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.

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 ownoccupation disability period.

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 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.
>
> 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 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.

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.

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.

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.

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 v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281, [2000] O.J. No. 2374 (Ont. S.C.J.) [*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 (B.C. S.C.), at para 73, [2000] B.C.J. No. 1254 (B.C. S.C.) [*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.

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] B.C.J. No. 151 (B.C. S.C.).

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 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.

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*, 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.
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> . . . . .
>
> [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.
>
> [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...
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> . . . . .
>
> [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.

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.

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 thirdparty 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] B.C.J. No. 1486 (B.C. S.C.) [*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.

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. R.*, 2008 FC 624 (F.C.) at para 34, [2008] F.C.J. No. 787 (F.C.):

> [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]

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 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.

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 undercompensate 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 views expressed by Justice George Strathy in *Helm v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602 (Ont. S.C.J.) at paras 25-27, [2012] O.J. No. 2081 (Ont. S.C.J.):

> 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 *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (Ont. S.C.J.) at para 107, [2005] O.T.C. 208 (Ont. S.C.J.).

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 of amounts recovered fall at the bottom of the scale of costs awarded in percentage terms: see *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968, 83 O.R. (3d) 481 (Ont. S.C.J.); *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.

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 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.

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.

Motions granted.

Footnotes

1 Also see *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (Ont. S.C.J.) at para 58, [2000] O.J. No. 2374 (Ont. S.C.J.).

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.

2018 ONSC 685
Ontario Superior Court of Justice

Marchand v. Ford Motor Company

2018 CarswellOnt 2895, 2018 ONSC 685, 288 A.C.W.S. (3d) 624

Richard Marchand and Kenneth Mortier (Plaintiffs) and Ford Motor Company and Ford Motor Company of Canada Ltd. (Defendants)

R. Raikes J.

Heard: January 19, 2018
Judgment: January 30, 2018
Docket: CV-15-22778

Counsel: John Archibald, Paul Bates, for Plaintiffs
Hugh DesBrisay, for Defendants

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.b Certification
V.2.b.i Plaintiff's class proceeding
V.2.b.i.H Miscellaneous

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.f Miscellaneous

Civil practice and procedure
XVI Disposition without trial
XVI.7 Settlement
XVI.7.a General principles

Headnote

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Miscellaneous
Plaintiff was Ontario resident and owner of 2013 Ford Edge, and he brought action on his own behalf and on behalf of putative class members in Canada who purchased or leased certain Ford vehicles alleging that vehicles had dangerous defect that allowed exhaust emissions to leak into vehicles and passenger compartments — Plaintiff brought claims based on negligent manufacture and design, failure to warn, unjust enrichment and waiver of tort — Action paralleled class proceedings in United States where nation-wide settlement was reached — During settlement discussions it became clear that certain vehicles showed very low incidence of exhaust odour complaints — Plaintiff sought to amend class definition to exclude owners of Ford Edge and Lincoln MKX models, discontinue plaintiff's claims personally and on behalf of owners of excluded vehicles, and add M, who owned Ford Explorer, as representative plaintiff — Plaintiff brought motion for relief,

including order adding M as representative plaintiff — Motion granted — Class counsel concluded that there was substantial risk that claims in respect of excluded vehicles would not be successful at certification or at trial on merits — Plaintiff owned excluded vehicle but not Ford Explorer to which proposed settlement applied — It was necessary to add M as representative plaintiff — It was fair and reasonable and in best interests of plaintiff and owners of excluded vehicles that claim asserted by and on their behalf be discontinued without prejudice and without costs.

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Miscellaneous
Plaintiff was Ontario resident and owner of 2013 Ford Edge, and he brought action on his own behalf and on behalf of putative class members in Canada who purchased or leased certain Ford vehicles alleging that vehicles had dangerous defect that allowed exhaust emissions to leak into vehicles and passenger compartments — Plaintiff brought claims based on negligent manufacture and design, failure to warn, unjust enrichment and waiver of tort — Action paralleled class proceedings in United States where nation-wide settlement was reached — During settlement discussions it became clear that certain vehicles showed very low incidence of exhaust odour complaints — Plaintiff sought to amend class definition to exclude owners of Ford Edge and Lincoln MKX models, discontinue plaintiff's claims personally and on behalf of owners of excluded vehicles, and add M, who owned Ford Explorer, as representative plaintiff — Plaintiff brought motion for relief, including order certifying action as class proceeding for settlement purposes — Motion granted — Statement of claim disclosed cause of action in negligence — There was identifiable class of two or more people — There was common issue, whether class vehicles contained defect that caused exhaust odour to enter passenger compartment — Class proceeding was fair, efficient and manageable method of advancing claim and was preferable to alternative that required individual class members to bring individual actions for amounts that were not economically feasible — M was appropriate representative plaintiff to represent class in respect of common issue and settlement.

Civil practice and procedure --- Disposition without trial — Settlement — General principles
Plaintiff was Ontario resident and owner of 2013 Ford Edge, and he brought action on his own behalf and on behalf of putative class members in Canada who purchased or leased certain Ford vehicles alleging that vehicles had dangerous defect that allowed exhaust emissions to leak into vehicles and passenger compartments — Plaintiff brought claims based on negligent manufacture and design, failure to warn, unjust enrichment and waiver of tort — Action paralleled class proceedings in United States where nation-wide settlement was reached — During settlement discussions it became clear that certain vehicles showed very low incidence of exhaust odour complaints — Plaintiff sought to amend class definition to exclude owners of Ford Edge and Lincoln MKX models, discontinue plaintiff's claims personally and on behalf of owners of excluded vehicles, and add M, who owned Ford Explorer, as representative plaintiff — Plaintiff brought motion for relief, including order approving settlement — Motion granted — There was substantive and procedural fairness, settlement was fair, reasonable and in best interests of class, and it was approved — Class members would receive tangible benefits from settlement that would specifically address underlying problem that gave rise to litigation — Parties engaged in arms-length negotiations, each side was represented by experienced counsel, there had been no collusion, and best interests of class had been taken into account by class counsel — Procedural fairness had been met in negotiation of settlement agreement — Defective product litigation was inherently risky, and settlement provided vehicle owners with potential fix for problem while they still owned and used vehicles and in timely fashion — Class counsel were experienced, they drew upon expertise and experience of counsel in United States litigation, they had done due diligence, and reasons for recommending settlement made sense — Class members almost universally approved settlement — Representative plaintiffs were each awarded honoraria of $5,000 — Proposed notice plan was adequate having regard to previous notice that was given, and notices were likely to come to attention of putative class members affected by settlement — Time frame to opt out was satisfactory and was approved.

Table of Authorities

Cases considered by *R. Raikes J.*:

CSL Equity Investments Ltd. v. Valois (2007), 2007 CarswellOnt 2521, 60 C.C.P.B. 8 (Ont. S.C.J.) — referred to

Corica v. Ford Motor Co. (November 28, 2016), Doc. 500-06-000827-168 (C.S. Que.) — referred to

Currie v. McDonald's Restaurants of Canada Ltd. (2006), 2006 CarswellOnt 1213, 27 C.P.C. (6th) 286, [2006] O.T.C.

205 (Ont. S.C.J.) — referred to

Dabbs v. Sun Life Assurance Co. of Canada (1998), 1998 CarswellOnt 5823 (Ont. Gen. Div.) — referred to

Marcantonio v. TVI Pacific Inc. (2009), 2009 CarswellOnt 4850, 82 C.P.C. (6th) 305 (Ont. S.C.J.) — referred to

Nunes v. Air Transat A.T. Inc. (2005), 2005 CarswellOnt 2503, 20 C.P.C. (6th) 93 (Ont. S.C.J.) — referred to

Osmun v. Cadbury Adams Canada Inc. (2010), 2010 ONSC 2643, 2010 CarswellOnt 2813, 5 C.P.C. (7th) 341 (Ont. S.C.J.) — referred to

Parsons v. Canadian Red Cross Society (1999), 1999 CarswellOnt 2932, 40 C.P.C. (4th) 151, 103 O.T.C. 161 (Ont. S.C.J.) — referred to

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
s. 5(1) — considered

s. 29 — considered

s. 29(3) — referred to

MOTION by plaintiff for order adding representative plaintiff, certifying action as class proceeding for settlement purposes and approving settlement.

***R. Raikes J.*:**

1 The plaintiffs move for an order, *inter alia*, adding Mr. Mortier as a representative plaintiff, certifying the action as a class proceeding for settlement purposes, approving the settlement including proposed notices to class members and notice plan, and ancillary relief arising from the certification and settlement approval.

Nature of Action

2 This action was commenced by statement of claim issued October 5, 2015. The plaintiff, Mr. Marchand, is an Ontario resident and owner of a 2013 Ford Edge. Mr. Marchand commenced the action on his own behalf and on behalf of all putative class members in Canada who purchased or leased one or more of the following Ford vehicle models:

- 2011 - 2015 Ford Explorers;
- 2011 - 2013 Ford Edge (3.5L or 3.7TIVCT engine); and
- 2011 - 2013 Lincoln MKX (3.5L or 3.7TIVCT engine).

3 The statement of claim alleges that these vehicles have a dangerous defect that causes exhaust emissions to leak into the vehicles and passenger compartments. The plaintiff asserts claims based on negligent manufacture and design, failure to warn, unjust enrichment and waiver of tort.

4 The action parallels class proceedings in the United States where a nation-wide settlement was reached on October 11, 2016 after completion of discoveries. The US settlement has been approved. The terms of the US settlement informed the discussions between the parties in this proceeding.

5 In addition, a similar class proceeding was commenced on November 28, 2016 in Québec Superior Court (*Corica v. Ford Motor Co.* (November 28, 2016), Doc. 500-06-000827-168 (C.S. Que.)). The proposed class definition in the Québec action is "all persons who reside or have resided in Québec who purchased and/or leased one or more of the Ford Explorers, Model Years 2011 - 2015". The allegations and claims in the Québec action are similar to those in this action.

6 For ease of reference, I will refer to this action as the Ontario action and to the *Corica* action as the Québec action in this decision.

7 I pause to note at the outset that counsel acting for the parties in both actions agreed to the use and application of the CBA protocol for multijurisdictional disputes. As a result, the steps leading to this hearing were coordinated and jointly conducted by teleconference and video conference. Indeed, the hearing on January 19 which gives rise to this decision was conducted by video conference with the Québec action where Mr. Justice Pierre Gagnon of the Québec Superior Court presided.

8 Proceeding in this manner was both efficient and helpful. During submissions, there were a couple of points of clarification that assisted to ensure that there was no overlapping class definition and that notice to the class was consistent and appropriate for both English and French-speaking residents in Canada.

9 As is evident, the proposed class definition in the statement of claim in the Ontario action is broader than the proposed Québec class definition in two aspects: geographic scope and the vehicles affected by the alleged defect. Dealing with the latter, the plaintiff seeks on this motion to

- Amend the proposed class definition to exclude the owners of the Ford Edge and Lincoln MKX models (the "Excluded Vehicles");

- Discontinue the claims of Mr. Marchand personally and on behalf of the owners of the Excluded Vehicles without prejudice and without costs;

- Add Mr. Mortier, who owns a Ford Explorer, as a representative plaintiff for the class being certified.

The proposed class definition on the certification motion is that contained in the Settlement Agreement and is consistent with relief now sought.

Discontinuance

10 During settlement negotiations, Ford provided class counsel with an analysis of complaint rates and warranty repair records for Excluded Vehicles. That analysis showed a very low incidence of exhaust odour complaints: only 61 of 717,125 Excluded Vehicles. In addition, Ford's analysis indicated that repairs performed under a 2014 Technical Service Bulletin (TSB) appeared to have been successful as only one of the 61 vehicles returned for a second repair.

11 As a result, class counsel concluded that there was a substantial risk that the claims in respect of the Excluded Vehicles would not be successful either at certification or at a trial on the merits. The parties have agreed that the claims of Mr. Marchand and other owners of the Excluded Vehicles should be discontinued on a without prejudice and without costs basis. This means of that the limitation period will no longer be tolled and will recommence running, and individual owners of those vehicles are free to bring an action against the defendants if they have not already done so. There has been no determination on the merits of such claims.

12 Mr. Marchand owns an excluded vehicle but not a Ford Explorer to which the proposed settlement applies. Accordingly, it is necessary to add Mr. Mortier as a representative plaintiff. I order that Mr. Mortier be added to the statement of claim as a plaintiff in this action.

13 I am satisfied that it is fair and reasonable and in the best interests of Mr. Marchand and the owners of the Excluded Vehicles that the claims asserted by and on their behalf be discontinued without prejudice and without costs pursuant to s. 29 of the *Class Proceedings Act, 1992*, S. O. 1992, c. 6 (hereafter "*CPA*").

Certification

14 The requirements for certification are found in section 5(1) of the *CPA* which may be summarized as follows:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for resolution of the common issues; and

(e) there is a representative plaintiff who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding and of notifying class members of the proceeding, and

(iii) does not have, on the common issues, an interest in conflict with the interests of other class members.

15 The test for certification is relaxed in the context of a settlement approval. The same factors are considered but the test is not as rigorously applied: *Currie v. McDonald's Restaurants of Canada Ltd.*, 2006 CarswellOnt 1213 (Ont. S.C.J.) at para. 18; *CSL Equity Investments Ltd. v. Valois*, 2007 CarswellOnt 2521 (Ont. S.C.J.) at para. 5.

16 The defendants consent to certification for the purpose of settlement only. If the settlement is not approved in both this action and in the Québec action, the parties will proceed as if this motion and the settlement never occurred.

17 I am satisfied on my review of the statement of claim and the evidence filed on the motion for certification that:

• the statement of claim discloses a cause of action in negligence

• there is an identifiable class of two or more persons

• there is a common issue to be certified: did the Class Vehicles, or any of them, contain a defect which caused exhaust odour to enter the passenger compartment?

• a class proceeding in this case is a fair, efficient and manageable method of advancing the claim and is preferable to the alternative which would require individual class members to bring individual actions for amounts which are not economically feasible

• Mr. Mortier is an appropriate representative plaintiff to represent the class in respect of the common issue and settlement.

18 With respect to the class definition, the parties have negotiated the following:

All persons resident in a Canadian province or territory, except for persons resident in the province of Québec, who currently own or lease, or who in the past owned or leased, a model year 2011 - 2015 Ford Explorer that was sold or leased in any province or territory of Canada, excluding:

(a) Ford employees, officers, directors, agents, and representatives, and their family members;

(b) presiding judges and Class Counsel;

(c) all persons who have previously executed and delivered a release or releases in favour of Ford US and/or Ford of Canada of claims relating to the presence of Exhaust Odour in a Class Vehicle;

(d) all persons (a) who commenced one or more individual proceedings asserting claims of any nature relating to the alleged presence of Exhaust Odour in a Class Vehicle (including a lawsuit or proceeding under CAMVAP) and (b) who did not or does not voluntarily dismiss or discontinue such proceeding with prejudice prior to the Opt-Out Deadline; and

(e) all those otherwise in the National Settlement Class that properly opt out of the National Settlement Class.

19 This class definition is referred to in the Settlement Agreement as the "National Settlement Class". It is an appropriate class definition for certification purposes.

20 There are several defined terms in the Settlement Agreement which are capitalized. I have attempted to capture those defined terms in the same manner in this decision. To be clear, except to the extent modified by the order that is attached to this decision, the definitions set out in the Settlement Agreement apply to and are incorporated into that order.

21 I turn now to the motion to approve the settlement.

Settlement Approval

22 Settlement of a class proceeding requires court approval: s. 29 *CPA*. Once approved, the settlement binds all class members: s. 29(3) *CPA*.

23 On a motion for court approval of a settlement of a class proceeding, the applicable test is whether, in all the circumstances, the settlement is fair, reasonable and in the best interests of those affected by it. The following principles apply to the consideration of a proposed settlement:

- the resolution of complex litigation through compromise of claims is encouraged by the courts and is consistent with public policy
- a settlement negotiated at arms' length by experienced counsel is presumptively fair
- to reject the terms of the settlement and require that litigation continue, a court must conclude that the settlement does not fall within a range of reasonable outcomes
- a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. The court must recognize that there are a number of possible outcomes within a range of reasonableness
- it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement
- it is also not the court's function to litigate the merits of the action or simply rubber stamp a settlement.

(See *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. Gen. Div.) at para.9; *Nunes v. Air Transat A.T. Inc.* (2005), 20 C.P.C. (6th) 93 (Ont. S.C.J.) at para. 7; *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643 (Ont. S.C.J.) at para. 31.)

24 There are several factors which the courts have considered to assess the reasonableness of a proposed settlement. These factors include:

- the likelihood of recovery or likelihood of success, sometimes referred to as litigation risk
- the amount and nature of discovery, evidence or investigation
- the proposed settlement terms and conditions
- the recommendation and experience of counsel
- the likely duration of the litigation
- the number of objectors and the nature of the objections
- the presence of arms' length bargaining and the absence of collusion
- the positions taken by the parties in the litigation and during negotiations.

(See *Marcantonio v. TVI Pacific Inc.* (2009), 82 C.P.C. (6th) 305 (Ont. S.C.J.) at para. 12; *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.) at paras. 71 - 73.

25 The court must be satisfied that there is both substantive and procedural fairness. Procedural fairness deals with the manner in which the settlement has been reached. It requires a consideration of the process followed. Hard-fought arms' length negotiations go a long way to satisfy the requirement of procedural fairness.

26 For reasons which follow, I am satisfied that there is both substantive and procedural fairness. I find that the settlement is fair, reasonable and in the best interests of the class. The settlement is approved.

Settlement Terms

27 The terms of the settlement are summarized at paras. 17 - 27 of the affidavit of Norman Groot filed in support of the motion.

28 Essentially, the settlement provides partial reimbursement for the cost of repair of the exhaust odour issue. A 2016 Exhaust Odour TSB sets out the steps to address the problem in two distinct phases. The first phase involves sealing and part replacement as well as recalibration of the vehicles' HVAC system. The second phase involves replacing the exhaust tips and muffler assembly for certain vehicles where the repair steps in phase I did not work.

29 The settlement distinguishes between non-warranty repair owners and warranty repair owners with respect to the extent of reimbursement. The average cost of a phase I service repair is approximately $800 and for a phase 2 repair, the average cost is $616.

30 Under the settlement, a non-warranty repair owner would be reimbursed 29% of the average cost of a phase I service repair and 37% of a phase 2 service repair. By contrast, a warranty repair owner would receive reimbursement of 29% of the average cost of a phase I service repair and the full reimbursement of the average cost of a phase 2 repair.

31 The amounts to be paid by Ford toward these repairs is modest; however, in late 2017, Ford implemented a Customer Service Plan pursuant to which Ford dealers will perform certain of the phase I service repair steps free of charge. As a result, the partial reimbursement for phase I repairs will cover most if not all of the cost of that repair. Ford's voluntary Customer Service Plan greatly enhances the benefits to the class of the settlement and makes the settlement terms far more attractive.

32 The Settlement Agreement also provides for an arbitration process where the repairs prove ultimately unsuccessful. In that arbitration process, Ford waives certain defences which is also beneficial to class members.

33 On the whole, I am satisfied that class members will receive tangible benefits from the settlement that will specifically address the underlying problem which gives rise to this litigation.

Settlement Process

34 As indicated above, the negotiations to settle this class proceeding have been informed by the negotiations and settlement of the US litigation. Ford has not delivered a defence in this action as is common at this stage in a class proceeding. The parties engaged in arms'-length negotiations. Each side was represented by experienced counsel.

35 The negotiations took place over a period in excess of one year. Numerous drafts were exchanged. This was not a quick and easy settlement. I am satisfied that there has been no collusion and that the best interests of the class have been taken into account by class counsel. I note that there have been no discussions of any kind to date with respect to the quantum of class counsel fees.

36 Ford issued two Exhaust Odour TSB's prior to the 2016 TSB which the plaintiffs allege failed to resolve the exhaust issue. In the course of settlement negotiations, Ford developed, with input from US plaintiffs' counsel and class counsel, a 2016 Exhaust Odour TSB which Ford issued to its dealers in December 2016. The plaintiffs' expert, Dr. David Renfroe has considered the 2016 Exhaust Odour TSB and concludes that it is reasonably likely to resolve the issue.

37 I am satisfied that procedural fairness has been met in the negotiation of the settlement agreement in this case.

Litigation Risk

38 Ford has not formally admitted the allegations and claims asserted; in fact, if the settlement is not approved, the action will proceed. Ford will deny the defects and any negligence. The action will be vigorously contested. It will require considerable expert evidence and voluminous production of documents. The motion for certification will likely be opposed with the risk that the action might not be certified if contested.

39 Defective product litigation is inherently risky. It can take many years to get to trial on only the common issues. Individual issues like damages and causation may remain.

40 The settlement in this case provides vehicle owners with a potential fix for the problem while they still own and use their vehicles and in a timely fashion.

Recommendation of Counsel

41 It is trite to observe that class counsel recommend the settlement. It is hard to imagine a case where a settlement would be put forward for approval where class counsel did not recommend the settlement.

42 In this case, class counsel are experienced in these matters. They have drawn upon the expertise and experience of counsel in the US litigation which was settled only after discovery. They have done their due diligence by engaging experts and investigating the problem and the steps for its resolution. The reasons expressed for their recommendation of the settlement make sense in the context of this case and the terms agreed upon.

Objections

43 Comprehensive notice of the certification and settlement approval hearing was provided through various media across Canada. In addition, class counsel placed the terms of the Settlement Agreement on their website. As a result of that effort, they have received numerous inquiries from class members who almost universally approve of the settlement.

44 The published notice directed putative class members who objected to the proposed settlement to make a written objection to the Administrator, RicePoint. No one appeared at the hearing in either Ontario or Quebec to object. Only one class member made a written objection to RicePoint. He objected to the settlement on the basis that it did not adequately compensate him and his family for the injury to their health from being exposed to exhaust which may have leaked into his

vehicle.

45 The Settlement Agreement expressly excludes from the release any and all claims for personal injury. Thus, the settlement does not affect a class member's right to sue individually for personal injury damages.

46 The draft order provided to the Court for consideration at the approval hearing includes a provision that the action be dismissed without costs and "with prejudice". For greater certainty and to ensure that the defendants cannot raise the dismissal of this action *per se* as a bar to a claim for personal injury damages, the draft order has been modified.

47 I note that class counsel advised that the statement of claim does not include a claim for damages for personal injury although it does allude to the potential for injury or harm as part of the allegations made. Counsel indicates that this was done for technical reasons to ensure recovery for economic loss.

48 Regardless, I am satisfied that the proposed amended wording for the order dealing with dismissal of the action adequately protects putative class members like the objector who feel they may have a claim for personal injury damages. This should not be taken to mean that such claims have merit or are not otherwise barred. Such issues will be addressed if and when a claim is asserted.

Honoraria for Representative Plaintiffs

49 The Settlement Agreement provides for payment of an honorarium to each of Mr. Marchand and Mr. Mortier in the amount of $5,000. This payment is subject to court approval. Counsel for the parties agree that I may reduce the amount but I cannot increase it.

50 The affidavits filed show that both representative plaintiffs have been actively involved with class counsel. They have diligently performed their responsibilities as representative plaintiffs. Neither Mr. Marchand nor Mr. Mortier have previously acted as a representative plaintiff in other class proceedings.

51 I expressed concern to counsel that I do not wish to encourage the development of professional representative plaintiffs; viz. individuals who repeatedly act as representative plaintiffs in various class proceedings to earn income through the payment of honoraria. I am satisfied that that practice is not at play in this case. The amount of the honoraria proposed is modest. I approve the proposed payment of $5,000 each as honoraria to Mr. Marchand and Mr. Mortier.

Notice Plan

52 Counsel have provided a notice plan together with a short-form and long-form notice for approval. Changes have been made to the draft notice(s) to address concerns raised during the hearing.

53 The notice for the certification and settlement approval hearing was widely disseminated by, *inter alia*, publication in numerous newspapers across Canada. Ford also gave notice to those customers in its NAVIS database.

54 The notice program for the certification and settlement approval hearing was quite successful. Plaintiffs' counsel report contact by many putative class members whose contact information they have.

55 The proposed publication of the settlement approval and of the time-line to opt out of the settlement is far less comprehensive. The parties seek to have the notice published once in each of two newspapers: in English in the Globe & Mail and in French in La Presse. The notice plan contemplates other means of communication including postings on webpages and notice directly to those in the NAVIS database.

56 The rationale for the reduced notice program at this stage is that such expansive notice is unnecessary. The fact of the class proceeding and its settlement has already been widely advertised. Affected individuals can follow up for the results of the hearing by searching online.

57 I am satisfied that the proposed notice plan is adequate having regard to the previous notice given. In my view, the notices are likely to come to the attention of putative class members affected by the settlement.

Opt-Out Period and Coupon

58 The Settlement Agreement provides for the delivery of an opt-out coupon to the Administrator, RicePoint, by April 6, 2018 failing which the owner or lessee of the vehicle is part of the class and bound by its terms.

59 I find the time frame to opt-out to be adequate in this case. The claim deals with vehicles that are now 3-7 years old. Not all Ford Explorers in these model years have experienced the issue. There has been good response to the notice already provided and the notice plan has a reasonable prospect of coming to the attention of those affected.

60 The opt-out coupon is satisfactory and is approved.

Conclusion

61 I conclude as follows:

- Mr. Mortier should be added as a representative plaintiff
- The claim by Mr. Marchand and the owners of Excluded Vehicles should be dismissed without prejudice and without cost
- The action should be certified as a class proceeding for settlement purposes
- The settlement is fair, reasonable and in the best interests of the class
- The notice plan and notices proposed are appropriate and approved
- The opt-out coupon is satisfactory and is approved
- Payment of a $5,000 honoraria to each of Mr. Marchand and Mr. Mortier is approved.

62 Counsel have provided a draft order, revised to address the concerns raised at the hearing, which is satisfactory. A copy of that order which includes orders ancillary to my findings above is marked as Schedule “A” to this decision and is hereby incorporated into the decision.

63 The last issue is the process to be followed for the determination and approval of class counsel fees. The settlement agreement contemplates that Ford will pay those fees and disbursement as agreed and approved, or as determined by the court.

64 Class counsel fees must be approved by the court. Counsel are directed to schedule a case conference by telephone when they are ready to proceed. The process to follow will be addressed then. It is preferable that the issue be brought forward sooner while the case is still fresh in the mind of the court.

Motion granted.

End of Document

2016 ONSC 3537
Ontario Superior Court of Justice

Middlemiss v. Penn West Petroleum Ltd.

2016 CarswellOnt 8785, 2016 ONSC 3537, [2016] O.J. No. 2936, 267 A.C.W.S. (3d) 534

James Middlemiss, Plaintiff and Penn West Petroleum Ltd., David E. Roberts, Murray R. Nunns, Todd H. Takeyasu, Frank Potter, James C. Smith, William E. Andrew and Jeffrey Curran, Defendants

Edward P. Belobaba J.

Heard: May 31, 2016
Judgment: June 6, 2016
Docket: CV-15-525189-CP

Counsel: Jay Strosberg, Kirk Baert, for Plaintiff
Scott Kugler, for Defendants, Penn West Petroleum, David E. Roberts and James C. Smith
Lawrence Ritchie, for Defendant, Murray R. Nunns
Lawrence Ritchie (agent), for Remaining Individual Defendants

Subject: Civil Practice and Procedure; Corporate and Commercial; Securities

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.b Certification
V.2.b.i Plaintiff's class proceeding
V.2.b.i.H Miscellaneous

Headnote

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Miscellaneous
Defendant was large oil and gas company, publicly traded in Toronto and New York Stock Exchanges, and individual defendants were officers and directors — When defendant disclosed need to restate earlier financials, its share price dropped and class actions were commenced in Canada and U.S., alleging misrepresentation and damages — World oil prices were falling at time, so defendant found itself facing insolvency, and all parties agreed to mediation — American and Canadian class actions were settled for $53 million, to be divided equally — Motion by plaintiffs in Canadian class action for leave under s. 138.8 of Securities Act, certification of class action, and approval of $26.5 million settlement and 33 per cent contingency fee — Motion granted — Action was brought in good faith and had reasonable chance of success — All requirements of s. 5(1) of Class Proceedings Act, 1992 met so action certified — This was early settlement, just months after action was commenced, so attracted greater scrutiny, and was for just $26.5 million when Canadian class members lost $186.5 million — However, counsel had adduced evidence about oil prices beginning to recover, but defendant's share price not recovering, and defendant had less than $2 million cash on hand and could not draw on assets, so plaintiffs' only realistic hope of recovery was through defendants' insurance, which would be eroded by defence fees — Total settlement was nearly entire amount of $55 million insurance policy, so settlement was reasonable and outcome was actually excellent — Contingency fee valid and approved, and fee and retainer agreements and consortium and carriage agreements also approved.

Table of Authorities

Cases considered by *Edward P. Belobaba J.*:

AFA Livförsäkringsaktiebolag v. Agnico-Eagle Mines Ltd. (2016), 2016 ONSC 532, 2016 CarswellOnt 2169 (Ont. S.C.J.) — referred to

Cannon v. Funds for Canada Foundation (2013), 2013 ONSC 7686, 2013 CarswellOnt 17784 (Ont. S.C.J.) — followed

Dabbs v. Sun Life Assurance Co. of Canada (1998), 1998 CarswellOnt 5823 (Ont. Gen. Div.) — referred to

O'Brien v. Bard Canada Inc. (2016), 2016 ONSC 3076, 2016 CarswellOnt 7494 (Ont. S.C.J.) — considered

Parsons v. Canadian Red Cross Society (1999), 1999 CarswellOnt 2932, 40 C.P.C. (4th) 151, 103 O.T.C. 161 (Ont. S.C.J.) — referred to

Rahimi v. SouthGobi Resources Ltd. (2015), 2015 ONSC 5948, 2015 CarswellOnt 16810 (Ont. S.C.J.) — followed

Sheridan Chevrolet Cadillac Ltd. v. Furukawa Electric Co. (2016), 2016 ONSC 729, 2016 CarswellOnt 1571 (Ont. S.C.J.) — referred to

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

s. 5(1) — considered

Securities Act, R.S.O. 1990, c. S.5
Generally — referred to

s. 138.8 [en. 2002, c. 22, s. 185] — considered

MOTION by prospective representative plaintiff for certification of class proceeding.

***Edward P. Belobaba J.*:**

1 The approval of this proposed securities class action settlement turns on whether the settlement amount falls within a range or zone of reasonableness.[1] The other factors that are repeated in the case law[2] — such as the risks of continued litigation and the experience of class counsel — more often than not amount to self-serving "boiler plate" that doesn't really help the judge decide if the proposed settlement is truly in the best interests of the class (and not just in the best interests of class counsel.)[3] It is the "zone of reasonableness" analysis that, in my view, is not only the most helpful but is usually determinative.

2 Here, as in too often the case, class counsel spent far too much time on the so-called "boiler plate" submissions and not enough time addressing and explaining the zone of reasonableness point.[4] Fortunately, class counsel agreed to file a supplementary affidavit providing more evidence about the latter and as a result, I was satisfied that the settlement was indeed within a zone of reasonableness and should be approved.[5]

Brief background

3 The defendant Penn West Petroleum was one of Canada's largest oil and gas companies. Its shares trade on the Toronto

and New York Stock Exchanges. The individual defendants are current or former officers or directors.

4 The factual narrative in this proposed securities class action follows a well-charted course. Penn West disclosed a need to restate earlier financials. The share price dropped. Class actions materialized within days in both the U.S. and Canada alleging misrepresentation and claiming substantial damages on behalf of aggrieved shareholders. Four class actions were commenced in Canada: two in Ontario that effectively merged into one; and one in each of Quebec and Alberta.

5 This familiar litigation narrative was complicated in this case by the fact that during the same time period, world oil prices were falling dramatically[6] and the defendant oil and gas producer soon found itself in a precarious financial position facing a real risk of insolvency.

6 It was in this context that class counsel persuaded all parties, including those involved in the parallel U.S. action, to sit down with a mediator. The mediation proved to be successful and shortly thereafter the American and Canadian class actions against Penn West were settled for $53 million Canadian. Given that an almost equal amount of shares were purchased on the TSX and the NYSE, it was agreed that the settlement amount would be divided equally and the Canadian class actions would receive $26.5 million.

7 Class counsel now moves for settlement approval. More specifically, class counsel asks that leave be granted under s. 138.8 of the *Securities Act*,[7] the action be certified for settlement purposes under s. 5(1) of the *Class Proceedings Act*,[8] and the $26.5 million settlement and class counsel's legal fees be formally approved by the court.

8 Similar approval hearings have been scheduled in Quebec and Alberta.

The motions for leave and certification

9 As I advised counsel at the hearing, I have no difficulty granting leave under the *Securities Act* and certifying the action for settlement purposes under the *Class Proceedings Act.* I am satisfied on the evidence before me that the action is being brought in good faith and there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff. As I noted in *Rahimi*,[9] it is hard to imagine a scenario where a publicly-traded company restates its financials and in doing so allegedly causes shareholder loss and leave under s. 138.8 is not granted.[10]

10 I also find that the requirements of s. 5(1) of the CPA have been satisfied. The pleadings disclose a cause of action (namely, statutory misrepresentation); there is an identifiable class (all persons, other than residents of Quebec and Alberta, who purchased Penn West shares on the TSX during the class period); the claim raises a common issue (did any of the Penn West financials contain a misrepresentation?); there some evidence that a class action would be the preferable procedure; and there is a suitable representative plaintiff with no conflicts of interest.

11 Leave and certification are thus granted for settlement purposes.

Settlement approval

12 This was an early stage settlement. The proposed class action was settled within months of the action being filed and before any motions for leave or certification were brought. Early stage settlements understandably attract more judicial scrutiny than, say, settlements achieved on the eve of the common issues trial.[11]

13 My concern here was as follows. The plaintiff used for $500 million in damages and the plaintiff's expert concluded that the actual monetary loss sustained by the Canadian class members was in the range of $186.5 million. Why did class counsel agree to settle for $26.5 million?

14 Class counsel tried to answer this question in very broad terms: in their view, the settlement amount was fair and reasonable because the defendant's financial state was precarious and there was a real risk of insolvency; and the company's available insurance coverage was being eroded by legal defence costs. Class counsel decided that while there was still a significant amount of coverage remaining under the insurance policies, it was better to settle rather than wait until judgment or a later settlement when the insurance policies would likely be depleted.

15 But this still did not explain why the $26.5 million settlement amount was within a range or zone of reasonableness. In other words, why $26.5 million and not, say, $126 million? I needed more information, in particular about the available insurance coverage — the applicable policy limits and how quickly these limits were being eroded by defence costs. Fortunately, class counsel agreed to provide additional information by way of a supplementary affidavit.

16 Having reviewed this additional information, I can now set out the reasons why the settlement amount is fair and reasonable and in the best interests of the class. At the time of the mediation and shortly thereafter when the settlement was concluded, class counsel had the following information:

(i) Even if oil prices were starting to slowly recover, the defendant's share price was not following suit. In other words, the market was no longer confident about the defendant's future as an ongoing concern. The defendant was off-side its financial covenants and there was a real risk of insolvency.

(ii) The defendant would not be able to contribute financially to any class action settlement or judgment. Penn West had less than $2 million in cash on hand and was in no position to draw down on any existing credit facilities. The only realistic source of funding for class member claims was from the company's insurance coverage.

(iii) The available insurance coverage, after the payment of actual and anticipated legal defence costs in the U.S. and Canada, was in the range of C$55 million.

17 The overall settlement amount of $53 million was therefore not only a reasonable portion of the available insurance monies but virtually the entire available amount. That is, the $53 million settlement, or $26.5 million for the Canadian class members, was not only within a zone of reasonableness, it was demonstrably at the high end of ultimate recoverability.

18 This additional information about the insurance limits explains why class counsel decided that $26.5 million was fair and reasonable and allows me to conclude without hesitation that the settlement as it pertains to the Ontario class members is very much in the best interests of the class and should be approved. This is an excellent outcome.

Legal fees approval

19 The retainer agreement provides for the recovery of a 33 per cent contingency fee plus disbursements and taxes. Following the reasoning in *Cannon*[12] I have no difficulty according presumptive validity to this contingency fee arrangement. As I have noted many times, it is only through a robust contingency fee system that class counsel will be appropriately rewarded for the wins and losses over many files and many years of litigation and that the class action will continue to remain viable as a meaningful vehicle for access to justice.

20 Class counsel is entitled to receive one-third of the $26.5 million recovery plus disbursements and taxes. The legal fees request is approved.

21 I am also pleased to formally approve the Fee and Retainer Agreement, the Consortium and Carriage Agreement and the Carriage and Co-operation Agreement - the latter two agreements were authorized by the Fee and Retainer Agreement.

22 My congratulations again to counsel on both sides for resolving this matter in such an impressive fashion.

23 Order to go as per the draft Order that I signed at the conclusion of the hearing.

Motion granted.

Footnotes

1 *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. Gen. Div.) at para. 12; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Ont. S.C.J.), at para. 70. Winkler, Perell, Kalajdzic and Warner, *The Law of Class Actions in Canada* (2014) at 305.

2 *Dabbs*, at para. 13; *Parsons* at para. 71-72.

3 See the discussion in *Sheridan Chevrolet Cadillac Ltd. v. Furukawa Electric Co.*, 2016 ONSC 729 (Ont. S.C.J.), at para. 12; *AFA Livförsäkringsaktiebolag v. Agnico-Eagle Mines Ltd.*, 2016 ONSC 532 (Ont. S.C.J.) [hereinafter Leslie], at paras. 3-12; and *O'Brien v. Bard Canada Inc.*, 2016 ONSC 3076 (Ont. S.C.J.), at paras.11-14.

4 As I noted in *O'Brien v. Bard Canada Inc.*, at para. 13: "It is simply not enough for class counsel (whose interests are not aligned with those of the class) to file a factum that in essence says nothing more than '*We know what we're doing ... trust us*.' It is my hope that in approving class action settlements in the future, judges will urge class counsel to skip the wind-up (i.e. all the non-specific "boiler-plate") and just throw the pitch (and explain why the settlement amount is within a zone of reasonableness.)"

5 In every one of my most recent settlement approval motions, class counsel had to file supplementary evidence about the "zone of reasonableness" before the settlement was approved: see *Sheridan Chevrolet* at paras. 13-15; *Leslie* at paras. 13-16 and *Bard* at paras. 11-14.

6 On July 29, 2014, the date of the company's first disclosure about the need for a restatement, the price of West Texas Intermediate crude oil was US$104.91 a barrel. By the summer and fall of 2015, the oil price had fallen to about US$30 a barrel. The impact on the defendant company's share prices was devastating: shares tumbled from a high of around $10.00 in July, 2014 to less than dollar ($0.82) in May, 2016.

7 *Securities Act*, R.S.O. 1990, c. S.5, as am.

8 *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

9 *Rahimi v. SouthGobi Resources Ltd.*, 2015 ONSC 5948 (Ont. S.C.J.) .

10 *Ibid.*, at para. 25.

11 See the discussion in *McIntyre (Litigation guardian of) v. Ontario*, 2016 ONSC 2662 (Ont. S.C.J.), at paras. 26-36.

12 *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 (Ont. S.C.J.).

2016 ONSC 3076
Ontario Superior Court of Justice

O'Brien v. Bard Canada Inc.

2016 CarswellOnt 7494, 2016 ONSC 3076, 266 A.C.W.S. (3d) 306

Donna O'Brien, Adam Pierce, Elizabeth Burden and Bruce Burden, Plaintiffs and Bard Canada Inc., C.R. Bard Inc., and Bard Medical Division, Defendants

Edward P. Belobaba J.

Heard: May 2, 2016
Judgment: May 11, 2016
Docket: CV-15-523068-CP

Counsel: Michael Peerless, Matthew Baer, for Plaintiffs
Michael Eizenga, Ashley Paterson, for Defendants

Subject: Civil Practice and Procedure; Public; Torts

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.b Certification
V.2.b.i Plaintiff's class proceeding
V.2.b.i.H Miscellaneous

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.d Orders, awards and related procedures
V.2.d.iii Termination of proceedings

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.iv Court approval of agreement for payment of fees and disbursements

Headnote

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Miscellaneous
Plaintiffs commenced class action with respect to products manufactured by defendant used to treat pelvic organ prolapse ("Avaulta class") and stress urinary incontinence ("Align or Ajust class") — Class action was settled for payment of $400,000 for benefit of Avaulta class, $1,550,000 for benefit of Align and Ajust class, $300,000 in special circumstances fund for benefit of both classes, and $225,000 for notice and claims administration — Plaintiffs brought motion for order certifying proposed class action for settlement purposes and approval of settlement and legal fees — Motion granted — Class action met requirements for certification under Class Proceedings Act, 1992 — Pleadings disclosed cause of action in

negligence — There was identifiable class defined — There was some basis in fact for existence and commonality of proposed common issue — Certification of common issue would avoid duplication in fact-finding and legal analysis and will definitely advance litigation — Class action would be fair, efficient and manageable method of advancing claim — Named plaintiffs had workable litigation plan in place and together would fairly and adequately represent interests of class.

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Orders, awards and related procedures — Termination of proceedings
Settlement — Plaintiffs commenced class action with respect to products manufactured by defendant used to treat pelvic organ prolapse ("Avaulta class") and stress urinary incontinence ("Align or Ajust class") — Class action was settled for payment of $400,000 for benefit of Avaulta class, $1,550,000 for benefit of Align and Ajust class, $300,000 in special circumstances fund for benefit of both classes, and $225,000 for notice and claims administration — Plaintiffs brought motion for order certifying proposed class action for settlement purposes and approval of settlement and legal fees — Motion granted — Settlement amount of $2.475 million was within zone of reasonableness — Settlement agreement was fair and reasonable and in best interests of class — Class counsels' knowledge level about risks and rewards of further litigation was relatively high given that they had just fought and lost larger certification motion with same basic liability and damages issues — Had matter gone to trial, recovery would have been in range of $50,000 to $150,000 per claimant — Discounting this by 50 per cent to reflect risks of litigation, compensation payment was in range of $25,000 to $75,000 per claimant — Given that 22 to 66 claims were expected and given settlement amount, average recovery would exceed $30,000 and individual claims would range from few thousand to around $100,000.

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Court approval of agreement for payment of fees and disbursements
Plaintiffs commenced class action with respect to products manufactured by defendant used to treat pelvic organ prolapse ("Avaulta class") and stress urinary incontinence ("Align or Ajust class") — Class action was settled for payment of $400,000 for benefit of Avaulta class, $1,550,000 for benefit of Align and Ajust class, $300,000 in special circumstances fund for benefit of both classes, and $225,000 for notice and claims administration — Plaintiffs brought motion for order certifying proposed class action for settlement purposes and approval of settlement and legal fees — Motion granted — Legal fees of $742,500 plus disbursements and taxes were approved — Amount claimed was consisted with contingency fee arrangement agreed to by plaintiffs which entitled class counsel to 30 per cent contingency plus disbursements and taxes — Contingency fee arrangements of up to one third recovery that are fully understood and accepted by representative plaintiffs should be presumptively valid and enforceable.

Table of Authorities

Cases considered by *Edward P. Belobaba J.*:

AFA Livförsäkringsaktiebolag v. Agnico-Eagle Mines Ltd. (2016), 2016 ONSC 532, 2016 CarswellOnt 2169 (Ont. S.C.J.) — referred to

Cannon v. Funds for Canada Foundation (2013), 2013 ONSC 7686, 2013 CarswellOnt 17784 (Ont. S.C.J.) — followed

O'Brien v. Bard Canada Inc. (2015), 2015 ONSC 2470, 2015 CarswellOnt 5377, 19 C.C.L.T. (4th) 47 (Ont. S.C.J.) — referred to

Sheridan Chevrolet Cadillac Ltd. v. Furukawa Electric Co. (2016), 2016 ONSC 729, 2016 CarswellOnt 1571 (Ont. S.C.J.) — referred to

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
s. 5(1) — considered

MOTION by plaintiffs for order certifying proposed class action for settlement purposes and approval of settlement and legal

fees.

***Edward P. Belobaba J.*:**

1 The plaintiffs ask that the court certify the proposed class action for settlement purposes and then approve the settlement and the legal fees.

2 Unlike the plaintiffs' initial and much larger class action which was not certified because it involved some 19 different categories of pelvic mesh products,[1] the class action herein is limited to just two categories: the defendant's Avaulta product that is used to treat pelvic organ prolapse ("POP") and the defendant's Align or Ajust product used to treat stress urinary incontinence ("SUI").

3 The settlement provides $400,000 for the benefit of the Avaulta Class, $1,550,000 for the benefit of the Align and Ajust Class, $300,000 in a "special circumstances fund" for the benefit of both classes, and $225,000 for notice and claims administration - for a non-reversionary total of $2,475,000.

4 Class counsel advises that there are currently 22 potential claimants.

5 Every class member's claim will be awarded points by class counsel (because they have the best understanding of each claim) based on the severity of the harm or injury sustained. The claims administrator will use the points to determine the appropriate compensation payment. Appeals from the decision of the administrator were initially to come to this court.

6 At the hearing on May 2, 2016 I voiced two concerns about the settlement as proposed: first, that any appeals from the decision of the administrator not involve the court; and second, that class counsel should provide more information as to why the $2.475 million settlement amount falls within a zone of reasonableness.

7 Both concerns were promptly addressed. Within days, class counsel advised that the parties had amended the settlement agreement to provide that a "special appeals master" (an experienced class action lawyer) would review and decide any claims appeals. Class counsel also provided a supplementary affidavit with the additional information that I required.

Certification for settlement purposes

8 The first order to business is to certify the proposed class action for settlement purposes. I have no difficulty doing so. Each of the five requirements set out in s. 5(1) of the *Class Proceedings Act*[2] is satisfied. The pleadings disclose a cause of action in negligence. There is an identifiable class defined, in essence, as all persons resident in Canada (excluding Quebec) who were implanted with an Avaulta, Align and/or Ajust product, and includes family law claims and the subrogated claims of the provincial health insurers.

9 There is some basis in fact for the existence and commonality of the proposed common issue - whether the defendants breached a duty of care owed to the classes by marketing and distributing the above-noted products in Canada. The certification of this common issue will avoid duplication in fact-finding and legal analysis and will definitely advance the litigation. A class action will be a fair, efficient and manageable method of advancing the claim and the named plaintiffs have a workable litigation plan in place and together will fairly and adequately represent the interests of the class.

10 The proposed class action, limited to the Avaulta, Align and Ajust products, is certified for settlement purposes.

Settlement approval

11 As already noted, I was not persuaded by the material that was initially filed by class counsel. The affidavit and factum, although in many respects routine, was little more than non-specific "boiler-plate."[3] The primary concern of a class action judge in approving a settlement is to be satisfied that the settlement amount falls within a range or zone of

reasonableness.[4] I frankly needed more information on this important point.

12 In a supplementary affidavit filed just a few days after the hearing, class counsel addressed my concern and explained why $2.475 million is within a zone of reasonableness. What follows is my summary of the additional evidence:

- Class counsels' knowledge level about the risks (and rewards) of further litigation in this case is relatively high given that they have just fought and lost a larger certification motion with the same basic liability and damages issues. In other words, this is not an "early stage" settlement and class counsel's assessment should be taken more seriously;

- About 328 Avaulta models and 4,059 Align/Ajust models were sold in Canada, although some may not be implanted and may still be in inventory. The risk of serious side effects for the SUI products is between 1 and 2% and for the POP products between 2.5 and 10%. Applying the higher percentage in each case results in about 33 POP claimants and 81 SUI claimants, with an overall total of 114 potential claimants.

- Class counsel, however, is currently aware of only 22 claimants and notes that the number of claims actually made typically ends up being two to three times the number of known cases at the time of resolution. Here this means, at most, 66 claimants.

- Had the matter gone to trial, the recovery would have been in the range of $50,000 to $150,000 per claimant. Discounting this by 50 per cent to reflect the risks of litigation, the compensation payment is therefore in the range of $25,000 to $75,000 per claimant. Given that 22 to 66 claims are expected, and given the settlement amount, the average recovery will exceed $30,000 and individual claims will range from a few thousand to around $100,000.[5]

13 This is exactly the kind of information that a court requires. It is simply not enough for class counsel (whose interests are not aligned with those of the class) to file a factum that says nothing more than "We know what we're doing ... trust us." It is my hope that in approving class action settlements in the future, judges will urge class counsel to skip the wind-up (i.e. all the non-specific "boiler-plate") and just throw the pitch (and explain why the settlement amount is within a zone of reasonableness.)

14 In this case, with the additional information provided by class counsel as summarized above, I am satisfied that the $2.475 million settlement amount is indeed within a zone of reasonableness. I am satisfied that the agreement is fair and reasonable and in the best interests of the class. The settlement is approved.

Legal fees approval

15 Under the retainer agreements entered into with the four representative plaintiffs, class counsel is entitled to a 30 per cent contingency plus disbursements and taxes. This is exactly what class counsel is requesting: legal fees of $742,500 plus disbursements and taxes.

16 As I noted in *Cannon*,[6] contingency fee arrangements of up to one-third recovery that are fully understood and accepted by the representative plaintiffs should be presumptively valid and enforceable. In my view, this is the most principled approach to class counsel compensation and one that best assures the future viability of the class action as a significant vehicle for access to justice. Class counsels' legal fees are therefore approved as requested.

17 Orders to go as per the draft Orders signed by me today.

Motion granted.

Footnotes

1 *O'Brien v. Bard Canada Inc.*, 2015 ONSC 2470 (Ont. S.C.J.) .

2 *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA").

[3] See my comments in *AFA Livförsäkringsaktiebolag v. Agnico-Eagle Mines Ltd.*, 2016 ONSC 532 (Ont. S.C.J.) .

[4] *Sheridan Chevrolet Cadillac Ltd. v. Furukawa Electric Co.*, 2016 ONSC 729 (Ont. S.C.J.) , at para. 12.

[5] I would add this calculation: assume an average compensation payment of $50,000 (the mid-point between $25,000 and $75,000) and assume 44 claimants (the mid-point between 22 and 66) the settlement should be around $2.2 million. Therefore, the actual settlement of $2.475 million falls easily within a zone of reasonableness.

[6] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 (Ont. S.C.J.) .

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Most Negative Treatment: Check subsequent history and related treatments.

2000 CarswellOnt 2174
Ontario Superior Court of Justice

Parsons v. Canadian Red Cross Society

2000 CarswellOnt 2174, [2000] O.J. No. 2374, 46 C.P.C. (4th) 236, 49 O.R. (3d) 281, 97 A.C.W.S. (3d) 1082

Dianna Louise Parsons, Michael Herbert Cruickshanks, David Tull, Martin Henry Griffen, Anna Kardish, Elsie Kotyk, Executrix of the Estate of Harry Kotyk, deceased and Elsie Kotyk, personally, Plaintiffs and The Canadian Red Cross Society, Her Majesty the Queen in right of Ontario and The Attorney General of Canada, Defendants

James Kreppner, Barry Issac, Norman Landry, as Executor of the Estate of the late Serge Landry, Peter Felsing, Donald Milligan, Allan Gruhlke, Jim Love and Pauline Fournier, as Executrix of the Estate of the late Pierre Fournier, Plaintiffs and The Canadian Red Cross Society, The Attorney General of Canada and Her Majesty the Queen in right of Ontario, Defendants

Winkler J.

Heard: February 14-16, 1999
Judgment: June 22, 2000
Docket: 98-CV-141369 CP, 98-CV-146405

Counsel: *Harvey Strosberg, Q.C.*, *Heather Rumble Peterson* and *Patricia Speight*, for Plaintiffs, Dianna Louise Parsons, Michael Herbert Cruickshanks, David Tull, Martin Henry Griffen, Anna Kardish and Elsie Kotyk.
R.F. Horak and *Michèle Smith*, for Her Majesty the Queen in Right of Ontario.
Michel Lapierre, for Attorney General of Canada.
Beth Symes, for Friend of the Court, Thalassemia Foundation of Canada.
William P. Dermody, for Intervenors, Hubert Fullarton and Tracey Goegan.
Terrence J. O'Sullivan and *Vanessa Jolles*, for Plaintiffs, James Kreppner, Barry Issac, Norman Landry, as Executor of the Estate of the late Serge Landry, Peter Felsing, Donald Milligan, Allan Gruhlke, Jim Love and Pauline Fournier, as Executrix of the Estate of the late Pierre Fournier.
Janice E. Blackburn, for Canadian Hemophilia Society, Friend of the Court.

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.d Orders, awards and related procedures
V.2.d.iv Appeals

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.iv Court approval of agreement for payment of fees and disbursements

Civil practice and procedure
XXIII Practice on appeal
XXIII.9 Parties
XXIII.9.b Miscellaneous

Professions and occupations
IX Barristers and solicitors
IX.5 Fees
IX.5.b Agreements for fees
IX.5.b.i Existence of agreement

Headnote

Practice --- Parties — Representative or class actions — General
Two companion class proceedings were brought against Red Cross and federal and provincial governments for damages arising from tainted blood — Settlement approved in actions against governments and stayed against Red Cross — Ontario class counsel groups brought motion for approval of counsel fees totalling $20 million — Ontario groups consisted of 60 lawyers and their supporting legal staff — All parties agreed that fair and reasonable fees appropriate and that counsel were skilful and effective — "Fair and reasonable" to be determined in light of risk undertaken by solicitor in conducting litigation and degree of success — Counsel found to have produced best possible result short of trial — Proceedings were largest personal injury case in Canadian legal history — High risk involved in taking on difficult and complex issues — Higher risk involved in class actions than in ordinary litigation because of requirement of court approval of any settlement — Motion granted.

Table of Authorities

Cases considered by *Winkler J.*:

Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998), 160 D.L.R. (4th) 186, 40 O.R. (3d) 83, 21 C.P.C. (4th) 272 (Ont. Gen. Div.) — considered

Doyer v. Dow Corning Corp. ((September 1, 1999)), no C.S. Montrèal 500-06-000013-934 (C.S. Que.) — referred to

Gagne v. Silcorp Ltd. (1998), 113 O.A.C. 299, 167 D.L.R. (4th) 325, 39 C.C.E.L. (2d) 253, 41 O.R. (3d) 417, 27 C.P.C. (4th) 114 (Ont. C.A.) — applied

Harrington v. Dow Corning Corp. (1999), 29 C.P.C. (4th) 14, 64 B.C.L.R. (3d) 332 (B.C. S.C.) — referred to

Maxwell v. MLG Ventures Ltd. (1996), 30 O.R. (3d) 304, 3 C.P.C. (4th) 360, 11 O.T.C. 292 (Ont. Gen. Div. [Commercial List]) — referred to

Nantais v. Telectronics Proprietary (Canada) Ltd. (1996), 28 O.R. (3d) 523, *(*sub nom. *Nantais v. Telectronics Propriety (Canada) Ltd.)* 134 D.L.R. (4th) 470, 7 C.P.C. (4th) 189 (Ont. Gen. Div.) — considered

Pelletier v. Baxter Health Care Co. ((July 9, 1999)), no Montreal 500-06000005-95 (C.S. Que.) — referred to

Serwaczek v. Medical Engineering Corp. (1996), 3 C.P.C. (4th) 386, 13 O.T.C. 63 (Ont. Gen. Div.) — referred to

Windisman v. Toronto College Park Ltd. (1996), 3 C.P.C. (4th) 369, 10 O.T.C. 375 (Ont. Gen. Div.) — referred to

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

s. 32(1) — referred to

s. 32(1)(c) — referred to

s. 32(2) — referred to

s. 32(4) — referred to

s. 33(1) — referred to

s. 33(2) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

MOTION for approval of counsel fees in tainted blood class proceedings.

***Winkler J.*:**

1 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. 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 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 $52,500,000.00. 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.

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.

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% 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 hearing that there is agreement among the 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 $52,500,000. 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 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 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 (Ont. 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 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 (Ont. Gen. Div.); *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 (Ont. Gen. Div.)).

13 Notwithstanding the different forms that a premium fee arrangement may take, the principle enuniciated 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 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), 3 C.P.C. (4th) 360 (Ont. Gen. Div. [Commercial List])); *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 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 untilized 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

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 criteria 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 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 more so, it demonstrates the thoroughness of class counsel in fashioning a msatisfactory 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

$1,100,000,000 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.
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 $1,100,000,000.00.

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 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 paragraph 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 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. Elliott, 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 firm 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 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 psuedo-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% probability of success would not suffer any economic prejudice if the fee earned in the successful actions was multiplied by a factor of 2. 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 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 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 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 fo 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 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.

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. 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 governments 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*. (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 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. ...
>
> 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 the 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-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, insofar 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, $15,000,000 in the Transfused Action and $5,000,000 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 $6,000,000 and $11,000,000 should be awarded in the Transfused Action. In the Hemophiliac Action, the range of the intervenors' submissions was from approximately $2,000,000 and $3,500,000. 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 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 was 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% 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 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 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 by these two concerns obviously complicated matters for the FPT governments and for the class counsel groups. Despite these complexities, the parties perservered 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 $52,500,000 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 amount 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 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 $52,500,000 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 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% and 33% of any compensation received. This arrangement would produce a counsel fee of over $220,000,000, 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 by 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 135-138:

> 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 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 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% 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% 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 $15,000,000 and $5,000,000 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 recovery. In *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1996), 28 O.R. (3d) 523 (Ont. Gen. Div.), Brockenshire J., in approving a lump sum fee, stated at 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 Ltd. Partnership v. Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 (Ont. Gen. Div.), this court stated at 87-88:

> 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 analysing 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 425:

> 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 ease [sic] 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% 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% 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 Secondly, 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 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 Thirdly, 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.

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 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 caliber 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), 29 C.P.C. (4th) 14 (B.C. S.C.)	$40,000,000	$6,000,000	15%	Yes
Doyer v. Dow Corning Corp. ((September 1, 1999)), no C.S. Montrèal 500-06-000013-934 (C.S. Que.), Tingley J.S.C.	$52,000,000	$10,400,000	20%	Yes
Nantais v. Telectronics Proprietary (Canada) Ltd. (1996), 28 O.R. (3d) 523 (Ont. Gen. Div.)	$23,140,000	$6,000,000	26%	Yes
Pelletier v. Baxter Health Care Co. ((July 9, 1999)), no Montreal 500-06000005-95 (C.S. Que.) *combined with *Jones v. Baxter Health Care Corp.* in Ontario	$21,525,000	$3,648,000	16.9%	Yes

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 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 Trust Fund established for the class members erather 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 was 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-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.

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.

Motion granted.

2017 ONSC 2448, 2017 CarswellOnt 6142, 277 A.C.W.S. (3d) 695, 9 C.P.C. (8th) 127

Most Negative Treatment: Check subsequent history and related treatments.

2017 ONSC 2448
Ontario Superior Court of Justice

Quenneville v. Volkswagen Group Canada Inc.

2017 CarswellOnt 6142, 2017 ONSC 2448, 277 A.C.W.S. (3d) 695, 9 C.P.C. (8th) 127

Matthew Robert Quenneville, Luciano Tauro, Michael Joseph Pare, Therese H. Gadoury, Amy Fitzgerald, Renee James, Al-Noor Wissanji, Jack Mastromattei and Jay MacDonald (Plaintiffs) and Volkswagen Group Canada Inc., Volkswagen Aktiengesellschaft, Volkswagen Group of America Inc., Audi Canada Inc., Audi Aktiengesellschaft, Audi of America Inc. and VW Credit Canada Inc. (Defendants)

Edward P. Belobaba J.

Heard: March 31, 2017
Judgment: April 26, 2017
Docket: CV-15-537029-CP

Counsel: Charles Wright, Harvey Strosberg, Reidar Mogerman, David O'Connor, Emilie Maxwell, for Plaintiffs
Cheryl Woodin, Robert Bell, Robert Charbonneau, Robin Squires, for Defendants

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.f Miscellaneous

Headnote

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Miscellaneous

Approval of settlement — Class action relating to diesel vehicles was certified — Proposed settlement was worth $2.1 billion and covered 105,000 class members — Motion was brought for court approval of settlement — Motion granted — Settlement was fair and reasonable and in best interests of class — Settlement was proportionate to US settlement — Amounts payable under settlement agreement were measured against legal benchmark — Remedy of rescission, and full refund of purchase price, provided under s. 18(1) of Consumer Protection Act was not available because vehicles had been driven and could not be returned — Class members would receive more under settlement than they would have received under tort law, which provided damages of price paid minus value received — Class members would have option to return vehicle for buy-back price plus damages payment of $5,100 to $8,000, or keep vehicle and obtain emissions modification and damages payment of $5,100 to $8,000 — In one example, class member would receive $8,208 more under settlement than under tort approach if he chose buy-back option, and $3,250 more if he kept vehicle; and analysis would provide similar results for other class members.

Table of Authorities

Cases considered by *Edward P. Belobaba J.*:

Addison v. Ottawa Auto & Taxi Co. (1913), 30 O.L.R. 51, 16 D.L.R. 318, 1913 CarswellOnt 882 (Ont. C.A.) — considered

Marcil v. Eastview Chevrolet Pontiac Buick GMC Ltd. (2016), 2016 ONSC 3594, 2016 ONCS 3594, 2016 CarswellOnt 10626, 2016 CarswellOnt 10627 (Ont. Div. Ct.) — referred to

Quenneville v. Volkswagen Group Canada Inc. (2016), 2016 ONSC 7959, 2016 CarswellOnt 20027, 6 C.E.L.R. (4th) 109 (Ont. S.C.J.) — referred to
Ramdath v. George Brown College of Applied Arts and Technology (2014), 2014 ONSC 3066, 2014 CarswellOnt 8568, 56 C.P.C. (7th) 296, 375 D.L.R. (4th) 488 (Ont. S.C.J.) — referred to
Vieira v. Prestige Auto Sales Inc. (2004), 2004 CarswellOnt 4449, 12 M.V.R. (5th) 297 (Ont. S.C.J.) — referred to
Wu v. Volvo Cars of Canada Ltd. (2004), 2004 CarswellOnt 1423 (Ont. Div. Ct.) — referred to

Statutes considered:

Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A
s. 18(1) — considered

s. 18(2) — considered

MOTION for court approval of settlement of class action proceeding.

***Edward P. Belobaba J.*:**

1 This class action relating to VW 2.0-litre diesel vehicles was certified for settlement purposes in December [1] about two months after the American settlement was judicially approved. [2] The proposed Canadian settlement ("the Settlement"), worth about $2.1 billion, mirrors much of what was provided to American class members in the U.S. settlement, worth about $10 billion.

2 Given that the number of affected VW owners and lessees in Canada is around 105,000 and amounts to about one-fifth of the 500,000 or so that reside in the U.S., the settlement proportions appeared to be appropriate. And, on their face at least, the buy-back provisions and damages payments in the Canadian settlement appeared to be reasonable.

3 However, I needed a benchmark against which the Settlement could sensibly be measured. The most obvious was a legal benchmark. For example, how much would the class members in Canada have recovered under provincial consumer protection legislation or under the common law of tort?

4 Because all of the vehicles have been driven and none of them can be returned in their original condition, the remedy provided under s. 18(1) of the Ontario *Consumer Protection Act*, [3] namely rescission of the purchase agreement, return of the car and recovery of the full purchase price, is not available. Under s. 18(2) of the Ontario Act and under tort law generally, the measure of damages that applies here, put simply, is "Price paid minus value received." [4] I will refer to this formula as "the tort approach."

5 At the March 31, 2017 hearing of this motion for settlement approval I advised class and VW counsel that I was not prepared to approve the proposed $2.1 billion Settlement until I was reassured that the amounts payable under the Settlement were at least equal to the amounts that the class members would receive under the tort approach.

6 Over the course of the last two weeks, class and VW counsel responded in detail to my numerous questions with written submissions and email exchanges, culminating with an in-person meeting on April 18. At the end of all of this, I can comfortably say that all of my concerns have been addressed and resolved.

7 For the reasons set out below, I am now satisfied that, in the overall, class members could well receive *more* under the Settlement than they would have recovered under the tort approach. The Settlement is therefore fair and reasonable and in the best interests of the class. I signed the approval Order on April 21, 2017 with reasons to follow.

8 These are my reasons.

(1) What class members will receive under the Settlement

9 The 105,000 class members purchased or leased one of the following VW or Audi 2-Litre diesel automobiles in the affected model years 2009 to 2015: VW Jetta 2009-15; VW Jetta Wagon 2009; VW Beetle 2013-15; VW Golf 2010-13 and 2015; VW Golf Wagon 2010-14; VW Golf Sportwagon 2015; VW Passat 2012-15; and Audi A3 2010-13 and 2015.

10 The Settlement provides a defined cash payment to all eligible owners and lessees and for many class members it also provides a choice to sell or trade in their vehicle, terminate their lease without any early termination penalty, or keep their vehicle and get an emissions modification once this is approved by government regulators, coupled with an extended emissions warranty.

11 For my purposes here, it is sufficient if I focus on what the average owner-class member will receive under the Settlement. [5] He or she will have a choice:

- *Return the vehicle* for the Buyback Price (the CBB wholesale value at mid-September, 2015 before the "defeat device" fraud was made public) PLUS a Damages Payment ranging from $5100 to $8000; or

- *Keep the vehicle*, obtain an emissions modification once it is approved by the regulators PLUS a Damages Payment ranging from $5100 to $8000;

[If the emissions modification for the particular vehicle is not approved and implemented, the class member can choose the Buyback plus the Damages Payment OR he or she can opt out of the Settlement and together with any others in the same position continue to litigate under this court's supervision.]

12 The chart below shows what six of the representative plaintiffs will receive under the Settlement and provides a fair representation of the range of recovery for all eligible owners:

Repre- sent- ative Plaint- iff	*Model*	*MY*	*Date of Purchase*	*Total Purch- ase Price*	*Current Mileage (km)*	*Dam- ages Pay- ment*	*Buy- back Vehicle Value{1}*	*Total Settle- ment Pay- ment*
Tauro	Golf	2015	3/25/2015	$23,904	51,355	$7,000	$17,650	$24,650
Tauro	Golf	2015	7/31/2015	$27,689	45,908	$7,000	$21,800	$28,800
Tauro	Jetta	2012	11/1/2011	$33,720	158,301	$5,250	$13,500	$18,750
Tauro	Jetta	2012	12/12/2011	$33,665	188,843	$5,250	$11,990	$17,240
Tauro	Golf	2015	3/25/2015	$27,700	62,102	$7,000	$20,800	$27,800
Pare	Passat	2012	8/29/2012	$38,908	133,000	$5,250	$18,450	$23,700
Gad- oury	A3	2010	12/15/2012	$32,635	91,000	$5,100	$16,950	$22,050
Fitzgerald	Beetle	2013	7/3/2013	$32,336	56,240	$5,500	$17,050	$22,550
James	Beetle	2013	3/9/2013	$30,612	119,574	$5,500	$15,050	$20,550
MacDonald	Golf	2011	9/9/2010	$38,181	157,000	$5,100	$14,750	$19,850

13 I will use Mr. Pare as an example. Mr. Pare can return his 2012 Passat under the Buyback option and receive a total of $23,700, or keep his car (assuming the emissions modification can be done) and receive a damages payment of $5250.

14 Is this fair and reasonable? How does this recovery compare to what Mr. Pare would have recovered under the tort approach?

(2) What class members would have received under the tort approach

15 Of the approximately 105,000 class members, only 36 opted out of the class action and only a tiny percentage objected to the Settlement. Some 522 class members filed valid pre-hearing objections, 10 spoke at the hearing on March 31, and a further 128 class members (probably including some duplications) forwarded post-hearing letters to my attention. I considered every objection and letter and I am grateful that these class members took the time to voice their

concerns. Most of the objections and letters focused on issues that were unique to the class member's personal situation and about which I can do very little, such as not receiving compensation for roof racks or extended warranties. But many of the letters also addressed a more generalized issue and urged me to find that class members were entitled to nothing less than a full refund of their purchase price.

16 A full refund of the purchase price is a non-starter. It is important to repeat again that under Canadian law, whether consumer protection legislation or tort law, no such recovery of the full purchase price is possible. No class member is entitled in law to rescind the sales agreement and recover his or her full purchase price because, in every case, the affected automobile has been driven and used for many months if not years - both before and after the "defeat device" fraud was publicly disclosed by the American EPA on September 18, 2015.

17 I discussed this matter at length with counsel and I reviewed the applicable legal authorities. I am satisfied that the tort approach requires not only that the residual (CBB) value of the class member's vehicle be deducted from the purchase price but that the balance must then be further reduced to reflect the fact that the car was used, that is driven, over the time period in question.

18 Consider again Mr. Pare's situation. Mr. Pare purchased a 2012 VW Passat in August 2012 for $38,908, including taxes. Let's assume that he learned about the VW "defeat device" fraud on or about September 18, 2015. By this Announcement Date, Michael had driven his Passat just over three years, logging about 88,000 kilometres.

19 As set out in the chart below, the CBB wholesale value of his car on the day before the Announcement was $18,450. It follows that up until the Announcement Date, Michael's use of the car (driving some 88,000 km) could be valued at $20,458 (that is $38,908 minus $18,450). The CBB wholesale value in November, 2015, shortly after the Announcement, was $17,450. That is, the core "loss" caused by the Announcement was only $1000. The CBB wholesale value today is about $13,492.

Represent-ative Plaintiff	*Model*	*MY*	*Sep 2015 Buyback Value*	*Nov 2015 Buyback Value*	*Mar 2017 Buyback Value*
Mr. Pare	Passat	2012	$18,450	$17,450	$13,492
Ms. Gadoury	A3	2010	$16,950	$15,900	$13,500
Ms. Fitzgerald	Beetle	2013	$17,050	$15,950	$14,900
Ms. James	Beetle	2013	$15,050	$13,950	$12,592
Dr. MacDonald	Golf	2011	$14,750	$13,800	$9,167

20 Thus, under the tort approach, had Michael sued VW in say November, 2015 he would have received Purchase Price minus Residual Value, i.e. $38,908 minus $17,450, for an initial balance of $21,458. But Canadian law is clear that the car owner must account "for any benefit he may have derived from the use of the property." [6] That is, he must "make allowance" for depreciation. [7] In Michael's case, the value to him of having the use of his car for some 37 months - driving some 88,000 km - is best measured by the depreciation [8] which is $20,458. Deducting his amount from the initial balance of $21,458 leaves Michael with a core damages award of $1000. He would also be allowed to claim incidental losses but these would probably be quite modest - let's say he would get $2000 in overall damages.

21 If Mr. Pare waited and sued VW today when the CBB value of his 2012 Passat is $13,492, his recovery under the tort approach would, again, be Purchase Price minus Residual Value minus Use Value over the last 4 $^{1}/_{2}$ years of driving. That is, $38,908 minus $13,492 minus $24,416 equals $1000. If you add $1000 for incidentals, the total recovery under the tort approach is $2000.

22 In short, the most Mr. Pare would probably recover under provincial consumer protection legislation or tort if he sued VW in fraud or fraudulent misrepresentation is $1000 to $2000 in damages. But he would still have his car with

(hopefully) a completed emissions fix and a CBB value of $13,492. Thus, under the tort approach, he would net out at $15,492 consisting of $2000 in damages and a car worth $13,492.

23 Under the Settlement, Mr. Pare will net out at $23,700 if he returns the car for the Buyback and Damages, and $18,742 (Damages Payment of $5250 plus CBB Value of $13,492) if he keeps the car and gets the emissions modification.

24 Thus, Mr. Pare will receive $8208 more under the Settlement than under the tort approach if he returns the car and chooses the Buyback option and $3250 more if he keeps the car.

25 There is another benefit to the Buyback option. The Buyback amount is frozen at the pre-Announcement September, 2015 vehicle value. This is significant for class members who continue to use their vehicle up to the date of their Buyback. In addition to the $23,700 Settlement amount that Mr. Pare will receive, he will be able to use and drive his car until the Buyback takes place without regard for the further use-related depreciation of $3,958. This is almost a $4000 additional benefit up to March, 2017 and it will continue to increase until the car is returned for the Buyback. [9]

26 It is therefore not surprising that in the U.S. the overwhelming majority of American class members are choosing the buyback option. According to a recent letter from VW's American counsel reporting on the progress of the U.S. Settlement Program, VW has thus far completed almost 240,000 buybacks or early lease terminations and has performed emission modifications to just over 6000 vehicles in the 2015 model year. [10]

27 I fully expect the Canadian experience to be similar, with the majority of class members here as well choosing the Buyback because under the Settlement this option provides the class member with a larger recovery than keeping the car and pocketing the Damages Payment or suing under the tort approach.

28 The analysis set out above deals only with one example, but the same analysis will result in similar findings for other owner-class members. I am therefore satisfied that in the overall the Settlement provides a larger recovery for class members, whether owners or lessees, than what would have been recovered under provincial consumer protection legislation or tort.

29 I am pleased to find that the Settlement is fair and reasonable and in the best interests of the class.

Disposition

30 The proposed Settlement is approved.

31 An honorarium in the amount of $49,975, ranging from $725 to $2925 in individual payments to the 31 representative plaintiffs residing in New Brunswick, Nova Scotia, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia is also approved as fair and reasonable.

32 Order to go as per the Approval Order signed on April 21, 2017.

Motion granted.

Footnotes

1 *Quenneville v. Volkswagen Group Canada Inc.*, 2016 ONSC 7959 (Ont. S.C.J.) (December 19, 2016).

2 *In re Volkswagen "Clean Diesel" Marketing Sales Practices and Products Liability Litigation*, MDL, No. 2672 (CRB)(JSC) (U.S. District Court, Northern District of California, October 25, 2016).

3 *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Schedule A.

4 Discussed in *Ramdath v. George Brown College of Applied Arts and Technology*, 2014 ONSC 3066 (Ont. S.C.J.), at paras. 15-16.

5 Of the 105,000 class members, about 98,000 are owners and only about 7,000 are lessees.

6 *Addison v. Ottawa Auto & Taxi Co.* (1913), 16 D.L.R. 318 (Ont. C.A.) at para. 8. Also see *Vieira v. Prestige Auto Sales Inc.* (2004), 12 M.V.R. (5th) 297 (Ont. S.C.J.) at paras 51 and 63; *Wu v. Volvo Cars of Canada Ltd.* (2004), 130 A.C.W.S. (3d) 188 (Ont. Div. Ct.) [2004 CarswellOnt 1423 (Ont. Div. Ct.)]; and *Marcil v. Eastview Chevrolet Pontiac Buick GMC Ltd.*, 2016 ONSC 3594 (Ont. Div. Ct.).

7 *Addison*, supra, note 6, at para. 8.

8 *Vieira*, supra, note 6, at paras. 63-64.

9 Although not part of the tort analysis, it will be comforting to class members to note that the Buyback plus Damages Payment will exceed the retail values of the eligible vehicles as of the day before the Announcement by as much as 112 to 128 percent. This "surplus" will address many of the individualized concerns about not being sufficiently compensated for the cost of accessories or extended warranties.

10 Canadian counsel advise that VW has filed emission modification plans with American regulators for model years 2009 to 2014 inclusive and are currently awaiting approval. VW counsel are hopeful that emissions modifications will soon be approved for all of the affected VW and Audi diesel vehicles.

End of Document

2012 ONSC 911
Ontario Superior Court of Justice

Robinson v. Rochester Financial Ltd.

2012 CarswellOnt 1368, 2012 ONSC 911, [2012] 5 C.T.C. 24, [2012] O.J. No. 534, 212 A.C.W.S. (3d) 20, 27 C.P.C. (7th) 351

Kathryn Robinson and Rick Robinson (Plaintiffs/Moving Parties) and Rochester Financial Limited et al. (Defendants/Respondents)

G.R. Strathy J.

Heard: January 17, 2012
Judgment: February 7, 2012
Docket: 08-CV-349792 CP

Counsel: David Thompson, Matthew G. Moloci, for Plaintiffs
Glenn Smith, Sean O'Donnell, for Defendant, Fraser Milner Casgrain LLP
John Finnigan, for Monitor, Grant Thornton Limited

Subject: Income Tax (Federal); Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
  V.2 Representative or class proceedings under class proceedings legislation
    V.2.e Costs, fees and disbursements
      V.2.e.iv Court approval of agreement for payment of fees and disbursements

Civil practice and procedure
XVI Disposition without trial
  XVI.7 Settlement
    XVI.7.e Miscellaneous

Tax
II Income tax
  II.9 Other deductions
    II.9.d Charitable donations

Headnote

Tax --- Income tax — Other deductions — Charitable donations
From 2003 to 2007, defendant's clients operated scheme which provided taxpayers with charitable tax receipts equivalent to 3 and one-half times taxpayers' cash donations, such that taxpayers profited from donations — CRA disallowed taxpayers' claimed charitable donation tax credits on basis that "donations" made by taxpayers were not gifts for purposes of Income Tax Act and that scheme was sham intended to enrich taxpayers rather than benefit charity — Taxpayers' action against defendant and co-defendants was certified as class proceeding — Law firm which provided co-defendant with legal opinion

that scheme and tax receipts issued thereunder would comply with applicable tax legislation was only remaining defendant in action — Parties negotiated settlement of class members' claims for total sum of $11 million, with $7.75 million to be paid to class members, payment of $5,000 to each representative plaintiff, and balance to be paid to class counsel for fees and disbursements and administration of settlement — Parties brought application for court approval of settlement — Settlement approved other than compensation for representative plaintiffs — Settlement was fair, reasonable and in best interests of class, was product of hard bargaining at arms' length, facilitated by experienced mediator, was recommended by highly qualified, reputable counsel with assistance of expert tax counsel, and addressed majority of objectors' concerns — Retainer agreement providing for contingency fee of 25 per cent of total value of settlement met requirements of Class Proceedings Act and was fair and reasonable, having regard to factors set out in prevailing authority and fact that class counsel demonstrated commendable diligence, perseverance and skill in pursuing very challenging piece of litigation on behalf of apathetic class members — Representative plaintiffs' request for $5,000 in compensation each was denied — Requests for compensation for representative plaintiffs were becoming routine, but such compensation was to be reserved for plaintiffs whose contributions were exceptional in sense of active involvement in initiation of litigation and retainer of counsel, exposure to real risk of costs, significant personal hardship or inconvenience in connection with prosecution of litigation, time undertaken in advancing litigation, communicating with other class members, and participating in discovery, settlement negotiations, and trial — Application of those factors, considered as whole, did not dictate payment of compensation in this case.

Civil practice and procedure --- Disposition without trial — Settlement — Miscellaneous
From 2003 to 2007, defendant's clients operated scheme which provided taxpayers with charitable tax receipts equivalent to 3 and one-half times taxpayers' cash donations, such that taxpayers profited from donations — CRA disallowed taxpayers' claimed charitable donation tax credits on basis that "donations" made by taxpayers were not gifts for purposes of Income Tax Act and that scheme was sham intended to enrich taxpayers rather than benefit charity — Taxpayers' action against defendant and co-defendants was certified as class proceeding — Law firm which provided co-defendant with legal opinion that scheme and tax receipts issued thereunder would comply with applicable tax legislation was only remaining defendant in action — Parties negotiated settlement of class members' claims for total sum of $11 million, with $7.75 million to be paid to class members, payment of $5,000 to each representative plaintiff, and balance to be paid to class counsel for fees and disbursements and administration of settlement — Parties brought application for court approval of settlement — Settlement approved other than compensation for representative plaintiffs — Settlement was fair, reasonable and in best interests of class, was product of hard bargaining at arms' length, facilitated by experienced mediator, was recommended by highly qualified, reputable counsel with assistance of expert tax counsel, and addressed majority of objectors' concerns — Retainer agreement providing for contingency fee of 25 per cent of total value of settlement met requirements of Class Proceedings Act and was fair and reasonable, having regard to factors set out in prevailing authority and fact that class counsel demonstrated commendable diligence, perseverance and skill in pursuing very challenging piece of litigation on behalf of apathetic class members — Representative plaintiffs' request for $5,000 in compensation each was denied — Requests for compensation for representative plaintiffs were becoming routine, but such compensation was to be reserved for plaintiffs whose contributions were exceptional in sense of active involvement in initiation of litigation and retainer of counsel, exposure to real risk of costs, significant personal hardship or inconvenience in connection with prosecution of litigation, time undertaken in advancing litigation, communicating with other class members, and participating in discovery, settlement negotiations, and trial — Application of those factors, considered as whole, did not dictate payment of compensation in this case.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Court approval of agreement for payment of fees and disbursements
From 2003 to 2007, defendant's clients operated scheme which provided taxpayers with charitable tax receipts equivalent to 3 and one-half times taxpayers' cash donations, such that taxpayers profited from donations — CRA disallowed taxpayers' claimed charitable donation tax credits on basis that "donations" made by taxpayers were not gifts for purposes of Income Tax Act and that scheme was sham intended to enrich taxpayers rather than benefit charity — Taxpayers' action against defendant and co-defendants was certified as class proceeding — Law firm which provided co-defendant with legal opinion that scheme and tax receipts issued thereunder would comply with applicable tax legislation was only remaining defendant in action — Parties negotiated settlement of class members' claims for total sum of $11 million, with $7.75 million to be paid to class members, payment of $5,000 to each representative plaintiff, and balance to be paid to class counsel for fees and disbursements and administration of settlement — Parties brought application for court approval of settlement — Settlement approved other than compensation for representative plaintiffs — Settlement was fair, reasonable and in best interests of class, was product of hard bargaining at arms' length, facilitated by experienced mediator, was recommended by highly

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Table of Authorities

Cases considered by *G.R. Strathy J.*:

Baker (Estate) v. Sony BMG Music (Canada) Inc. (2011), 2011 ONSC 7105, 2011 CarswellOnt 15453 (Ont. S.C.J.) — followed

Dabbs v. Sun Life Assurance Co. of Canada (1998), 1998 CarswellOnt 5823 (Ont. Gen. Div.) — considered

Dabbs v. Sun Life Assurance Co. of Canada (1998), 40 O.R. (3d) 429, 22 C.P.C. (4th) 381, 5 C.C.L.I. (3d) 18, [1998] I.L.R. I-3575, 1998 CarswellOnt 2758 (Ont. Gen. Div.) — considered

Dabbs v. Sun Life Assurance Co. of Canada (1998), 165 D.L.R. (4th) 482, 113 O.A.C. 307, 7 C.C.L.I. (3d) 38, 27 C.P.C. (4th) 243, 1998 CarswellOnt 3539, [1999] I.L.R. I-3629, 41 O.R. (3d) 97 (Ont. C.A.) — referred to

Dabbs v. Sun Life Assurance Co. of Canada (1998), 235 N.R. 390 (note), 118 O.A.C. 399 (note), 41 O.R. (3d) 97n (S.C.C.) — referred to

Fakhri v. Alfalfa's Canada Inc. (2005), 2005 BCSC 1123, 2005 CarswellBC 1858, 20 C.P.C. (6th) 70, 47 B.C.L.R. (4th) 379 (B.C. S.C.) — considered

Ford v. F. Hoffmann-La Roche Ltd. (2005), 12 C.P.C. (6th) 226, 2005 CarswellOnt 1094, [2005] O.T.C. 208 (Ont. S.C.J.) — considered

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MacKinnon v. Vancouver City Savings Credit Union (2004), 2004 CarswellBC 2889, 2004 BCSC 1604, 34 B.C.L.R. (4th) 322 (B.C. S.C.) — referred to

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Nunes v. Air Transat A.T. Inc. (2005), 20 C.P.C. (6th) 93, 2005 CarswellOnt 2503 (Ont. S.C.J.) — referred to

Parsons v. Coast Capital Savings Credit Union (2010), 6 B.C.L.R. (5th) 261, 321 D.L.R. (4th) 338, 489 W.A.C. 111, 289 B.C.A.C. 111, [2010] 12 W.W.R. 222, 2010 BCCA 311, 2010 CarswellBC 1507 (B.C. C.A.) — referred to

Reid v. Ford Motor Co. (2006), 2006 BCSC 1454, 2006 CarswellBC 2399 (B.C. S.C.) — referred to

Robinson v. Rochester Financial Ltd. (2010), 89 C.P.C. (6th) 91, 2010 CarswellOnt 206, 2010 ONSC 463 (Ont. S.C.J.) — referred to

Smith Estate v. National Money Mart Co. (2011), 2011 CarswellOnt 1920, 331 D.L.R. (4th) 208, 3 C.P.C. (7th) 223, 276 O.A.C. 237, 106 O.R. (3d) 37, 2011 ONCA 233 (Ont. C.A.) — considered

Tesluk v. Boots Pharmaceutical PLC (2002), 2002 CarswellOnt 1266, 21 C.P.C. (5th) 196 (Ont. S.C.J.) — considered

Walker v. Union Gas Ltd. (2009), 2009 CarswellOnt 662, 74 C.P.C. (6th) 366 (Ont. S.C.J.) — considered

Windisman v. Toronto College Park Ltd. (1996), 1996 CarswellOnt 2970, 10 O.T.C. 375, 3 C.P.C. (4th) 369 (Ont. Gen. Div.) — followed

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
s. 32(1) — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

Request for approval of settlement of class action.

***G.R. Strathy J.*:**

1 This endorsement sets out my reasons for approving the settlement of this class action and approving the fees and disbursements of class counsel, an Order to that effect having been issued on January 17, 2012.

2 The action relates to a tax shelter called the Banyan Tree Foundation Gift Program, which operated in 2003-2007. It has been referred to as a "leveraged" charitable donation program because, in return for a proportionately small out-of-pocket payment, a taxpayer was purportedly entitled to ratchet-up his or her donation and to receive a charitable tax receipt equivalent to 3 1/2 times the amount of his or her cash outlay.

3 The leverage was supposed to be provided by a "loan" to the participant, made by one of the defendants, Rochester Financial Limited, secured by a promissory note. Part of the participant's cash payment was described as a "security deposit", which was supposed to be invested so that it would pay off the loan before the taxpayer was ever called upon to pay it.

4 The effect of this was to allow the taxpayer to profit from his or her donation - in the case of a taxpayer in the highest bracket, a payment of $2,700 would secure a tax credit of $4,600, resulting in a profit of about $1,900.

5 The program was promoted by the Banyan Tree Foundation through a network of salespeople who were paid substantial commissions.

6 Canada Revenue Agency ("C.R.A.") disallowed the charitable donation tax credits claimed by participants in the Gift Program. It took the position that the "donation" made by the taxpayer was not a gift for the purposes of the *Income Tax Act*, because the loan was not *bona fide* and there were nothing more than book-keeping entries to give an aura of respectability to the transaction. It said that the participants were never at risk to repay their loans and that the program was a sham, designed to have the appearance of a legitimate charitable donation, when the real purpose was to enrich the taxpayer rather than benefit a charity. It therefore disallowed the charitable donation tax credits, and the participants were required to repay the taxes they had deducted, with interest.

7 Not only did the participants lose their deductions, their security deposits have disappeared, apparently due to defalcation by the investment manager.

8 In January 2010, Justice Lax certified this action as a class proceeding: *Robinson v. Rochester Financial Ltd.*, 2010 ONSC 463, [2010] O.J. No. 187 (Ont. S.C.J.).

9 There is no realistic prospect of recovery from any of the parties directly responsible for the Gift Program. This leaves the defendant law firm, Fraser Milner Casgrain LLP ("FMC"), as the last party standing. It provided legal opinions that the Gift Program complied with the applicable tax legislation and that the tax receipts issued by the Banyan Tree Foundation should be recognized by C.R.A.

10 As a result of mediation before a former judge of this Court, class counsel negotiated a settlement, subject to Court approval, of class members' claims against FMC for the total sum of $11 million. Approximately $7.75 million of this amount will be paid to class members in proportion to the charitable contributions they made, under a distribution plan that will be administered by class counsel. The balance will be used to pay the fees and disbursements of class counsel and the costs of administration of the settlement. In addition to this cash distribution, the plaintiffs asked the Court to make a declaration that the promissory notes executed by class members in connection with the Gift Program are unenforceable.

11 The proposed settlement, and the order I have granted, are somewhat unusual in that all individuals who have previously opted-out of this action, will have the opportunity to opt back in and to enjoy the benefits of the settlement. One of the reasons for this is that, following certification, Banyan Tree Foundation engaged in a misinformation campaign, designed to encourage class members to opt-out of this proceeding, suggesting that class members who opted out would be unable to challenge their C.R.A. reassessments. When this was brought to my attention by class counsel, I issued an order dated June 25, 2010, providing for further notice to class members and an opportunity to revoke their opt-outs. I am satisfied that, in the particular circumstances of this case, it is appropriate to extend this relief in connection with the settlement.

12 Those class members who have previously opted-out, and wish to remain outside the Class, need not do anything further.

13 There were approximately 2,825 participants in the Gift Program. They have received extensive individual notice of the proposed settlement. Approximately 500 objections to the settlement have been delivered. Almost all of these objectors have sent a standard form letter that appears to have been authored by Mr. Tim Millard, an accountant who was also a salesman for the Gift Program and who had approximately 40 clients who are class members. Mr. Millard and two other class members, Mr. Harrington and Dr. Maier, attended the hearing and made submissions. About seven or eight other class members attended the hearing but made no submissions.

14 The uniform concern expressed by Mr. Millard, Mr. Harrington and Dr. Maier, who spoke at the hearing, and by those class members who sent in the standard form letter, related not to the amount of the settlement, but rather to the proposed term of the settlement that would declare the "loan" portion of the taxpayer's contribution to the Gift Program (i.e., the leveraged portion), void and unenforceable. These objectors were concerned that a declaration to this effect would potentially adversely affect any future appeals they may make of their tax assessments or re-assessments.

15 This issue was raised at the hearing and, as a result of further discussions between class counsel and the objectors, a revised form of order, satisfactory to Messrs Millard, Harrington and Maier, was approved. That form of order, simply declares that the loan agreements and promissory notes executed by class members in connection with the Gift Program are unenforceable by the defendants, their successors and assigns.

16 A handful of objectors who sent written communications were concerned about the relatively modest amount they would receive under the settlement in comparison to the loss of their contributions, the loss of their anticipated deductions and any penalties and interest they may be required to pay. I will discuss this issue below.

17 In order to approve a settlement, the court must be satisfied that it is fair, reasonable and in the best interests of the class: *Nunes v. Air Transat A.T. Inc.*, 2005 CarswellOnt 2503 (Ont. S.C.J.) at para. 7; *Ford v. F. Hoffmann-La Roche Ltd.* (2005), [2005] O.J. No. 1118 (Ont. S.C.J.). The "fairness and reasonableness" analysis will vary from case to case, but courts frequently turn to the factors set out in *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. Gen. Div.), at 13; and (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.) at 440-444; aff'd (1998), 41 O.R. (3d) 97 (Ont. C.A.); leave to appeal to

S.C.C. denied [1998] S.C.C.A. No. 372 (S.C.C.):

(a) the presesence of arm's length bargaining and the absence of collusion;

(b) the proposed settlement terms and conditions;

(c) the number of objectors and nature of objections;

(d) the amount and nature of discovery, evidence or investigation;

(e) the likelihood of recovery or likelihood of success;

(f) the recommendations and experience of counsel;

(g) the future expense and likely duration of litigation;

(h) information conveying to the court the dynamics of, and the positions taken by the parties during the negotiations;

(i) the recommendation of neutral parties, if any; and,

(j) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.

18 I am satisfied that most of these factors have been addressed in this settlement. The settlement is clearly the product of hard bargaining at arms' length, facilitated by an experienced mediator. It comes with the recommendation of highly qualified and reputable counsel, who have engaged the assistance of expert tax counsel. The concerns of the overwhelming majority of objectors have been satisfied. The settlement is clearly a compromise, but liability of FMC was a very contentious issue. FMC would argue, if the matter proceeded to trial, that its opinions were consistent with the state of the law as it existed at the time and that the subsequent hardening of the position of C.R.A. and, it would appear, the appellate case law, was not something that could have been foreseen at the time. There were other issues that would also be brought into play by FMC, including whether class members relied on its opinions. A significant discount of the claim was warranted to reflect the real risk that the claim against FMC would not succeed.

19 While a very small number of objectors have expressed concerns about the amount of the settlement, the vast majority of the objectors were concerned only with the issue of the proposed relief in relation to their loans. Over eighty percent of class members have made no comment on the settlement. I acknowledge, however, that some class members think that the settlement amount is too low. Every settlement is necessarily a compromise. It reflects the possibility that the class may recover nothing if the action goes to trial and that there is a benefit to early resolution.

20 For the purposes of a settlement approval motion, I should assume that if the settlement is not approved, the action will proceed to trial. In effect, I would be substituting my view of the prospects of success for the views of class counsel, who have lived with this action since its outset and who are familiar with the risks and benefits of continuing with the action. While I can, in appropriate cases, appoint *amicus* to assist my examination of the settlement, I have in this case a high level of confidence in the fairness and reasonableness of the settlement and I approve it.

Fee of Class Counsel

21 Class counsel entered into a contingency fee retainer agreement with the representative plaintiffs that provided for a contingent fee of 25% of the total value of any settlement. They request approval of the payment of $3,252,682.65 for their fees, disbursements and taxes.

22 I find that the fee agreement meets the requirements of s. 32(1) of the *Class Proceedings Act*, S.O. 1992, c. 6 (the "*C.P.A.*") and that it is fair and reasonable, having regard to the factors set out in the case law, as summarized in *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (Ont. S.C.J.) at para. 67.

23 In this case, I consider the following circumstances of particular significance:

(a) this action would never have been commenced, let alone successfully resolved, had it not been been for the initiative, tenacity and persistence of class counsel in the face of widespread apathy on the part of all class members;

(b) class counsel funded disbursements of almost $200,000, making it unnecessary to apply to the Class Proceedings Fund;

(c) class counsel have gone without any compensation at all through four years of litigation;

(d) class counsel gave an indemnity to the representative plaintiffs with respect to any adverse costs award - the assumption of a significant risk of not only receiving no fees and disbursements, but the possibility of a substantial six figure costs award against them;

(e) the matter was complex and the outcome was far from certain;

(f) the result achieved is financially significant and every class member will receive actual cash compensation;

(g) in addition to the cash value of the settlement, class members will receive the added benefit of a declaration that their loans and promissory notes are unenforceable, a matter of some concern to class members;

(h) the time spent by class counsel was about 4,600 hours with a face value of about $1.8 million, and the proposed fee represents a multiplier of less than 2;

(i) there has been no real opposition to class counsel's fee by class members, whose only significant objection related to the scope of the proposed declaration; and

(j) the payment of the proposed fee does not significantly dilute the recovery by class members, and their ability to pay the fee is not an issue.

24 Having supervised this proceeding for more than two years, I am satisfied that class counsel have demonstrated commendable diligence, perseverance and skill in pursuing a very challenging piece of litigation and bringing it to a successful conclusion.

25 I do not propose to repeat the observations I made in *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, [2011] O.J. No. 5781 (Ont. S.C.J.), concerning the value of contingency fees in the fair compensation of class counsel. In my view, with the benefit of hindsight, it is fair and reasonable that class members should pay the fee requested by class counsel and I approve that fee.

Compensation for the Representative Plaintiffs

26 Class counsel have made a request for compensation in the amount of $5,000 for each of the representative plaintiffs, relying on the authority of *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Ont. Gen. Div.), on the basis that the plaintiffs have rendered "active and necessary assistance" in the prosecution of the case.

27 In *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105, [2011] O.J. No. 5781 (Ont. S.C.J.), I set out the principles applicable to this request at para. 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, 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.

28 Class counsel says that this is one of those exceptional cases in which compensation should be paid. As I have noted, class counsel faced considerable apathy on the part of class members and it was exceedingly difficult to find someone prepared to take on the role of representative plaintiff until Mr. and Mrs. Robinson stepped up to the plate. Taking on that role required that they expose private personal financial information, including their income tax returns for the years they participated in the Gift Program. They each spent more than 300 hours in assisting class counsel in the prosecution of the action. In comparison, they will receive a modest award of about $6,000 under the settlement.

29 In *Windisman*, above, Sharpe J. observed, at para. 28:

> Ordinarily, an individual litigant is not entitled to be compensated for the time and effort expended in relation to prosecuting an action. In my view, there is an important distinction to be drawn with reference to class proceedings. The representative plaintiff undertakes the proceedings on behalf of a wider group and that wider group will, if the action is successful, benefit by virtue of the representative plaintiff's effort. If the representative plaintiff is not compensated in some way for time and effort, the plaintiff class would be enriched at the expense of the representative plaintiff to the extent of that time and effort. In my view, 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, the representative plaintiff may be compensated on a quantum meruit basis for the time spent. I agree with the American commentators that such awards should not be seen as routine. The evidence here is that Ms. Windisman took a very active part at all stages of this action. It seems clear that the case would not have been brought but for her initiative. She assumed the risk of costs and she devoted an unusual amount of time and effort to communicating with other class members, acting as a liaison with the solicitors, and assisting the solicitors at all stages of the proceeding. She kept careful records of her time and effort.

30 In that case, the representative plaintiff had kept docketed time entries showing 81.2 hours of time and estimated a further 25 hours of undocketed time. Sharp J. awarded compensation of $4,000, to be deducted from the net recovery of the class.

31 This issue brings into play some conflicting values. On the one hand, we do not wish to create a conflict of interest between the representative plaintiffs and the class, by giving the former more substantial contribution. This was discussed by Winkler J. in *Tesluk v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 (Ont. S.C.J.):

> In the present circumstances the work of the Representative Plaintiffs was unnecessary to the preparation or presentation of the case. Indeed, their work did not begin until after the settlement had been structured. Their work did not result in any monetary success for the class. If they were to be compensated in the manner requested they would be the only class members to receive any direct monetary compensation. The entire settlement is in the form of Cy-pres distribution. The representative plaintiffs are seeking some $80,000 in total which is to be deducted from the settlement. By way of contrast, in Windisman, the representative plaintiff took an active part at all stages of the proceeding, the case would not have been brought except for her initiative, she assumed the risk of costs, and devoted an unusual amount of time communicating with class members and assisting counsel. The class members received a direct monetary benefit due in part to her efforts.
>
> While the work of the representative plaintiffs is commendable, to compensate them for the work when the settlement funds for the entire class are being donated to research without a single penny finding its way into the hands of a class member would be contrary to the precept of the Cy-pres distribution in particular and to a class proceeding generally. Compensation for representative plaintiffs must be awarded sparingly. The operative word is that the functions undertaken by the Representative Plaintiffs must be "necessary", such assistance must result in monetary success for the class and in any event, if granted, should not be in excess of an amount that could be purely compensatory on a quantum

> meruit basis. Otherwise, where a representative plaintiff benefits from the class proceeding to a greater extent than the class members, and such benefit is as a result of the extraneous compensation paid to the representative plaintiff rather than the damages suffered by him or her, there is an appearance of a conflict of interest between the representative plaintiff and the class members. A class proceeding cannot be seen to be a method by which persons can seek to receive personal gain over and above any damages or other remedy to which they would otherwise be entitled on the merits of their claims. This request is denied.

32 In *Hislop v. Canada (Attorney General)*, [2004] O.J. No. 1867 (Ont. S.C.J.), an action claiming CPP survivor's pensions for same sex partners, E. Macdonald J. awarded compensation of $15,000 to one representative plaintiff, two others received $10,000 each and two others received $5,000 each.

33 In *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (Ont. S.C.J.), Cullity J. awarded the representative plaintiff $25,000 for his efforts, which he described as an "exceptional contribution". He made the following observations at paras. 45 and 46:

> ... Mr Garland has, in my judgment, made out a strong case for compensation. He took the initiative in seeking legal advice with respect to the legality of late payment penalties and in instructing counsel to commence the proceedings. He was instrumental in keeping the legal team together when members of the class counsel sought to withdraw from the proceedings on the ground of a business conflict, and he accepted a large part of the responsibility for communicating with class members personally or through interviews with representatives of the media. He also played an active part in the settlement negotiations and, in particular, in obtaining agreement to the nature and details of the *cy pres* distribution - one of the matters for which he found it desirable to retain separate counsel.
>
> The litigation was commenced, and continued, by Mr Garland in the public interest and, I am satisfied, that throughout it his primary concern has been to protect and serve the interests of the class. It was on this ground that he firmly opposed counsel's proposal to replace the method of calculating their fee under the 1998 fee agreement with the application of a multiplier to be applicable irrespective of the gross recovery.

34 In *McCutcheon v. Cash Store Inc.*, [2008] O.J. No. 5241 (Ont. S.C.J.), Cullity J. approved a payment of $10,000, stating at paras. 22 and 23:

> Although I am not oblivious to the risk of engendering expectations that such payments will be approved as a matter of course, the request in this case is strongly supported by class counsel who have sworn to the significant amount of time expended by Mr McCutcheon in advancing the interests of the class. His efforts were not confined to meetings with class counsel but extended to communicating with other class members, monitoring developments in the pay-day loan industry and providing input and assistance to class counsel in the settlement negotiations. Counsel have testified to his active part in all stages of the litigation and his time and energy spent in liaising between them and class members. They have sworn that he accepted the personal exposure to an adverse costs award and, to the benefit of the class, that he did not choose to seek assistance from the Class Proceedings Fund. They have stated that the request for compensation was made entirely at their suggestion. While I consider the amount requested to be on the high side, I am satisfied that, independently of this payment and the payment of counsel fees, the settlement merits approval and that the total amount of class counsel fees and the representative plaintiff's compensation could be justified if, as in *Garland*, it consisted of counsel fees from which the representative plaintiff's compensation was to be paid. On the basis of the strong support provided by class counsel, I will approve the amount of $10,000. I will, however, reiterate what I have said in other cases that, as a general rule, all benefits and payments to be made by defendants should be treated as a single package when considering the fairness and reasonableness of a settlement from the viewpoint of a class. This, I believe, should be accepted whether or not there are expressed to be separate agreements for fees to be paid directly by defendants rather than out of a settlement amount otherwise earmarked for the benefit of the class. As in other parts of the law, substance must prevail over form.

35 In *Fakhri v. Alfalfa's Canada Inc.*, 2005 BCSC 1123, [2005] B.C.J. No. 1723 (B.C. S.C.), Gerow J. of the British Columbia Supreme Court awarded $5,000 as compensation for the representative plaintiff. In that case, the defendant had agreed to pay the amount directly to the representative, with the result that it would not dilute the recovery of the class. It was found that the plaintiff had delivered multiple affidavits, reviewed pleadings, provided instructions, attended the mediation and court hearings, and helped shape the final settlement. The judge found that the plaintiff's efforts on behalf of the class

had an impact on the successful resolution of the proceeding.

36 In *Walker v. Union Gas Ltd.*, [2009] O.J. No. 536 (Ont. S.C.J.), Cumming J. approved a payment of $5,000 to the representative payment, out of the fees of class counsel. He observed that the plaintiff had spent more than 70 hours in the conduct of the litigation, including reviewing some 10 bankers' boxes of documents, cross-referencing documents and isolating bills, and traveling to Toronto for the meeting with the Class Proceedings Committee.

37 In the recent case of *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, [2011] O.J. No. 1321 (Ont. C.A.), the Court of Appeal affirmed the motion judge's decision to award $3,000 compensation to the representative plaintiff. It suggested that generally such a fee should be paid out of the settlement fund, rather than out of class counsel's fees, to avoid any spectre of fees-plitting. In that case, the Court of Appeal observed, at para. 134, that judges of this court have taken different approaches with respect to the payment of fees for the representative plaintiffs. It noted that it had not previously dealt with the issue. We can take from the Court of Appeal's decision that the court may award compensation to a representative plaintiff in an "appropriate case".

38 In *McCarthy v. Canadian Red Cross Society*, [2007] O.J. No. 2314 (Ont. S.C.J.) there was a request for fees and disbursements to be paid to the representative plaintiff, in the amount of $75,000. In dismissing the request, Winkler J. observed at para. 20:

> Mr. McCarthy has fulfilled his obligation to the class as their representative. However, a distinction must be drawn between the professional advisors to the class and the representative plaintiff with respect to fees. Where it is necessary for the representative plaintiff to incur out-of-pocket expenses in acting in that capacity, such as attendance at discoveries as one example, it may be appropriate for class counsel to reimburse such amounts and claim it as a disbursement subject to recovery on approval by the Court. While each case turns on its facts, in my view, it is not generally appropriate for a representative plaintiff to receive a payment for fees or for time expended in the pursuit of the action. Further, any payment made to a representative plaintiff in connection with the action, whether directly or indirectly, and whether for reimbursement or otherwise, must be disclosed to the Court.

39 It would appear that judges in British Columbia have been less reluctant to award compensation for representative plaintiffs. In addition to *Fakhi v Alfalfa's Canada Inc.*, above, I will mention *Reid v. Ford Motor Co.*, 2006 BCSC 1454 (B.C. S.C.), in which a payment of $3,000 was approved on a *quantum meruit* basis, to be paid from class counsel fees and *MacKinnon v. Vancouver City Savings Credit Union*, 2004 BCSC 1604, 34 B.C.L.R. (4th) 322 (B.C. S.C.) in which a payment of $5,000 was approved to be paid as a disbursement.

40 In a recent decision of the British Columbia Court of Appeal in *Parsons v. Coast Capital Savings Credit Union*, 2010 BCCA 311, [2010] B.C.J. No. 1184 (B.C. C.A.), the representative plaintiff appealed an order of the settlement approval motion judge refusing to award compensation to the representative plaintiff in the amount of $10,000. The motion judge had concluded that British Columbia law only permitted compensation to be paid to the representative plaintiff where he or she has made a contribution that is over and above the contribution expected of a representative plaintiff, although it need not be an extraordinary contribution.

41 After a thorough review of the authorities in both Canada and the United States, the Court of Appeal concluded that it was not necessary for the class representative to show that he or she performed services of special significance. It said that where the representative plaintiff has fulfilled his or her duties, and a favourable settlement has been achieved, a "modest award in recognition of the effort expended on behalf of the class" would be appropriate. The Court stated, at paras. 20-3:

> I consider it is too narrow to say, as the judge did here, that services of special significance beyond the usual responsibilities under the *Act* are required for a separate award to the representative plaintiff. Where the representative plaintiff has fulfilled his or her duties, which will include attendance for examination in discovery, providing instructions on all steps taken in the litigation and on the settlement (which necessarily requires immersion in the substance of the case), and where a monetary settlement in favour of the class members is achieved, a modest award in recognition of the effort expended on behalf of the class members is consistent with restitutionary principles and recognition of the principle of *quantum meruit.* This expectation is further justified by the exposure to costs assumed by the representative plaintiff in commencing the action. While that risk is mitigated upon certification, there is a real exposure to costs assumed on commencing the action. Other intangible costs also are borne by such a plaintiff, including

the sometimes not inconsiderable weight of being the leader of the claimants.

In other words, I do not consider exceptional service is required. Rather competent service accompanied by positive results should be sufficient for recognition in this way, weighing in this factor the quantum of personal benefit achieved by the representative plaintiff with the overall benefit achieved for the class.

In considering the quantum of such a payment, where the representative plaintiff's personal benefit is small but the collective benefit is great, there may be disproportion between personal benefit on the one hand and effort and responsibility on the other, so as to weigh in favour of a somewhat larger award. Nevertheless, in no case should the award be so large as to create the impression that the representative plaintiff was put into a conflict of interest. The outer bounds of what could be an appropriate compensatory award may vary from case to case, depending on factors such as the terms of settlement or award at issue and the personal circumstances of the representative plaintiff.

In this case Ms. Parsons was a representative plaintiff in another action, and in the course of that proceeding her counsel observed the overdraft payment that grounded this action. In other words, Ms. Parsons did not initiate the claim. Nonetheless she exposed herself to costs in any proceedings that might have arisen prior to the certification application, she assumed responsibility for deriving benefit for others, she attended at an examination for discovery, she was available for conversation during the mediation, and in the end result she fronted an action that was significantly successful. In my view these features of the case, while not extraordinary, militate in favour of payment to her of a modest sum, described by her counsel as an honourarium.

42 The Court held that an award of $3,500, payable as a disbursement, would be appropriate. I note that one of the factors the Court of Appeal considered was the representative plaintiff's exposure to costs, a factor not relevant in this case due to the indemnity agreement.

43 In this particular case, while I acknowledge the contribution made by Kathryn Robinson and by Rick Robinson, and commend them on the work they have done to bring this matter to a successful conclusion on behalf of their fellow class members, I am not prepared to award such compensation. In my respectful view, requests for compensation for the representative plaintiff are becoming routine, as Sharpe J. anticipated in *Windisman*, above. I agree with those who have expressed the opinion that compensation should be reserved to those cases where, considering all the circumstances, the contribution of the plaintiff has been exceptional. The factors that might be appropriate for consideration could include:

(a) active involvement in the initiation of the litigation and retainer of counsel;

(b) exposure to a real risk of costs;

(c) signicant personal hardship or incovenience 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.

44 I conclude, with some regret, that in this particular case the application of these factors, considered as a whole, do not dictate payment of compensation.

Conclusion

45 The settlement is therefore approved, as are the fees and disbursements of class counsel. I have also issued an order, on consent, discharging the Monitor, Grant Thornton Limited.

Settlement approved.

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Pro-Sys Consultants Ltd. v. Microsoft Corporation | 2018 BCSC 2091, 2018 CarswellBC 3185 | (B.C. S.C., Nov 27, 2018)

2016 ONSC 4752
Ontario Superior Court of Justice

Rosen v. BMO Nesbitt Burns Inc.

2016 CarswellOnt 12015, 2016 ONSC 4752, 100 C.P.C. (7th) 344, 133 O.R. (3d) 73, 268 A.C.W.S. (3d) 756, 37 C.C.E.L. (4th) 240

Proceeding under the Class Proceedings Act, 1992

Yegal Rosen (Plaintiff) and BMO Nesbitt Burns Inc. (Defendant)

Edward P. Belobaba J.

Heard: July 21, 2016
Judgment: July 25, 2016
Docket: CV-10-396685CP

Counsel: Jonathan Ptak, Jody Brown, Eli Karp, for Plaintiff
Peter Griffin, Monique Jilesen, for Defendant

Subject: Civil Practice and Procedure; Public; Employment

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.iv Court approval of agreement for payment of fees and disbursements

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.vi Miscellaneous

Civil practice and procedure
XVI Disposition without trial
XVI.7 Settlement
XVI.7.a General principles

Headnote

Civil practice and procedure --- Disposition without trial — Settlement — General principles
Misclassification overtime class action claimed unpaid overtime for defendant's investment advisors — Class action was settled with defendant agreeing to pay $12 million on non-reversionary basis for class member compensation plus $500,000

for costs of administration — Plaintiff applied for relief, including approval of settlement — Application granted — Class counsel's knowledge of risk of further litigation was detailed and significant — Class counsel presented hard evidence that showed why settlement amount fell within zone of reasonableness — Overall benefit to class members of immediate payout, without further delay or uncertainty, was significant and justified judicial approval — Settlement was fair and reasonable and was in best interests of class.

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Court approval of agreement for payment of fees and disbursements
Misclassification overtime class action claimed unpaid overtime for defendant's investment advisors — Class action was settled with defendant agreeing to pay $12 million on non-reversionary basis for class member compensation plus $500,000 for costs of administration — Plaintiff applied for relief, including approval of legal fees of $2,736,138 plus taxes and disbursements — Application granted — Legal fees accorded with retainer agreement and represented 25 percent contingency fee of settlement — Contingency fee arrangements that were fully understood and accepted by representative plaintiff were valid and enforceable — Legal fees were approved.

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Miscellaneous
Misclassification overtime class action claimed unpaid overtime for defendant's investment advisors — Class action was settled with defendant agreeing to pay $12 million on non-reversionary basis for class member compensation plus $500,000 for costs of administration — Plaintiff applied for relief, including approval of honorarium of $10,000 for representative plaintiff — Application granted — Representative plaintiff assisted in preparing case and contributed to success of action — Representative plaintiff retained and instructed counsel, helped with statement of claim, disclosed personal financial and employment information, and he maintained contact and solicited input from other class members — Representative plaintiff participated in every step of six-year litigation, amount sought was appropriate, and honorarium was approved.

Table of Authorities

Cases considered by *Edward P. Belobaba J.*:

AFA Livförsäkringsaktiebolag v. Agnico-Eagle Mines Ltd. (2016), 2016 ONSC 532, 2016 CarswellOnt 2169 (Ont. S.C.J.) — referred to

Cannon v. Funds for Canada Foundation (2013), 2013 ONSC 7686, 2013 CarswellOnt 17784 (Ont. S.C.J.) — referred to

Fantl v. Transamerica Life Canada (2009), 2009 CarswellOnt 4710 (Ont. S.C.J.) — referred to

Frank v. Caldwell (2014), 2014 ONSC 1484, 2014 CarswellOnt 2704, 60 C.P.C. (7th) 386 (Ont. S.C.J.) — referred to

Fulawka v. Bank of Nova Scotia (2014), 2014 ONSC 4743, 2014 CarswellOnt 11626, 69 C.P.C. (7th) 134 (Ont. S.C.J.) — referred to

Fulawka v. Bank of Nova Scotia (2016), 2016 ONSC 1576, 2016 CarswellOnt 4164 (Ont. S.C.J.) — considered

Horgan v. Lakeridge Health Corp. (2014), 2014 ONSC 5209, 2014 CarswellOnt 12213, 69 C.P.C. (7th) 98 (Ont. S.C.J.) — referred to

McIntyre (Litigation guardian of) v. Ontario (2016), 2016 ONSC 2662, 2016 CarswellOnt 6668 (Ont. S.C.J.) — referred to

Middlemiss v. Penn West Petroleum Ltd. (2016), 2016 ONSC 3537, 2016 CarswellOnt 8785 (Ont. S.C.J.) — considered

Parsons v. Canadian Red Cross Society (1999), 1999 CarswellOnt 2932, 40 C.P.C. (4th) 151, 103 O.T.C. 161 (Ont. S.C.J.) — referred to

Rosen v. BMO Nesbitt Burns Inc. (2013), 2013 ONSC 2144, 2013 CarswellOnt 11561, 9 C.C.E.L. (4th) 315, 44 C.P.C. (7th) 149, 2013 C.L.L.C. 210-053 (Ont. S.C.J.) — referred to

Rosen v. BMO Nesbitt Burns Inc. (2013), 2013 ONSC 7762 (Ont. Div. Ct.) — referred to

Sheridan Chevrolet Cadillac Ltd. v. Furukawa Electric Co. (2016), 2016 ONSC 729, 2016 CarswellOnt 1571 (Ont. S.C.J.) — referred to

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
s. 29(2) — considered

Employment Standards Act, 2000, S.O. 2000, c. 41
Generally — referred to

APPLICATION by plaintiff for approval of settlement, legal fees and honorarium for representative plaintiff.

***Edward P. Belobaba J.*:**

1 This misclassification class action claiming unpaid overtime for Nesbitt investment advisors has settled. The plaintiff now seeks judicial approval of the settlement, the legal fees for class counsel and an honorarium for the representative plaintiff.

2 For the reasons set out below, all of the requests are approved. The settlement amount, the legal fees and the honorarium are fair and reasonable and the overall settlement is in the best interests of the class.

Background

3 This action was commenced in 2010 and was certified as a class proceeding in 2013. The plaintiff says this is the first and so far only misclassification overtime class action in Canada to be certified on a contested basis[1] and upheld on appeal.[2] There are about 1800 class members. The class period, as amended, covers some 14 years, from January, 2002 to June, 2016.

4 The parties have settled after six and a half years of litigation, the production of more than two million documents and extensive cross-examinations on the affidavits filed for certification. The trial was to begin in April, 2017.

5 The settlement was achieved after two days of mediation in January, 2016 before the Hon. Warren Winkler. A term sheet was signed a week later and the settlement agreement was executed on April 22, 2016.

The settlement

6 The defendant has agreed to pay $12 million on a non-reversionary basis for class member compensation and a further $500,000 to cover the costs of administration. The administrator will distribute the net settlement amount on a confidential and non-contested basis. Settlement class members will not be required to prove any overtime hours to establish entitlement. Nesbitt cannot challenge any class member's entitlement. All that a class member has to do to receive an "equal share" distribution is to confirm his or her address to the administrator.

7 After deductions for the legal fees, the requested honorarium for the representative plaintiff and the ten per cent levy to the Class Proceedings Fund, the net amount payable to the class members is about $7.8 million.

8 The approximately 1800 class members have been divided into two groups: 705 trainees (the "rookie" IAs who

completed the Nesbitt Trainee Program and the six month period of close supervision) and 1136 non-trainees (the more senior IAs who were hired laterally into Nesbitt generally with existing clients or who completed the training program prior to the start of the class period in 2002).

9 The $12 million settlement fund has been allocated as follows: $10 million to the trainees and $2 million to the non-trainees, or on a net basis, about $6.5 million to the trainees, and about $1.3 million to the non-trainees. The allocation makes sense because the non-trainees, given their duties and responsibilities, are more likely to fall within the "managerial" or "greater benefit" exemptions of the *Employment Standards Act*.[3]

10 As already noted, the $12 million settlement, or about $7.8 million net to class members, is non-reversionary and must be paid out in its entirety. The actual amount that each class member will receive will depend on the take-up rate. For the trainee group, the "equal share" payment will range from about $10,000 per class member if the take-up is 100 per cent, to about $20,000 per person if the take-up is 50 per cent. For the non-trainee group, the payments will range from about $700 if the take-up is 100 per cent to $1400 if the take-up is fifty per cent. Class counsel anticipates that the overall take-up rate will be around 75 per cent.

11 The plaintiff asks that the settlement be approved.

Settlement Approval

12 Section 29(2) of the *Class Proceedings Act*,[4] provides that a settlement of a class proceeding is not binding unless approved by the court. The court must be satisfied that the settlement is fair, reasonable, and in the best interests of the class.[5] An important component of this analysis is evidence that the settlement falls within a zone of reasonableness.[6]

13 In my experience, class counsel generally spend too much time in their affidavit material and factum explaining why they were wise to settle and why their judgment about the settlement amount should accepted. They set out a litany of reasons that I have described as "boiler plate"[7] — their vast litigation experience, the always "hard fought" negotiations and the many risks of further litigation. The boiler plate, in essence, comes down to this: *"We're experienced class counsel; we negotiated the best possible deal for the class members; trust us."*[8] These self-serving assertions, although well-intentioned, are not helpful. Nor are they very persuasive.

14 The problem is the contingency fee. It is well known that I favour the contingency fee in class action litigation.[9] But, as I noted in *Clegg*,[10] the contingency fee creates a significant dilemma, indeed a conflict of interest, for class counsel in settlement scenarios. Should class counsel continue to press for more compensation for class members even if it means losing at trial and not getting paid at all, or settle for a sub-optimal amount but pocket a guaranteed contingency? 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."[11]

15 Boiler-plate submissions about, say, the risks of further litigation, become credible only if the settlement is achieved in the later stages of litigation.[12] The closer class counsel is to trial the more he or she will know about the risks and rewards of further litigation. Put simply, in late stage settlements, the court is more prepared to accept the "trust us" boiler-plate than in early stage settlements.

16 Here, class counsel's knowledge base about the risks of further litigation was detailed and significant. I agree that this settlement was akin to a late stage settlement — the parties have been engaged in more than six years of litigation; just over 2 million documents have been produced; and more than 20 potential witnesses including junior and senior Nesbitt employees at various offices across the province, were cross-examined. But having said this, even if the so-called boiler-plate in this case is more credible because of the late stage of settlement, it only explains why the parties settled, not why they settled for $12 million.

17 In other words, even in a late stage settlement where class counsel's knowledge base is at or near its highest and the boiler-plate about litigation risk is more believable, more is needed. Class counsel must still present hard evidence showing why the settlement amount falls within a range or zone of reasonableness.

18 Here class counsel satisfied the "zone of reasonableness requirement" by presenting data from comparable U.S. overtime settlements in the financial services sector. Similar data is not available in Canada because this is the first overtime misclassification settlement. In the U.S., however, there have been numerous class action settlements for misclassified financial services employees. Class counsel reviewed the U.S. settlement amounts[13] and calculated the "per month" overtime compensation.

19 The compensation in the comparable U.S. settlements ranges from $28 to $179 per month of eligible employment on a net basis. The "per month" compensation that flows out of the $12 million settlement herein will range from about $64 (if the take-up is 100 per cent) to about $130 per month (if the take-up is 50 per cent.) Given the American comparators, the projected range herein of $64 to $130 per month of eligible employment on a net basis falls squarely within the zone of reasonableness.

20 Here, of course, class members will receive an "equal share" payout that does not depend on months worked and thus does not require a costly claims process, individual adjudications and related appeals. This alone provides a significant benefit to every class member. As I noted in *Fulawka*, "The overall benefit to class members of an immediate and substantial payout, without further delay or uncertainty, is significant and justifies judicial approval."[14]

21 In sum, I am satisfied that the $12 million settlement falls within a zone of reasonableness and is in the best interests of the class. The settlement is approved.

Legal Fees Approval

22 Class counsel is seeking a legal fee of $2,736,138 plus taxes and disbursements. The fee accords with the retainer agreement and represents a 25 per cent contingency fee on the $12 million settlement minus $263,861 for the costs recovered on the certification and leave motions.

23 I have no difficulty approving a 25 per cent contingency fee. In *Cannon*[15] I concluded that "contingency fee arrangements that are fully understood and accepted by the representative plaintiffs should be presumptively valid and enforceable."[16] In my view, the multiplier approach that has judges assessing the "risk" assumed by class counsel by considering only the case that is before the court is unworkable and frankly nonsensical.[17] If the plaintiff has shown that the settlement is indeed within a zone of reasonableness I will continue to accord presumptive validity to contingent fee agreements — at least for settlement amounts up to $100 million, which in Canada covers the vast majority of class action settlements.[18]

24 The legal fees are approved.

Honorarium approval

25 Class counsel also asks that the representative plaintiff receive an honorarium of $10,000 to be paid out of the settlement fund. I am satisfied that such a payment should be made.

26 Mr. Rosen assisted in the preparation of the case and contributed to the success of the action. He retained and instructed counsel. He helped with the statement of claim. He was cross-examined on his certification affidavit and in doing so was obliged to disclose personal financial and employment information. Mr. Rosen maintained contact and solicited input from other class members. In a word, he participated in every step of the six-year litigation including settlement discussions, the mediation and the finalization of the settlement agreement.

27 The amount of the honorarium requested is appropriate and in line with other cases in which honoraria have been granted.[19] The requested honorarium is approved.

Conclusion

28 This overtime settlement is a first in Canada for investment advisors and has already achieved behaviour modification. Nesbitt has implemented an overtime policy for the six month period of close supervision for IA trainees.

29 The settlement falls within a zone of reasonableness and is in the best interests of the class. The amount of the settlement, the requested legal fees and honorarium are fair and reasonable. The motions for approval are granted.

Application granted.

Footnotes

1 *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144 (Ont. S.C.J.).

2 *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 7762 (Ont. Div. Ct.).

3 *Employment Standards Act, 2000*, S.O. 2000, c. 41.

4 *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA").

5 *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (Ont. S.C.J.) at para. 57.

6 *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Ont. S.C.J.) at para. 70.

7 *Sheridan Chevrolet Cadillac Ltd. v. Furukawa Electric Co.*, 2016 ONSC 729 (Ont. S.C.J.), at para. 10.

8 *Sheridan Chevrolet*, *supra*, note 7, at para. 11. Also see *AFA Livförsäkringsaktiebolag v. Agnico-Eagle Mines Ltd.*, 2016 ONSC 532 (Ont. S.C.J.), at para. 11 *et seq* and *McIntyre (Litigation guardian of) v. Ontario*, 2016 ONSC 2662 (Ont. S.C.J.) [hereinafter *Clegg*] at para. 29 *et seq.*

9 *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 (Ont. S.C.J.). Also see *Middlemiss v. Penn West Petroleum Ltd.*, 2016 ONSC 3537 (Ont. S.C.J.), at para. 19: "It is only through a robust contingency fee system that class counsel will be appropriately rewarded for the wins and losses over many files and many years of litigation and that the class action will continue to remain viable as a meaningful vehicle for access to justice."

10 *Clegg*, *supra*, note 8.

11 Hensler et al, *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, (Rand Report, 2000) at 424.

12 As I stated in *Clegg*, *supra*, note 8, at para. 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."

13 Settlements from California were excluded in these calculations because certain features in the state's labour legislation (acknowledged in the case law) make direct comparisons impracticable.

14 *Fulawka v. Bank of Nova Scotia*, 2016 ONSC 1576 (Ont. S.C.J.), at para. 13.

15 *Cannon*, *supra*, note 9.

16 *Ibid.*, at para 8.

17 See above note 9. No judge can reasonably assess the "risk" undertaken by class counsel by looking only at the case that is before the court.

18 Exceptionally large class settlements (for me, anything over $100 million) will require more thought about the calculation of the appropriate contingency fee: see *Cannon*, *supra*, note 9, at para. 9.

19 *Horgan v. Lakeridge Health Corp.*, 2014 ONSC 5209 (Ont. S.C.J.), at paras. 42 and 57; *Frank v. Caldwell*, 2014 ONSC 1484 (Ont. S.C.J.), at paras. 34-40; and *Fulawka v. Bank of Nova Scotia*, 2014 ONSC 4743 (Ont. S.C.J.) at para. 24.

2018 ONSC 6101
Ontario Superior Court of Justice

Shah v. LG Chem, Ltd.

2018 CarswellOnt 17032, 2018 ONSC 6101, 298 A.C.W.S. (3d) 20

KHURRAM SHAH and ALPINA HOLDINGS INC. (Plaintiffs) and LG CHEM, LTD., LG CHEM AMERICA, INC., PANASONIC CORPORATION, PANASONIC CORPORATION OF NORTH AMERICA, PANASONIC CANADA, INC., SANYO ELECTRIC CO., LTD., SANYO NORTH AMERICA CORPORATION, SANYO ENERGY (U.S.A.) CORPORATION, SONY CORPORATION, SONY ENERGY DEVICES CORPORATION, SONY ELECTRONICS, INC., SONY OF CANADA LTD., SAMSUNG SDI CO., LTD., SAMSUNG SDI AMERICA, INC., SAMSUNG ELECTRONICS CANADA INC., HITACHI LTD., HITACHI MAXELL, LTD., MAXELL CORPORATION OF AMERICA, MAXELL CANADA, GS YUASA CORPORATION, NEC CORPORATION, NEC TOKIN CORPORATION, NEC CANADA, TOSHIBA CORPORATION, TOSHIBA AMERICA ELECTRONIC COMPONENTS, INC. and TOSHIBA OF CANADA LIMITED (Defendants)

Perell J.

Heard: October 15, 2018
Judgment: October 15, 2018
Docket: CV-13-483540

Counsel: Linda Visser, Jean-Marc Leclerc, for Plaintiffs
Ian C. Matthews, for Defendants, NEC Corporation and NEC Tokin Corporation
Evangelia (Litsa) Kriaris, for Defendants, Samsung SDI Co., Ltd. and, Samsung SDI America, Inc.
Byron Shaw, for Defendants, Sony Corporation, Sony Energy Devices Corporation, Sony Electronics, Inc., and Sony of Canada Ltd.
Chenyang Li, for Defendants, LG Chem and LG Chem America, Inc.
Wendy Sun, for Defendants, Hitachi Maxell, Ltd., and Maxell Corporation of America
Daphne Papadatos, for Defendants, Toshiba Corporation, Toshiba America Electronic Components, Inc. and Toshiba of Canada Limited
Scott Azzopardi, for Defendants, Panasonic Corporation, Panasonic Corporation of North America, Panasonic, Canada, Inc., Sanyo Electric Co. Ltd., Sanyo North America Corporation and Sanyo Energy (U.S.A.) Corpiration

Subject: Civil Practice and Procedure; Corporate and Commercial; Criminal

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.d Orders, awards and related procedures
V.2.d.iii Termination of proceedings

Civil practice and procedure
V Class and representative proceedings

V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.iv Court approval of agreement for payment of fees and disbursements

Headnote

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Court approval of agreement for payment of fees and disbursements
Plaintiffs brought action against multiple defendants under Class Proceedings Act — Plaintiffs alleged that defendants conspired to fix price of lithium ion batteries sold in Canada between January 1, 2000 and December 31, 2011 — Plaintiffs claimed damages of $75 million plus punitive and exemplary damages of $10 million — Plaintiffs entered into settlement agreements with three groups of defendants who agreed to pay $50,000, $2.2 million, and $4.5 million respectively — Class counsel sought combined legal fee of $1,608,719.17 and disbursements totalling $430,958.57, largely made up of expert fees — Class counsel brought motion for approval of retainer agreements and of fees and disbursements in connection with settlements — Motion granted — Fees and disbursements were reasonable and maintained integrity of profession.

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Orders, awards and related procedures — Termination of proceedings
Settlement — Approval of — Plaintiffs brought action against multiple defendants under Class Proceedings Act — Plaintiffs alleged that defendants conspired to fix price of lithium ion batteries sold in Canada between January 1, 2000 and December 31, 2011 — Plaintiffs claimed damages of $75 million plus punitive and exemplary damages of $10 million — Plaintiffs entered into settlement agreements with three groups of defendants who agreed to pay $50,000, $2.2 million, and $4.5 million respectively — Plaintiffs brought motion for approval of settlements — Motion granted — Settlements were fair and reasonable and in best interests of class members — Notice of settlement approval hearing was disseminated and there were no objections to settlement.

Table of Authorities

Cases considered by *Perell J.*:

AFA Livförsäkringsaktiebolag v. Agnico-Eagle Mines Ltd. (2016), 2016 ONSC 532, 2016 CarswellOnt 2169, 90 C.P.C. (7th) 201 (Ont. S.C.J.) — referred to

Al-Harazi v. Quizno's Canada Restaurant Corp. (2007), 2007 CarswellOnt 4633, 49 C.P.C. (6th) 191 (Ont. S.C.J.) — referred to

Baxter v. Canada (Attorney General) (2006), 2006 CarswellOnt 7879, 83 O.R. (3d) 481, 40 C.P.C. (6th) 129 (Ont. S.C.J.) — referred to

Commonwealth Investors Syndicate Ltd. v. Laxton (1994), 94 B.C.L.R. (2d) 177, 117 D.L.R. (4th) 382, 48 B.C.A.C. 206, 78 W.A.C. 206, 1994 CarswellBC 324 (B.C. C.A.) — referred to

Corless v. KPMG LLP (2008), 2008 CarswellOnt 4708 (Ont. S.C.J.) — referred to

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Fischer v. IG Investment Management Ltd. (2010), 2010 ONSC 7147, 2010 CarswellOnt 9886, 9 C.P.C. (7th) 444 (Ont. S.C.J.) — referred to

Fraser v. Falconbridge Ltd. (2002), 2002 CarswellOnt 2357, 33 C.C.P.B. 60, 24 C.P.C. (5th) 396 (Ont. S.C.J.) — referred to

Godfrey v. Sony Corp. (2016), 2016 BCSC 844, 2016 CarswellBC 1313 (B.C. S.C.) — considered

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Shah v. LG Chem, Ltd. (2017), 2017 ONSC 7206, 2017 CarswellOnt 19267 (Ont. S.C.J.) — referred to

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Smith Estate v. National Money Mart Co. (2010), 2010 ONSC 1334, 2010 CarswellOnt 1238, 94 C.P.C. (6th) 126 (Ont. S.C.J.) — referred to

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Sony Corp. v. Godfrey (2017), 2017 CarswellBC 3105 (S.C.C.) — referred to

Welsh v. Ontario (2018), 2018 ONSC 3217, 2018 CarswellOnt 8108 (Ont. S.C.J.) — referred to

Wilson v. LG Chem Ltd. (2014), 2014 ONSC 1875, 2014 CarswellOnt 3562, 68 C.P.C. (7th) 147 (Ont. S.C.J.) — referred to

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

s. 29 — considered

s. 29(2) — considered

Competition Act, R.S.C. 1985, c. C-34
Generally — referred to

Pt. VI — referred to

s. 36 — referred to

s. 45 — considered

MOTION by plaintiffs for approval of settlements in class action; MOTION by class counsel for approval of retainer agreements and fees and disbursements relating to settlements.

***Perell J.*:**

A. Introduction

1 Pursuant to the *Class Proceedings Act*,[1] the Plaintiffs, Khurram Shah and Alpina Holdings Inc., have brought a competition law class action. The action is brought on behalf of direct, indirect, and umbrella purchasers in the marketplace for rechargeable Lithium Ion Battery Cells ("LIBs").

2 The 26 Defendants are: LG Chem, Ltd., LG Chem America, Inc., Panasonic Corporation, Panasonic Corporation of North America, Panasonic Canada, Inc., Sanyo Electric Co., Ltd., Sanyo North America Corporation, Sanyo Energy (U.S.A.) Corporation, Sony Corporation, Sony Energy Devices Corporation, Sony Electronics, Inc., Sony of Canada Ltd., Samsung SDI Co., Ltd., Samsung SDI America, Inc., Samsung Electronics Canada Inc., Hitachi Ltd., Hitachi Maxell, Ltd., Maxell Corporation of America, Maxell Canada, GS Yuasa Corporation, NEC Corporation, NEC Tokin Corporation, NEC Canada, [Inc.], Toshiba Corporation, Toshiba America Electronic Components, Inc., and Toshiba of Canada Limited.

3 The action was discontinued or dismissed as against five Defendants: Hitachi Ltd., Maxell Canada, NEC Canada, Inc., Toshiba of Canada Limited (all discontinuances), and GS Yuasa Corporation (dismissal).

4 Two Japanese corporations, NEC Corporation and NEC Tokin Corporation (collectively "NEC") were successful in having the action dismissed on jurisdictional grounds[2], but subsequently NEC agreed to settle the claims against it. The settlement requires court approval.

5 Related class proceedings with a consortium of Class Counsel are proceeding in British Columbia and Québec. NEC

was not named in the Québec or the British Columbia proceedings.

6 The Plaintiffs allege that the 19 remaining Defendants (in seven groupings) conspired to fix the price of LIBs manufactured and sold in Canada for the 11 years between January 1, 2000 and December 31, 2011.

7 Two groups of Defendants; that is: Samsung SDI Co., Ltd. and, Samsung SDI America, Inc. (collectively "Samsung") and Sony Corporation, Sony Energy Devices Corporation, Sony Electronics, Inc., and Sony of Canada Ltd. (collectively "Sony") have signed settlement agreements. These settlements require court approval.

8 The Plaintiffs' action, which was certified after a contested certification motion that included certification as against Sony,[3] has been certified for settlement purposes as against NEC and Samsung.[4]

9 The Plaintiffs now move for approval of the NEC, Samsung, and Sony settlements, and Class Counsel move for an order: (1) approving class proceedings retainer agreements; and (2) approving fees and disbursements in connection with the settlements.

B. Facts

1. The Class Actions

10 The Plaintiffs commenced their action in June 2013. They claimed general and special damages of $75 million and punitive and exemplary damages of $10 million for conspiracy, interference with economic relations, unjust enrichment, and conduct that is contrary to Part VI of the *Competition Act*.[5] The Statement of Claim alleges that the price-fixing conspiracy caused damages in Canada because the prices of LIBs sold directly or indirectly to the Plaintiffs and other proposed Class Members in Canada were at artificially inflated levels, and the proposed Class Members paid more for LIBs and products containing LIBs than they would have in the absence of the wrongful conduct.

11 Class Counsel in the Ontario action is a consortium of Sotos LLP and Siskinds LLP. In 2014, they won carriage after a carriage motion against Consumer Law Group Professional Corporation and Rochon Genova LLP.[6]

12 Parallel litigation was commenced in British Columbia and Québec. Class Counsel in Ontario is cooperating with the law firms Camp Fiorante Matthews Mogerman LLP ("CFM"), counsel in the B.C. action, and Belleau Lapointe s.e.n.c.r.l. counsel in the Québec action. CFM will be paid out of any fees awarded in the Ontario action, which along with the action in Québec are the active actions.

13 Morganti Legal PC commenced a proceeding in January 2013. By agreement with Class Counsel in Ontario, Morganti Legal PC withdrew from the case and discontinued its action. Class Counsel agreed to pay Morganti Legal its disbursements ($1,030.24), and to pay its time incurred on the file ($30,000) plus one-half of any multiplier awarded to Class Counsel in a fee award. The $1,030.24 disbursement amount is claimed in the disbursements sought. Any fee amounts payable to Morganti Legal will be paid out of any award made to Class Counsel.

14 As noted above, NEC was successful in having the action dismissed on jurisdictional grounds but in July 2015, NEC agreed in principle to settle the claims against NEC. (NEC was a small player in terms of its global market share. NEC's market share ranged for a high of 6% in 2000 to a low of 0% in 2010 on October 15, 2015.) Under the Settlement Agreement, NEC agreed to pay $50,000. It also agreed to provide copies of the documents that were produced in the U.S. proceedings and to the U.S. Department of Justice. As a term of the settlement, the Plaintiffs abandoned the appeal of the order on the jurisdiction motion. The NEC Settlement Agreement was amended on September 15, 2017 to take into account, among other things, the fact that the representative plaintiff in Québec changed following execution of the October 15, 2015 Agreement.

15 In 2015, settlement discussions began between the Plaintiffs and Samsung. An agreement in principle was reached and the parties continued to negotiate the specific terms of the settlement. The Settlement Agreement was signed on November 21, 2017.

16 Meanwhile in 2015, after a four-day hearing, I certified the action as a class action under the *Class Proceedings Act,*

1992.[7] More precisely, I certified the statutory cause of action (s. 36 of the *Competition Act*) for conduct that is contrary to s. 45 of the *Competition Act*, and I certified the associated common issues.

17 For the certification order, in the class definition, I removed what the parties called the "Unconnected Purchasers" or "Umbrella Purchasers" from class membership. I did not certify the Plaintiffs' causes of action for unlawful means conspiracy and unjust enrichment based on a contravention of the *Competition Act*. I did not certify the predominant purpose conspiracy and the interference with economic relations tort claim.

18 The result was a national class action with the following class definition:

> All persons in Canada who, between January 1, 2000 and December 31, 2011 (the "Class Period"), purchased a Lithium Battery* manufactured by the Defendants and/or any of the following products containing a Lithium Battery manufactured by the Defendants: (1) notebook computer**; (2) cell phones, including smartphones; (3) tablet computers; (4) e-book readers; (5) MP3 players; (6) personal digital assistants; (7) handheld GPS; (8) handheld video players; and/or (9) lithium ion battery packs (collectively "LIB Products"). Excluded from the class are the Defendants and the Defendants' present and former parents, predecessors, subsidiaries and affiliates, and any person who timely and validly opts out of the proceeding.

*a Lithium Battery is a rechargeable battery cell which uses lithium-ion technology.
**for greater certainty, a notebook computer includes a laptop computer.
excluding cell phones acquired as part of a cellular phone service contract.

19 In January 2016, the Plaintiffs and Defendants sought leave to appeal the Certification Order. Both motions for leave were heard by the Divisional Court in August 2016, with the Plaintiffs being granted leave and the Defendants being denied leave.[8] In April 2017, the Divisional Court allowed the Plaintiffs' appeal as it related to the claim for the tort of unlawful means conspiracy, but the Divisional Court did not allow the appeal as it related to umbrella purchaser claims.[9] The Plaintiffs were granted leave to appeal to the Ontario Court of Appeal on the umbrella purchaser issue. In October 2018, the Court of Appeal varied the judgement of the Divisional Court to include the umbrella purchasers.[10]

20 The issue of umbrella purchasers will ultimately be resolved in an appeal pending before the Supreme Court of Canada in *Godfrey v. Sony Corp.*,[11] an unrelated class-action proceeding that originated in British Columbia.

21 By agreement among the parties, there have been no costs awarded in respect of any motions or appeals in the Ontario action.

22 In the spring of 2016, the Plaintiffs began settlement negotiations with Sony. Over the next year, the settlement discussions continued. The negotiations culminated with an agreement in principle in June 2017. The Sony Settlement Agreement was signed in February 2018. Under the settlement, Sony agreed to pay $4.5 million, and it agreed to cooperate in the ongoing litigation by providing relevant documents and data, employee interviews and authentication of information and documents.

23 In June 2017, the Québec action was authorized on behalf of persons in Québec. The Defendants' motion for leave to appeal to the Québec Court of Appeal was denied. The Plaintiffs intend to amend the class definition in the Ontario action to exclude Québec residents.

24 Both the Ontario and the Québec proceedings are now in the discovery stage. The defendants have produced more than 1.5 million documents. Class Counsel have loaded the documents into a review platform, performed various analytics and have spent 728 hours reviewing documents.

25 There are parallel class proceedings in the United States brought on behalf of direct and indirect purchasers that have been consolidated pursuant to the United States' multidistrict litigation protocol. Certification of the American proceedings was denied in April 2017, and subsequent attempts to have the denial of certification reconsidered for the indirect purchasers on new evidence have failed. Notwithstanding the denials of certification in the United States, several settlement agreements have been achieved in the United States. The direct purchaser litigation was resolved in its entirety, with most settlements being reached before the unsuccessful certification motion. In the indirect purchaser action, settlements have been reached

with all defendants except one (Panasonic/Sanyo).

26 As noted above, in Canada, on November 21, 2017, the Plaintiffs entered into a settlement agreement with Samsung, whereby Samsung agreed to pay a total of U.S. $2.2 million.

27 The Settlement Agreements with NEC, Samsung, and Sony respectively provide the following, among other things:

- the Settlement Amounts will be held in an interest-bearing trust account for the benefit of Settlement Class Members;
- the costs of disseminating the Notice of Certification and Settlement Approval Hearings are to be paid by Class Counsel from the Settlement Amounts;
- the Settling Defendants agree to provide reasonable cooperation to the plaintiff class in order to assist in the continued prosecution of this action against the non-settling defendants.

28 As part of the Settlement Agreements, the parties are seeking an order that precludes any right to contribution and indemnity against the Settling Defendants, and preserves the non-settling Defendants' rights of discovery as against the Settling Defendants. The bar order provides that if a court ultimately determines there are rights of contribution and indemnity between co-conspirators, the Plaintiffs will limit their claims against the non-settling Defendants to those damages allocable to the sales and/or conduct of the non-settling Defendants.

29 The NEC Settlement Agreement is conditional upon approval of the Ontario Court. The Samsung and Sony settlements are conditional upon approval of the Ontario and Québec Courts.

30 Pursuant to court order, notice of the settlement approval hearing was disseminated. To date there have been no objections to the settlements.

2. Counsel Fee

31 The combined legal fee sought by Siskinds, Sotos and CFM is $1,608,719.17. The following chart summarizes the fee sought:

NEC Settlement Amount	$50,000.00
Plus: Interest as of August 31, 2018	$1,167.83
Total	$51,167.83
Ontario and BC Fee Application (25%)	$12,791.96
Sony Settlement Amount	$4,500,000.00
Plus: Interest as of August 31, 2018	$34,126.03
Total	$4,534,126.03
Ontario and BC Fee (25% * 87% = 21.75%)	$986,172.41
Samsung SDI Settlement Amount	$2,778,600.00
Plus: Interest as of August 31, 2018	$24,870.37
Total	$2,803,470.37
Ontario and BC Fee (25% * 87% = 21.75%)	$609,754.81
Total Ontario and BC Fee Application	$1,608,719.18

32 In Québec a fee approval application was brought by Belleau Lapointe s.e.n.c.r.l. in respect of Samsung and Sony. It made no fee claim in respect of NEC. The settlement and fee approval motions were heard and allowed by the Québec Superior Court on September 26, 2018, approving total fees of $237,628.24 and disbursements of $37,622.16. These amounts represent 13% of the 25% contingency fee sought by Class Counsel. In this motion, Siskinds, Sotos and CFM are requesting the remaining 87% of the 25% contingency fee.

33 The total docketed time incurred since the commencement of the action until July 31, 2018 is broken down as follows:

Law Firm	Total Docketed Time

Siskinds	$1,057,030.00
Sotos	$1,076,152.34
CFM	$583,296.25
TOTAL	$2,716,478.59

34 The requested fees of $1,608,719.18 represent a multiplier of 0.59 on the total docketed time to date.

35 Class counsel are also claiming disbursements totalling $430,958.57. The largest disbursement pertains to expert fees.

36 The requested fees and disbursements are consistent with the retainer agreements, which specify that "Class Counsel's fee shall be 25% of the amounts paid by the defendants in satisfaction of any judgment(s), order(s), report(s) on a reference, or settlement(s), including any pre-judgment interest or post-judgment interest, plus disbursements and applicable taxes".

C. Analysis

1. Settlement Approval

37 Section 29 of the *Class Proceedings Act, 1992* requires court approval for the discontinuance, abandonment, or settlement of a class action. Section 29 states:

> *Discontinuance, abandonment and settlement*
>
> 29.(1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.
>
> *Settlement without court approval not binding*
>
> (2) A settlement of a class proceeding is not binding unless approved by the court.
>
> *Effect of settlement*
>
> (3) A settlement of a class proceeding that is approved by the court binds all class members.
>
> *Notice: dismissal, discontinuance, abandonment or settlement*
>
> (4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,
>
> (a) an account of the conduct of the proceeding;
>
> (b) a statement of the result of the proceeding; and
>
> (c) a description of any plan for distributing settlement funds.

38 Section 29(2) of the *Class Proceedings Act*, *1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. 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 the class.[12]

39 In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the

future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with Class Members during the litigation.[13]

40 In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement.[14] An objective and rational assessment of the pros and cons of the settlement is required.[15]

41 In mandating that settlements are subject to court approval, the class action statutes place an onerous responsibility to ensure that the class members interests are not being sacrificed to the interests of Class Counsel who have typically taken on an enormous risk and who have a great deal to gain not only in removing that risk but in recovering an enormous reward from their contingency fee. The incentives and the interests of class counsel may not align with the best interests of the class members, and, thus, it falls on the court to seriously scrutinize the proposed settlement both in its making and in its substance.[16]

42 The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and 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.[17] A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.[18]

43 Generally speaking, the exercise of determining the fairness and reasonableness of a proposed settlement involves two analytical exercises. The first exercise is to use the factors and compare and contrast the settlement with what would likely be achieved at trial. The court obviously cannot make findings about the actual merits of the Class Members' claims. Rather, the court makes an analysis of the desirability of the certainty and immediate availability of a settlement over the probabilities of failure or of a whole or partial success later at a trial. The court undertakes a risk analysis of the advantages and disadvantages of the settlement over a determination of the merits. The second exercise, which depends on the structure of the settlement, is to use the various factors to examine the fairness and reasonableness of the terms and the scheme of distribution under the proposed settlement.[19]

44 In the case at bar, I am satisfied that the settlements with NEC, Samsung, and Sony, are fair and reasonable and in the best interests of the Class Members. These settlements are approved.

2. Fee Approval

45 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 lawyer in conducting the litigation and the degree of success or result achieved.[20]

46 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 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.[21]

47 The court must consider all the factors and then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession.[22]

48 In my opinion, having regard to the various factors used to determine whether to approve Class Counsel's fee request, the request in the immediate case should be approved.

D. Conclusion

49 For the above reasons, the settlements and the fee requests are approved.

Motions granted.

Footnotes

1 *1992*, S.O. 1992, c. 6.

2 *Shah v. LG Chem, Ltd.*, 2015 ONSC 2628 (Ont. S.C.J.).

3 *Shah v. LG Chem, Ltd.*, 2015 ONSC 6148 (Ont. S.C.J.), leave to appeal granted 2016 ONSC 4670 (Ont. Div. Ct.), var'd 2017 ONSC 2586 (Ont. Div. Ct.), var'd 2018 ONCA 819 (Ont. C.A.).

4 *Shah v. LG Chem, Ltd.*, 2017 ONSC 7206 (Ont. S.C.J.).

5 R.S.C. 1985, c. C-34.

6 *Wilson v. LG Chem Ltd.*, 2014 ONSC 1875 (Ont. S.C.J.).

7 *Shah v. LG Chem, Ltd.*, 2015 ONSC 6148 (Ont. S.C.J.), leave to appeal granted 2016 ONSC 4670 (Ont. Div. Ct.), var'd 2017 ONSC 2586 (Ont. Div. Ct.), var'd 2018 ONCA 819 (Ont. C.A.).

8 *Shah v. LG Chem, Ltd.*, leave to appeal granted 2016 ONSC 4670 (Ont. Div. Ct.).

9 *Shah v. LG Chem, Ltd.*, 2017 ONSC 2586 (Ont. S.C.J.), var'd 2018 ONCA 819 (Ont. C.A.).

10 *Shah v. LG Chem Ltd.*, 2018 ONCA 819 (Ont. C.A.).

11 *Godfrey v. Sony Corp.*, 2016 BCSC 844 (B.C. S.C.), aff'd 2017 BCCA 302 (B.C. C.A.), leave to appeal to S.C.C. granted [2017] S.C.C.A. No. 408 (S.C.C.).

12 *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (Ont. S.C.J.) at para. 57; *Farkas v. Sunnybrook & Women's College Health Sciences Centre*, [2009] O.J. No. 3533 (Ont. S.C.J.) at para. 43; *Kidd v. Canada Life Assurance Co.*, 2013 ONSC 1868 (Ont. S.C.J.).

13 *Fakhri v. Alfalfa's Canada Inc.*, 2005 BCSC 1123 (B.C. S.C.); *Jeffery v. Nortel Networks Corp.*, 2007 BCSC 69 (B.C. S.C.); *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (Ont. S.C.J.) at para. 38; *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (Ont. S.C.J.) at para. 59; *Farkas v. Sunnybrook & Women's College Health Sciences Centre*, [2009] O.J. No. 3533 (Ont. S.C.J.) at para. 45; *Kidd v. Canada Life Assurance Co.*, 2013 ONSC 1868 (Ont. S.C.J.).

14 *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (Ont. S.C.J.) at para. 10.

15 *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 (Ont. S.C.J.) at para. 23.

16 *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.) at para. 30; *L. (T.) v. Alberta (Director of Child Welfare)*, 2015 ABQB 815 (Alta. Q.B.) at para. 11; *AFA Livförsäkringsaktiebolag v. Agnico-Eagle Mines Ltd.*, 2016 ONSC

532 (Ont. S.C.J.) at paras. 3-17; *Sheridan Chevrolet Cadillac Ltd. v. Furukawa Electric Co.*, 2016 ONSC 729 (Ont. S.C.J.); *McIntyre (Litigation guardian of) v. Ontario*, 2016 ONSC 2662 (Ont. S.C.J.) at para. 26; *Welsh v. Ontario*, 2018 ONSC 3217 (Ont. S.C.J.); *Perdikaris v. Purdue Pharma*, 2018 SKQB 86 (Sask. Q.B.).

17 *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Ont. S.C.J.) at para. 70; *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.).

18 *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 (Ont. S.C.J.) at para. 13; *McCarthy v. Canadian Red Cross Society* (2007), 158 A.C.W.S. (3d) 12 (Ont. S.C.J.) [2007 CarswellOnt 3735 (Ont. S.C.J.)] at para. 17.

19 *Welsh v. Ontario*, 2018 ONSC 3217 (Ont. S.C.J.).

20 *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (Ont. S.C.J.) at para. 13; *Smith Estate v. National Money Mart Co.*, 2010 ONSC 1334 (Ont. S.C.J.) at paras. 19-20, varied 2011 ONCA 233 (Ont. C.A.); *Fischer v. IG Investment Management Ltd.*, [2010] O.J. No. 5649 (Ont. S.C.J.) at para. 25.

21 *Smith Estate v. National Money Mart Co.*, 2010 ONSC 1334 (Ont. S.C.J.), varied 2011 ONCA 233 (Ont. C.A.); *Fischer v. IG Investment Management Ltd.*, [2010] O.J. No. 5649 (Ont. S.C.J.) at para. 28.

22 *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 (B.C. C.A.) at para. 47.

End of Document

2017 ONSC 2803
Ontario Superior Court of Justice

Sheridan Chevrolet v. Hitachi, Ltd.

2017 CarswellOnt 6892, 2017 ONSC 2803, 280 A.C.W.S. (3d) 702

Sheridan Chevrolet et al v. Hitachi, Ltd. et al

Sheridan Chevrolet et al v. Denso Corporation et al

Urlin Rent A Car Ltd. et al v. Furukawa Electric Co. Ltd. et al.

Sheridan Chevrolet et al v. Sumitomo Electric Industries, Ltd. et al

Sheridan Chevrolet et al v. Hitachi, Ltd. et al

Sheridan Chevrolet et al v. Hitachi, Ltd. et al

Sheridan Chevrolet et al v. Diamond Electric Mfg. Co. Ltd. et al

Sheridan Chevrolet et al v. Denso Corporation et al

Sheridan Chevrolet et al v. Denso Corporation et al

Sheridan Chevrolet et al v. Autoliv ASP, Inc. et al.

Sheridan Chevrolet et al v. Denso Corporation et al

Sheridan Chevrolet et al v. Hitachi, Ltd. et al

Edward P. Belobaba J.

Heard: May 1, 2017
Judgment: May 10, 2017
Docket: CV-14-506641-CP, CV-13-478125-CP, CV-12-446737-CP, CV-13-482967-CP, CV-14-506649-CP, CV-14-506683-CP, CV-14-506686-CP, CV-15-524183-CP, CV-15-524184-CP; CV-13-472259-CP, CV-13-478127-CP, CV-14-506670-CP

Counsel: Charles M. Wright, David Sterns, Kerry McGladdery-Dent, for Plaintiffs
J. Kevin Wright, Kelly Friedman, for Hitachi Defendants
Patricia D.S. Jackson, for Leoni Defendants
Joshua Krane, Randall Hofley, for Autoliv Defendants
Vitali Berditcherski, for Toyoda Defendants
Chantelle Spagnola, for Denso Defendants
Neil Campbell, for Bosch Defendants
Neil Campbell, Lindsay Lorimer, for Sumitomo Defendants
James Gotowiec, for Mitsubishi Defendants
Mel Hogg, for SY Systems Defendants
Emrys Davis, for Delphi Defendants
Evangelia Litsa Kriaris, for Mikuni Defendants
Lisa Parliament, for Mitsuba Defendants

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.iv Court approval of agreement for payment of fees and disbursements

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.f Miscellaneous

Headnote

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Miscellaneous
Approval of settlement — Settlement was reached in auto-parts price-fixing class actions — Plaintiffs brought motion for judicial approval of settlements — Motion granted — Settlement amounts fell within zone of reasonableness — Class counsel filed appropriate affidavits with respect to parallel settlements in United States and sales in Canada — Canadian settlement amounts fell within rule of thumb of one-tenth of American settlements.

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Court approval of agreement for payment of fees and disbursements
Approval — Settlement was reached in auto-parts price-fixing class actions — Plaintiffs brought motion for judicial approval of settlements and of legal fees in accordance with retainer agreements — Motion granted — Presumptive validity was accorded to properly executed contingency fee arrangement — It was only through robust contingency compensation system that class counsel would be appropriately rewarded for wins and losses over many files and many years of litigation and that class action would continue to remain viable as meaningful vehicle for access to justice.

Table of Authorities

Cases considered by *Edward P. Belobaba J.*:

Cannon v. Funds for Canada Foundation (2013), 2013 ONSC 7686, 2013 CarswellOnt 17784 (Ont. S.C.J.) — considered

Middlemiss v. Penn West Petroleum Ltd. (2016), 2016 ONSC 3537, 2016 CarswellOnt 8785 (Ont. S.C.J.) — considered

Ramdath v. George Brown College of Applied Arts and Technology (2016), 2016 ONSC 3536, 2016 CarswellOnt 8468 (Ont. S.C.J.) — referred to

Sheridan Chevrolet Cadillac Ltd. v. Furukawa Electric Co. (2016), 2016 ONSC 729, 2016 CarswellOnt 1571 (Ont. S.C.J.) — referred to

Urlin Rent a Car Ltd. v. Furukawa Electric Co. (2016), 2016 ONSC 7965, 2016 CarswellOnt 20732 (Ont. S.C.J.) — referred to

Statutes considered:

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

s. 29(2) — considered

MOTION by plaintiffs for judicial approval of settlements and legal fees.

***Edward P. Belobaba J.*:**

1 The 35 or so auto-parts price-fixing class actions that I am continuing to case manage have started to settle, or at least settle with certain defendants involving certain auto-parts. I have already approved several such settlements.[1]

2 In cases where counsel ask that the action be certified for settlement purposes, I do so readily because all of these auto-parts actions follow the same template and easily satisfy the requirements in s. 5 of the *Class Proceedings Act*[2] ("CPA"). In cases where settlement approval alone is the issue, I generally focus on whether the settlement amount falls within a zone of reasonableness. Class counsel now understands what evidence is required in these auto-part cases and they file the appropriate affidavits — about parallel settlements in the U.S., and fines imposed and sales in Canada. In short, both here and in the cases still coming, I expect that settlement approval will be the norm.

3 Here the plaintiffs move for judicial approval under s. 29(2) of the CPA for the following settlements:

(i) ***the Hitachi defendants*** in the ten actions listed below have agreed to pay CDN$6,667,084 for the benefit of the settlement classes allocated as follows:

Air Flow Meters	$725,000
Alternators	$950,000
Electronic Control Units	$150,000
Electronic Throttle Bodies	$1,000,000
Fuel Injection Systems	$1,267,084
Ignition Coils	$1,100,000
Inverters	$150,000
Motor Generators	$150,000
Starters	$575,000
Valve Timing Control	$600,000

(ii) ***the Autoliv defendants*** in the Occupant Safety Systems action have agreed to pay US$3.2 million for the benefit of the settlement class; and,

(iii) ***the Leoni defendants*** in the Automotive Wire Harness Systems action have agreed to pay CDN$250,000 for the benefit of the settlement class.

Consent certification for settlement purposes

4 The plaintiffs also seek certification, for settlement purposes only, of the Ontario Occupant Safety Systems action as against Autoliv and the Ontario Automotive Wire Harness Systems action as against Leoni. The actions in which Hitachi is the settling defendant were certified for settlement purposes as against Hitachi at the same time as notice approval. I note that that proposed class and common issues are substantively the same as those previously certified. I also note that the proposed representative plaintiffs were previously appointed as representative plaintiffs.

5 Certification for settlement purposes as against Autoliv in the Occupant Safety Systems action and as against Leoni in the Automotive Wire Harness Systems action is easily granted.

Settlement approvals

6 I will consider the Hitachi, Autoliv and Leoni settlements in turn.

(1) Hitachi

7 Hitachi has agreed to pay CDN$6,667,084 as allocated in the chart above and provide substantial cooperation in the ongoing litigation.

8 I am satisfied that this settlement falls within a zone of reasonableness for the following reasons. The amount of the U.S. settlement was $61.5 million — the Canadian settlement falls within the one-tenth rule of thumb. Further, there were no direct Canadian sales. This point is supported by the fact that Hitachi has not been the subject of any fines or penalties by the Competition Bureau. The settlement was therefore valued based on Hitachi's indirect sales into Canada and its commitment to provide what class counsel describes as "meaningful cooperation, particularly with regard to the ringleaders of the various conspiracies in several of the relevant actions" and the provision of confidential evidentiary proffers to this end.

9 The Hitachi settlements are approved.

(2) Autoliv

10 Autoliv has agreed to pay US$3.2 million or CDN$4,172,800 and provide substantial cooperation in the ongoing litigation.

11 I am satisfied that the settlement falls within a zone of reasonableness for the following reasons. No fines or penalties were paid to Canadian regulators. The amount of Autoliv's settlements in the U.S. Occupant Safety Systems litigation was US$65 million, about US$25 million of which was allocated to indirect purchasers. I agree with class counsel that this case is comparable to the U.S. indirect purchasers situation because Autoliv's only direct purchaser in Canada has opted out of the action. The Autoliv settlement amount is 12.8% of the U.S. indirect settlement amount and 8.6% of the estimated affected commerce — placing the amount generally within the one-tenth rule of thumb.

12 The Autoliv settlement is approved.

(3) Leoni

13 Leoni has agreed to pay CDN$250,000 and provide substantial cooperation in the ongoing litigation. The amount of Leoni's settlements in the U.S. litigation was US$1.95 million — the Canadian settlement therefore falls within the one-tenth rule of thumb. Also, Leoni has not been the subject of any fines or penalties by the Competition Bureau most likely because Leoni's alleged involvement in the Automotive Wire Harness Systems conspiracy only affected the Renault II, which was never sold in Canada.

14 The Leoni settlements are approved.

Legal fees approval

15 By agreement amongst counsel, 7.2% of the Autoliv, Hitachi and Leoni settlement amounts are notionally allocated to the Quebec classes for the purpose of the fee applications in that province. The remaining Autoliv, Hitachi and Leoni settlement amounts are notionally allocated to the Ontario and B.C. classes for the purpose of the fee applications in those provinces. In accordance with the retainer agreements entered into with the Ontario representative plaintiffs, Ontario and B.C. Class Counsel are seeking a fee of 25% of the amount notionally allocated to the Ontario and B.C. classes.

16 As I explained in *Cannon*[3] and again in *Middlemiss v. Penn West Petroleum* ,[4] I am prepared to accord presumptive validity to a properly executed contingency fee arrangement such as the one that is before me. It is only through a robust contingency-compensation system that class counsel will be appropriately rewarded for the wins and losses over many files and many years of litigation and that the class action will continue to remain viable as a meaningful vehicle for access to justice.[5] (The point about "wins and losses" is clearly illustrated by comparing class counsel's docketed time with the fees that will be recovered in the Automotive Wire Harness Systems action in the chart below.)

17 The chart summarizes the legal fees request, the docketed time and the disbursements:

Action	Fees (plus applicable taxes)	Time Incurred	Disbursements (including interest, plus applicable taxes)
Ontario and B.C. Approval			
Alternators	$220,400	$62,401.80	$45,826.32
Automotive Wire Harness Systems	$58,000	$2,393,186.95	$250,488.88
Electronic Control Units	$34,800	$96,079.75	$1,929.68
Fuel Injection Systems	$293,963.49	$154,922.00	$66,353.47
Ignition Coils	$255,200	$54,244.50	$22,867.55
Occupant Safety Systems	$968,089.60	$413,547.50	$12,862.29
Starters	$133,400	$63,241.55	$28,742.60
Ontario Approval Only			
Air Flow Meters	$168,200	$43,146.45	$4,952.70
Electronic Throttle Bodies	$232,000	$13,952.60	$7,528.21
Inverters	$34,800	$19,329.00	$10,834.37
Motor Generators	$34,800	$14,976.50	$10,491.26
Valve Timing Devices	$139,200	$20,922.50	$21,025.94

18 Ontario and B.C. class counsel's request for legal fees in the overall amount of $2,572,853.09 plus disbursements of $483,903.27 including interest and applicable taxes is approved.

Honoraria

19 The representative plaintiffs in the Automotive Wire Harness Systems action have been actively involved both in that litigation and the auto parts cases as a whole. I agree with class counsel that the payment of a $2500 honorarium to each representative plaintiff in the Automotive Wire Harness Systems action is warranted.

20 The request for the payment of the honoraria is approved.

Remaining requests

21 Orders also to go approving the Distribution Protocol; authorizing General Motors of Canada (in respect of the Pontiac Vibe), Honda Canada, Nissan Canada, Subaru Canada,, and Toyota Canada ("the National Brands") to disclose name, address and purchase information for the limited purposes of providing notice and facilitating the claims administration process; appointing RicePoint Administration Inc. as the administrator for the limited purpose of receiving, processing and consolidating the customer information provided by the National Brands, and as the claims administrator for the purpose of administering the Distribution Protocol; and approving the Claims Notices and the Plan of Dissemination.

Disposition

22 The settlements described above with Hitachi, Autoliv and Leoni are approved. Certification is granted, for settlement purposes only, in the Ontario Occupant Safety Systems action as against Autoliv and the Ontario Wire Harness Systems action as against Leoni. Class counsel's legal fees, the requested honoraria and the remaining requests noted above are also approved.

23 Orders to go as per the draft Orders signed on May 1, 2017.

Motion granted.

Footnotes

1 See for example, *Sheridan Chevrolet Cadillac Ltd. v. Furukawa Electric Co.*, 2016 ONSC 729 (Ont. S.C.J.) and *Urlin Rent a Car Ltd. v. Furukawa Electric Co.*, 2016 ONSC 7965 (Ont. S.C.J.) .

2 *Class Proceedings Act, 1992*, S.O. 1992, c.6.

3 *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 (Ont. S.C.J.) .

4 *Middlemiss v. Penn West Petroleum Ltd.*, 2016 ONSC 3537 (Ont. S.C.J.) .

5 *Ibid.*, at para. 19. Also see *Ramdath v. George Brown College of Applied Arts and Technology*, 2016 ONSC 3536 (Ont. S.C.J.) , at note 14: "Over a period of years, plaintiff-side class action firms will win cases and lose cases. The "risk" that contingency lawyers face cannot be assessed case-by-case or one-off, but must be measured across a great many files. A "large" contingency recovery in one case will offset the loss or losses in other cases. That is why the "multiplier" approach that purports to assess risk by considering only the case that is currently before the court is fundamentally flawed, indeed unprincipled."

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2011 ONCA 233
Ontario Court of Appeal

Smith Estate v. National Money Mart Co.

2011 CarswellOnt 1920, 2011 ONCA 233, [2011] O.J. No. 1321, 106 O.R. (3d) 37, 199 A.C.W.S. (3d) 1077, 276 O.A.C. 237, 331 D.L.R. (4th) 208, 3 C.P.C. (7th) 223

Kenneth Smith, as Estate Trustee of the Last Will and Testament of Margaret Smith, deceased, and Ronald Oriet, Plaintiffs (Appellants) and Sutts, Strosberg LLP, Heenan Blaikie LLP, Paliare Roland Rothstein Rosenberg LLP and Koskie Minsky LLP, Appellants and National Money Mart Company and Dollar Financial Group, Inc., Defendants (Respondents)

M.J. Moldaver, R.P. Armstrong, R.G. Juriansz JJ.A.

Heard: October 25, 2010
Judgment: March 28, 2011*
Docket: CA C51893

Proceedings: reversing in part *Smith Estate v. National Money Mart Co.* (2010), 2010 ONSC 1334, 2010 CarswellOnt 1238, 94 C.P.C. (6th) 126 (Ont. S.C.J.)

Counsel: Terrence J. O'Sullivan, James Renihan, for Appellants
Chris Hubbard, for Money Mart (not participating in appeal)
Mahmud Jamal, Jason MacLean, for Dollar Financial Group, Inc. (not participating in appeal)

Subject: Civil Practice and Procedure; Public; Torts

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.iv Court approval of agreement for payment of fees and disbursements

Headnote

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Court approval of agreement for payment of fees and disbursements
Debtors brought class action against creditors with respect to allegedly criminal rate of interest charged on "payday" loans — During trial, parties reached settlement with forgiving of outstanding loans, credits for new loans, payment of $27.5 million cash for class counsel fees and representative plaintiff's $3,000 fee, and establishment of class fund — Settlement was approved with class counsel fees reduced to $14.5 million — Class counsel appealed — Appeal allowed in part — Representative plaintiff's fee would be paid out of class fund — Motion judge did not err in failing to find counsel's base fee and apply multiplier as set out in s. 33 of Class Proceedings Act, 1992 — Acting under s. 32 of Act, motions judge considered various factors in fixing fee of $14.5 million as fair and reasonable — Court's authority to determine class counsel fees under s. 32(4) of Act was distinct from and far more expansive than authority under s. 33(7) of Act — Court's jurisdiction under s. 33(7) of Act was premised on existence of fee agreement meeting requirements of s. 33(4) of Act, which agreement here did not — Motion judge withheld approval of fee agreement by assessing fees in manner different than set

out in it, and committed no error — Motion judge had solid foundation for view that settlement was not worth $120 million, on basis that credits would not have benefit equal to face value and that most likely beneficiaries were not class members but creditors' future customers — Motion judge's inference, in finding credits were not equal to cash, that class counsel would not accept transaction credits as payment was fair based on their position that entire cash remnant should be devoted to their fees.

Table of Authorities

Cases considered by *R.G. Juriansz J.A.*:

Baxter v. Canada (Attorney General) (2006), 83 O.R. (3d) 481, 40 C.P.C. (6th) 129, 2006 CarswellOnt 7879 (Ont. S.C.J.) — considered

Charles Trust (Trustee of) v. Atlas Cold Storage Holdings Inc. (2009), *(*sub nom. *Lawrence v. Atlas Cold Storage Holdings Inc.)* 257 O.A.C. 39, 2009 ONCA 690, 2009 CarswellOnt 5789, *(*sub nom. *Atlas Cold Storage Holdings Inc. v. Sutts, Strosberg LLP)* 311 D.L.R. (4th) 323, 78 C.P.C. (6th) 208 (Ont. C.A.) — referred to

Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998), 160 D.L.R. (4th) 186, 1998 CarswellOnt 1896, 40 O.R. (3d) 83, 21 C.P.C. (4th) 272, 62 O.T.C. 71 (Ont. Gen. Div.) — considered

Fantl v. Transamerica Life Canada (2009), 2009 CarswellOnt 2383, 2009 ONCA 377, 72 C.P.C. (6th) 1, 249 O.A.C. 58, 95 O.R. (3d) 767 (Ont. C.A.) — considered

Ford v. F. Hoffmann-La Roche Ltd. (2005), 12 C.P.C. (6th) 226, 2005 CarswellOnt 1094, [2005] O.T.C. 208 (Ont. S.C.J.) — considered

Frohlinger v. Nortel Networks Corp. (2007), 2007 CarswellOnt 240, 40 C.P.C. (6th) 62, 2007 C.E.B. & P.G.R. 8233 (Ont. S.C.J.) — considered

Gagne v. Silcorp Ltd. (1998), 113 O.A.C. 299, 1998 CarswellOnt 4045, 27 C.P.C. (4th) 114, 41 O.R. (3d) 417, 167 D.L.R. (4th) 325, 39 C.C.E.L. (2d) 253 (Ont. C.A.) — considered

Garland v. Enbridge Gas Distribution Inc. (2006), 56 C.P.C. (6th) 357, 2006 CarswellOnt 9605 (Ont. S.C.J.) — followed

Killough v. Canadian Red Cross Society (2001), 2001 BCSC 198, 2001 CarswellBC 185, 85 B.C.L.R. (3d) 233 (B.C. S.C.) — considered

Killough v. Canadian Red Cross Society (2001), 2001 BCSC 1060, 2001 CarswellBC 1527, 91 B.C.L.R. (3d) 309 (B.C. S.C.) — considered

Martin v. Barrett (2008), 2008 CarswellOnt 9521 (Ont. S.C.J.) — considered

McCarthy v. Canadian Red Cross Society (2001), 8 C.P.C. (5th) 350, 2001 CarswellOnt 2255, [2001] O.T.C. 470 (Ont. S.C.J.) — followed

McCutcheon v. Cash Store Inc. (2008), 2008 CarswellOnt 7841 (Ont. S.C.J.) — referred to

Miller v. Mackey Intern., Inc. (1976), 70 F.R.D. 533 (U.S. Dist. Ct. S.D. Fla.) — followed

Nantais v. Telectronics Proprietary (Canada) Ltd. (1996), 1996 CarswellOnt 2638, 28 O.R. (3d) 523, *(*sub nom. *Nantais v. Telectronics Propriety (Canada) Ltd.)* 134 D.L.R. (4th) 470, 7 C.P.C. (4th) 189 (Ont. Gen. Div.) — followed

Walker v. Union Gas Ltd. (2009), 2009 CarswellOnt 662, 74 C.P.C. (6th) 366 (Ont. S.C.J.) — referred to

Weinberger v. Great Northern Nekoosa Corp. (1991), 925 F.2d 518 (U.S. C.A. 1st Cir.) — referred to

Windisman v. Toronto College Park Ltd. (1996), 1996 CarswellOnt 2970, 10 O.T.C. 375, 3 C.P.C. (4th) 369 (Ont. Gen. Div.) — referred to

Zucker v. Westinghouse Elec. (2004), 374 F.3d 221 (U.S. C.A. 3rd Cir.) — referred to

Statutes considered:

Champerty, Act respecting, R.S.O. 1897, c. 327
Generally — referred to

Class Action Fairness Act, 2005, 28 U.S.C.
Generally — referred to

s. 1712(d) — referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

s. 32 — considered

s. 32(1) — considered

s. 32(2) — considered

s. 32(3) — considered

s. 32(4) — considered

s. 32(4)(a) — considered

s. 33 — considered

s. 33(1) — considered

s. 33(2) — considered

s. 33(3) “base fee” — considered

s. 33(3)-33(9) — referred to

s. 33(4) — considered

s. 33(7) — considered

s. 33(7)(a) — considered

s. 33(7)(b) — considered

s. 33(7)(c) — considered

Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

Payday Loans Act, 2008, S.O. 2008, c. 9
Generally — referred to

Solicitors Act, R.S.O. 1990, c. S.15
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 13.02 — referred to

APPEAL by class counsel from judgment reported at *Smith Estate v. National Money Mart Co.* (2010), 2010 ONSC 1334, 2010 CarswellOnt 1238, 94 C.P.C. (6th) 126 (Ont. S.C.J.), fixing their counsel fees in class action settlement.

***R.G. Juriansz J.A.*:**

1 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. 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 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 checking 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 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% of the transaction credits as they are used, and 10% 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 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 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 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 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), 8 C.P.C. (5th) 350 (Ont. S.C.J.) also compared unopposed motions in class action to *ex parte* proceedings. After referring to authorities that highlighted that "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 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: *Charles Trust (Trustee of) v. Atlas Cold Storage Holdings Inc.* (2009), 311 D.L.R. (4th) 323 (Ont. 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 to appoint 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 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" prepared for the NJI Conference on Class Actions in 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, presented 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*:

> 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 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), 85 B.C.L.R. (3d) 233 (B.C. 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:

> 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), 91 B.C.L.R. (3d) 309 (B.C. 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 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.

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 (Ont. S.C.J.) and *Frohlinger v. Nortel Networks Corp.* (2007), 40 C.P.C. (6th) 62 (Ont. 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. Westinghouse Elec.*, 374 F.3d 221 (U.S. C.A. 3rd Cir. 2004); *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518 (U.S. C.A. 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 Intern., Inc.*, 70 F.R.D. 533 (U.S. Dist. Ct. 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, "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:

> [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), 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 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. Nonmonetary 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 nonmonetary 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 and dealing with it. Class counsel had not placed before the court any 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* 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 "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 could allow a premium for service providers engaged by class counsel on a contingency basis. He declined 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 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 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 of intertwined reasons. In those intertwined reasons, he expressly stated, at paras. 95, 104 and 113,[1] 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 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 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 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. 1992, c. 6, s. 33 (1).
>
> **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. 1992, c. 6, s. 33 (2).

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; (”honoraries de base”)

”multiplier” means a multiple to be applied to a base fee. (”multiplicateur”) 1992, c. 6, s. 33 (3).

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. 1992, c. 6, s. 33 (4).

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. 1992, c. 6, s. 33 (5).

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. 1992, c. 6, s. 33 (6).

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. 1992, c. 6, s. 33 (7).

Idem

(8) In making a determination under clause (7) (a), the court shall allow only a reasonable fee. 1992, c. 6, s. 33 (8).

Idem

(9) In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding. 1992, c. 6, s. 33 (9).

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 not; and
>
> (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise. 1992, c. 6, s. 32 (1).
>
> **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. 1992, c. 6, s. 32 (2).
>
> **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. 1992, c. 6, s. 32 (3).
>
> **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
>
> I direct that the amount owing be determined in any other manner. 1992, c. 6, s. 32 (4).

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 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 monies 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 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. Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 (Ont. Gen. Div.), observed 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 Proprietary (Canada) Ltd.* (1996), 28 O.R. (3d) 523 (Ont. Gen. Div.), Brockenshire J. commented that the arrangement of sections 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) through (9)." That is because sections 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), 56 C.P.C. (6th) 357 (Ont. 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 "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) applies is the fee agreement that was before this court in *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (Ont. 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:

> 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....
>
> [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;
>
> 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 paragraph 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 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, 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 paragraph 8, which deals with costs paid by the defendants, and paragraph 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 paragraph 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 (Ont. 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 paragraph 9 would be a first charge on the settlement fund by virtue of s. 32(3) of the 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 *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (Ont. 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.

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 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.

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. 24 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 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 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 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 that the settlement was not worth $120 million "for the purposes of the contingency fee agreement". He described 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 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 that the transaction credits could be viewed "as a business promotion scheme under which Money Mart discounts its price and makes less profit from a profitable transaction" but "obtains business it would otherwise not have obtained". He also drew attention to the fact that the settlement provided that a maximum of five dollars 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 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 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".

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. 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, 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 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 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 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".

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 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 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,

> [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 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 two dollars. 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,

> 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 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 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 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. 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 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 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 counsel. Second, the CPA does not envisage contingency fee agreements with anyone other than properly appointed class counsel. He pointed out 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'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.

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 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, 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 "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.

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 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 (Ont. 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 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 case management judge charged with responsibility for 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".

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 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 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 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. 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), 3 C.P.C. (4th) 369 (Ont. 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.* (2006), 56 C.P.C. (6th) 357 (Ont. S.C.J.) and *McCutcheon v. Cash Store Inc.*, [2008] O.J. No. 5241 (Ont. S.C.J.), and Cumming J. in *Walker v. Union Gas Ltd.* (2009), 74 C.P.C. (6th) 366 (Ont. 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.

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.

***M.J. Moldaver J.A.*:**
I agree

***R.P. Armstrong J.A.*:**
I agree

Appeal allowed in part.

Footnotes

[*] Corrigenda received from the court on April 5, 2011 have been incorporated herein.

[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.

2006 SKQB 533
Saskatchewan Court of Queen's Bench

Sparvier v. Canada (Attorney General)

2006 CarswellSask 765, 2006 SKQB 533, [2006] S.J. No. 752, 153 A.C.W.S. (3d) 1043, 290 Sask. R. 111, 35 C.P.C. (6th) 110

KENNETH SPARVIER, DENNIS SMOKEYDAY, RHONDA BUFFALO, JOHN DOE I, JANE DOE I, JOHN DOE II, JANE DOE II, JOHN DOE III, JANE DOE III, JOHN DOE IV, JANE DOE IV, JOHN DOE V, JANE DOE V, JOHN DOE VI, JANE DOE VI, JOHN DOE VII, JANE DOE VII, JOHN DOE VIII, JANE DOE VIII, JOHN DOE IX, JANE DOE IX, JOHN DOE X, JANE DOE X, JOHN DOE XI, JANE DOE XI, JOHN DOE XII, JANE DOE XII, JOHN DOE XIII, JANE DOE XIII, and other John and Jane Does Individuals and Entities to be added (PLAINTIFFS) and ATTORNEY GENERAL OF CANADA, and other James and Janet Does Individuals and Entities to be added (DEFENDANT)

Proceeding under The Class Actions Act, S.S. 2001, c. C-12.01

D.P. Ball J.

Judgment: December 15, 2006
Docket: Regina Q.B.G. 816/05

Counsel: Kirk M. Baert, Celeste Poltak for Plaintiffs, National Certification Committee
Catherine A. Coughlan, John Terry for Attorney General of Canada
P. Jonathan Faulds for National Consortium of Counsel
Eugene Meehan, Q.C., E.F. Anthony Merchant, Q.C., Casey R. Churko for Merchant Law Group
Bonnie B. Reid for Unaffiliated Counsel
W. Rod Donlevy, Michel G. Thibault for Catholic Entities
Alexander D. Pettingill for Protestant Entities
John K. Phillips, Laura C. Young for Assembly of First Nations

Subject: Civil Practice and Procedure; Public; Contracts

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.d Orders, awards and related procedures
V.2.d.i Order on common issues and individual issues

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.iv Court approval of agreement for payment of fees and disbursements

Headnote

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Orders, awards and related procedures — Order on common issues and individual issues
Plaintiffs brought action against federal government arising out of residential school system — Parties reached settlement that provided for payment to each person who resided at residential school as well as independent assessment process under which former students could seek additional compensation for sexual or serious physical abuse — Settlement also provided for funding for commemorative and healing programs — Parties brought application to have action certified as class action and for approval of proposed settlement — Application granted in part — Requirements for certification as class action had been met — Settlement provided significant benefits for class members that would not be recovered through individually litigated claims — Settlement was fair, reasonable, and in best interests of class as whole subject to certain deficiencies regarding administration of individual assessment process being addressed.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Court approval of agreement for payment of fees and disbursements
Plaintiffs brought action against federal government arising out of residential school system — Parties reached settlement that provided for payment to each person who resided at residential school as well as independent assessment process under which former students could seek additional compensation for sexual or serious physical abuse — Settlement also provided for funding for commemorative and healing programs — Parties brought application to have action certified as class action and for approval of proposed settlement — Application granted in part — Action was certified as class proceeding and settlement was approved subject to certain deficiencies being addressed — Provisions of agreement requiring payment of legal fees to plaintiffs' counsel were clear and enforceable — Amount of fees was to be agreed upon by parties or determined in action in Court of Queen's Bench — Legal fees were to be between $25 million and $40 million — Time spent by plaintiffs' counsel was substantial — Legal issues were complex and litigation risks were extremely high — Amount recovered by plaintiffs was approximately $2 billion, not including payments under independent assessment process — Clients expected to pay significant fees.

Table of Authorities

Cases considered by *D.P. Ball J.*:

Endean v. Canadian Red Cross Society (2000), 45 C.P.C. (4th) 39, [2000] 8 W.W.R. 294, 78 B.C.L.R. (3d) 28, 2000 BCSC 971, 2000 CarswellBC 1298 (B.C. S.C.) — referred to

Fischer v. Delgratia Mining Corp. (1999), 1999 CarswellBC 3110 (B.C. S.C. [In Chambers]) — referred to

Gariepy v. Shell Oil Co. (2003), 2003 CarswellOnt 2466, 48 C.P.C. (5th) 340 (Ont. S.C.J.) — referred to

Killough v. Canadian Red Cross Society (2001), 2001 CarswellBC 2837, 2001 BCSC 1745 (B.C. S.C.) — referred to

Knudsen (Guardian ad litem of) v. Consolidated Food Brands Inc. (2001), 2001 BCSC 1837, 2001 CarswellBC 3139 (B.C. S.C.) — referred to

L. (H.) v. Canada (Attorney General) (2005), 2005 SCC 25, 2005 CarswellSask 268, 2005 CarswellSask 273, 333 N.R. 1, 8 C.P.C. (6th) 199, 24 Admin. L.R. (4th) 1, 262 Sask. R. 1, 347 W.A.C. 1, [2005] 8 W.W.R. 1, 29 C.C.L.T. (3d) 1, 251 D.L.R. (4th) 604, [2005] 1 S.C.R. 401 (S.C.C.) — referred to

Lam v. Ajinomoto U.S.A. Inc. (2004), 2004 CarswellBC 1088, 2004 BCSC 651, 47 C.P.C. (5th) 122 (B.C. S.C.) — referred to

Quatell v. Canada (Attorney General) (2006), 2006 BCSC 1840, 2006 CarswellBC 3075 (B.C. S.C.) — considered

Smith v. Brockton (Municipality) (2004), 2004 CarswellOnt 837 (Ont. S.C.J.) — considered

Sparvier v. Canada (Attorney General) (2006), 283 Sask. R. 244, 2006 CarswellSask 497, 2006 SKQB 362 (Sask. Q.B.)

— referred to

White v. Canada (Attorney General) (2006), 2006 BCSC 561, 2006 CarswellBC 864 (B.C. S.C.) — referred to

Windisman v. Toronto College Park Ltd. (1996), 1996 CarswellOnt 2970, 10 O.T.C. 375, 3 C.P.C. (4th) 369 (Ont. Gen. Div.) — referred to

Statutes considered:

Arbitration Act, 1992, S.S. 1992, c. A-24.1
Generally — referred to

Class Actions Act, S.S. 2001, c. C-12.01
Generally — referred to

s. 6 — referred to

s. 38(1) — referred to

s. 41(1) — referred to

s. 41(2) — referred to

s. 41(5) — referred to

Queen's Bench Act, 1998, S.S. 1998, c. Q-1.01
Generally — referred to

Rules considered:

Queen's Bench Rules, Sask. Q.B. Rules
Generally — referred to

APPLICATION for certification of action as class proceeding and for approval of settlement.

***D.P. Ball J.*:**

1 All parties apply for certification of this action as a class proceeding and for approval of a proposed settlement, including approval of legal fees payable to the plaintiffs' counsel. Similar applications for approval have been made to superior courts in eight other Canadian jurisdictions.

2 As a term of the proposed settlement, the parties have agreed to combine this and all other outstanding residential schools' litigation into one *omnibus* class action to be filed in every jurisdiction. If all nine jurisdictions approve the settlement on substantially the same terms and conditions, it is expected that all of the litigation will be brought to an end.

3 I have had an opportunity to review draft decisions of other courts which summarize the history of the Residential Schools' system pursued by Canada, eloquently describe the tragic consequences for many Indian children and their families, explain the need to settle (or to implement a means of settling) their outstanding claims, and analyze the elements of the proposed settlement. I will not attempt to supplement what has already been stated on those subjects. I agree with and adopt the decision of Winkler R.S.J. in *Baxter v. Canada (Attorney General)*, Court File No. 00-CV-192059CP. The Courts in British Columbia, Alberta and Quebec have reached substantially the same conclusions as the Court in Ontario on the basic questions of class action certification and approval of the settlement. I will briefly explain why I agree with the Courts in those jurisdictions. I will then address the Merchant Law Group ("MLG") fee issue in somewhat greater detail than the other Courts.

4 This settlement is unique in that it responds to historic wrongs perpetrated against First Nations' people in Canada. As Winkler R.S.J. has stated in *Baxter*, *supra*:

> [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 school 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.

Certification of Class Action

5 Certification of a Saskatchewan action as a class action is based on the criteria set out in *The Class Actions Act*, S.S. 2001, c. C-12.01. Pursuant to s. 6 of the Act, the court must be satisfied that:

> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class;
>
> (c) the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members;
>
> (d) a class action would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a person willing to be appointed as a representative plaintiff who:
>
> > (i) would fairly and adequately represent the interests of the class;
> >
> > (ii) has produced a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action; and
> >
> > (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

The requirements for certification of a class action in Saskatchewan are similar, if not identical, to the requirements in other Canadian jurisdictions with class action legislation. I am satisfied that all of the requirements for certification of this action as a class action have been met. However, the action cannot be certified on this motion unless the proposed settlement is also approved.

Approval of Settlement

6 The accepted test for approving a class action settlement is whether it is fair, reasonable, and in the best interests of the

class as a whole. The settlement in this case has five main elements:

> (a) A Common Experience Payment ("CEP") to be paid to all persons who resided at an Indian Residential School in Canada between January 1, 1920 and December 31, 1997, and who were living as of May 30, 2005;
>
> (b) An Independent Assessment Process ("IAP") under which a former residential school student can seek additional compensation for sexual or serious physical abuse;
>
> (c) A Truth and Reconciliation Process, including the establishment of a Truth and Reconciliation Commission;
>
> (d) Funding for commemorative activities; and
>
> (e) Funding to the Aboriginal Healing Foundation for healing programs over a five-year period.

The elements of the settlement are thoroughly reviewed in a number of the other decisions and I need not add to what has been said. The settlement clearly provides significant benefits for class members that, for legal and practical reasons, would not be recovered through individually litigated claims. The CEP is notable in that it will compensate all class members living as at May 30, 2005, solely on the basis that they attended a Residential School. In addition, if the IAP is administered efficiently and expeditiously, impediments to recovery will be removed for those who suffered serious physical or sexual abuse during their Residential School experience.

7 Several members of the Survivor Class filed written material or attended at the hearing in Regina to comment on the merits and deficiencies of the proposed settlement. Most, though not all, spoke in favour of the settlement in spite of its perceived imperfections. Some had concerns about how and when the settlement would be implemented and the benefits would be paid. Some were hoping for a forum in which to relate their memories of the residential school system.

8 The Courts in the other jurisdictions appear to have heard similar representations. Again, the comments of Winkler R.S.J. in *Baxter*, *supra*, are apropos:

> [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.

9 One objection to the settlement was that the estates of members of the Survivor Class who died before May 30, 2005, would not be entitled to receive the CEP. I agree that the critical date will operate arbitrarily. It is essential that the personal representatives of the estates of those who will be excluded from the settlement are clearly notified that unless they opt out their rights will be extinguished.

10 A group of former Residential School students at Ile-a-la-Crosse who are pursuing a separate proposed class action (*Aubichon et al. v. Attorney General of Canada*, Q.B.G. No. 2036/2005, J.C. Regina) objected to being excluded from the terms of the Settlement Agreement. The exclusion of the Ile-a-la-Crosse group may be one of the Settlement Agreement's more significant imperfections. However, I accept that compromises are a reality in any settlement. I also accept this agreement represents the best that could be achieved for the greatest number of class members; indeed, reaching agreement has been a remarkable achievement for which all parties deserve a great deal of credit.

11 There are, however, concerns with respect to the planned administration and implementation of the settlement which are identified by Winkler R.S.J. in *Baxter*, *supra*, and in the decisions of Brenner C.J. in British Columbia, McMahon J. in Alberta, and Tingley J. in Quebec. The courts in those jurisdictions have decided to approve the settlement subject to the concerns being addressed. I will explain why I agree with their approach.

Requirements for Approval of Settlement

12 In *Baxter*, Winkler R.S.J. has observed that a key term of the settlement is merely access to a modified claims' procedure which will represent the start, rather than the end, of litigation for individual class members advancing claims under the IAP. Many such claims are expected, and it is estimated that the recoverable benefits may be in the order of $2 billion to $3 billion. For these reasons, Winkler R.S.J. concluded that the adjudication procedure must be shown to be manageable. As he stated at para. 29:

> [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 than the opportunity to litigate their claims in a 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.

13 Quite apart from the various sections of the Settlement Agreement which explicitly engage the courts' supervisory jurisdiction, the courts generally have jurisdiction over the administration of class action settlements. (In confirmation of that principle counsel cited *Smith v. Brockton (Municipality)*, [2004] O.J. No. 789 (Ont. S.C.J.) in which Winkler J. provided detailed directions to the administrator of the Walkerton Compensation Plan). I note that the draft order sought by the parties on this application states that the "Court's jurisdiction is preserved for the purposes of supervision, operation and implementation of the agreement and this judgment."

14 Those who would approve the Settlement Agreement immediately in this case are understandably concerned that deferral will at best cause unacceptable delay for elderly claimants and at worst cause the entire settlement to collapse. I understand and share their concerns. However, for the courts to carry out their supervisory role they must be given adequate information regarding the anticipated costs of IAP administration. As well, Canada's administrative role under the IAP must be separated from the adjudicative process and an autonomous supervisor or supervisory board must report ultimately to the courts. I am persuaded that pausing to address the deficiencies now may serve to avoid unmanageable problems later. If the parties are committed, the necessary assurances can be provided without undue delay.

15 In my respectful view, given Canada's role in the creation and operation of the Residential Schools' system for over a century, Canada's resolute defence of individual claims by members of the Survivor Class for over a decade and the adversarial climate in which the Settlement Agreement was negotiated, class members should now receive assurances that their IAP claims will be expeditiously and efficiently adjudicated and that Canada's administrative role will be separated from the adjudication process. Moreover, as Brenner C.J. points out in *Quatell v. Canada (Attorney General)* [2006 CarswellBC 3075 (B.C. S.C.)], Docket: L051875, Vancouver, at para. 12, separating Canada's administrative role from the litigation process will serve to insulate Canada from unfounded conflict of interest claims.

16 In addition to the concerns I have outlined regarding the IAP, I agree that the legal fees to be charged to IAP claimants must be controlled. I can add nothing useful to what has been stated on that issue by Brenner C.J., McMahon J., and Winkler R.S.J. (I agree with McMahon J. that although the parties should not make approval of a class action settlement conditional upon approval of legal fees, as they have done in this case, I will not allow that concern to stand in the way of granting this application).

17 Finally, I agree with Winkler R.S.J.'s concerns that the ongoing administration of the settlement will be frustrated if decisions must be obtained in all nine jurisdictions on all matters. One need look no further than this application to appreciate the fact that efforts to achieve unanimity are always time consuming and often unsuccessful.

18 To summarize, I concur that the following matters identified by Winkler R.S.J., are to be addressed (references are to the relevant paragraphs in the *Baxter*, *supra*, judgment):

> (a) Financial information sufficient to enable the courts to make an informed decision regarding the anticipated cost of administration of the IAP will be provided for the purposes of approval and thereafter on a periodic basis (para.

52);

(b) An autonomous supervisor or supervisory board will oversee the administration of the IAP, reporting ultimately to the court (para. 52);

(c) The adjudicator hearing each case under the IAP will regulate counsel fees to be charged having regard to the complexity of the case, the result achieved, the intention to provide claimants with a reasonable settlement, and the fact that an additional 15% of the compensation award will be paid as fees by Canada (para. 78); and

(d) The parties will establish a protocol for determining the manner in which issues relating to the ongoing administration of the settlement will be submitted to the courts in each jurisdiction for determination. This will ensure that the requirement for unanimous approval of all courts of any material amendment will not unduly hinder or delay the ability of the courts to make timely decisions (para. 81).

19 I am approving the entire settlement as "fair, reasonable and in the best interests of the class as a whole" subject to receiving assurances that the identified deficiencies will be addressed. My approval will extend to those portions of the Settlement Agreement which provide for payment of legal fees and disbursements to the National Consortium, to independent counsel and to Merchant Law Group ("MLG").

Merchant Law Group Fees

20 In this decision I will consider, in somewhat greater detail than the other courts, those portions of the Settlement Agreement which provide for payment of legal fees and disbursements to MLG. I will begin by identifying the relevant legislation and *The Queen's Bench Rules*.

Legislation and The Queen's Bench Rules

21 Sections 38(1) of *The Class Actions Act*, S.S. 2001, c. C-12.01 states:

38(1) A class action may be settled, discontinued or abandoned only:

(a) with the approval of the court; and

(b) on the terms the court considers appropriate.

22 The relevant portions of s. 41 of *The Class Actions Act* states:

41(1) An agreement respecting fees and disbursements between a lawyer 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 action; 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 lawyer and a representative plaintiff is not enforceable

unless approved by the court, on the application of the lawyer.

. . . . .

(5) If an agreement is not approved by the court, the court may:

(a) determine the amount owing to the lawyer respecting the fees and disbursements;

(b) direct an inquiry, assessment or accounting pursuant to *The Queen's Bench Rules* to determine the amount owing; or

(c) direct that the amount owing be determined in any other manner.

Although subsection 41(2) contemplates that the application for approval of legal fees will be brought by the lawyer to whom the fees will be payable, all parties bring this application.

The Contractual Provisions

23 The portions of the Settlement Agreement which provide for payment of legal fees to MLG were negotiated by representatives of both sides, most notably by the Federal Representative, The Honourable Frank Iacobucci, Q.C. and by Mr. Tony Merchant, Q.C. of MLG. On November 20, 2005, Mr. Iacobucci and Mr. Merchant signed an agreement (the "Merchant Fee Verification Agreement" or the "MFVA") which stated:

Agreement Between the Government of Canada and the Merchant Law Group Respecting the Verification of Legal Fees

The Government of Canada and the Merchant Law Group agree that in addition to the requirement to provide an affidavit as set out in Article # [*sic*] of the Agreement in Principle, the Merchant Law Group's fees shall be subject to the following verification process.

1) 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 shall be made available for review and verification by a firm to be chosen by the Federal Representative the Honourable Frank Iacobucci.

2) The Federal Representative shall review the material from the verification process and consult with the Merchant Law Group to satisfy himself 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 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.

3) If the Federal Representative is not satisfied as described in 2) above, he and the Merchant Law Group shall make all reasonable efforts to agree to another amount to be paid to the Merchant Law Group for legal fees.

4) If the Federal Representative and the Merchant Law Group cannot agree as described in 3) above, the amount to be paid to the Merchant Law Group for legal fees shall be determined through binding arbitration, but that amount shall in no event be more than $40 million or less than $25 million. The arbitration shall be by a single arbitrator who shall be a retired judge:

(a) selected by the Federal Representative and the Merchant Law Group from a list comprising:

(i) John Major,

(ii) Peter Cory,

(iii) John Morden, or

(iv) Allan McEachern; and

(b) if not so jointly chosen, then chosen by the Federal Representative in consultation with Tony Merchant and appointed in accordance with the Saskatchewan *Arbitration Act*, with the arbitration to take place in Saskatchewan.

”Tony Merchant”

”Frank Iacobucci”

”November 20, 2005”

”Toronto, Ontario”

24 Immediately after the Merchant Fee Verification Agreement was signed, an Agreement in Principle (”AIP”) was signed by all interested parties, including Mr. Iacobucci as Federal Representative and Mr. Merchant as the representative of MLG. The AIP, which was approved by the Federal Cabinet on November 22, 2005, provided for payment of legal fees to MLG, to a group of 19 other law firms (known as the National Consortium) and to other individual lawyers. One portion of the AIP stated:

WHEREAS legal counsel have done very substantial work on behalf of Eligible CEP Recipients for many years, have contributed significantly to the achievement of the Agreement in Principle and have undertaken not to seek payment of legal fees in respect of the Common Experience Payment to be paid to Eligible CEP Recipients, Canada agrees to compensate legal counsel in respect of their legal fees as follows.

. . . . .

4. The National Consortium and the Merchant Law Group shall each be paid $40,000,000 plus reasonable disbursements, and GST and PST, if applicable, in recognition of the substantial number of Eligible CEP Recipients each of them represents and the class action work they have done on behalf of Eligible CEP Recipients. Paragraphs 1, 2 and 3 above shall not apply to any lawyer who is a partner of, employed by or otherwise affiliated with a National Consortium member law firm or the Merchant Law Group.

5. The Federal Representative shall engage in such further verification processes with respect to the amounts payable to the Merchant Law Group and National Consortium as have been agreed to.

6. No lawyer or law firm that has taken part in these settlement negotiations or who accepts a payment for legal fees from the[sic] Canada shall charge an Eligible CEP Recipient any fees or disbursements in respect of the Common Experience Payment paid to the Eligible CEP Recipient.

25 After further negotiation, the AIP was finalized by a Settlement Agreement which was approved by the Federal Cabinet on May 10, 2006. The Settlement Agreement dealt extensively with payment of legal fees to lawyers representing residential school claimants. The following provisions were relevant to the MLG claim:

13.05 No Fees on CEP Payments

No lawyer or law firm that has signed this Settlement Agreement or who accepts a payment for legal fees from Canada, pursuant to Sections 13.06 or 13.08, will charge an Eligible CEP Recipient any fees or disbursements in respect of the Common Experience Payment.

13.08 The National Consortium and the Merchant Law Group Fees

(1) The National Consortium will be paid forty million dollars ($40,000,000.00) plus reasonable disbursements, and GST and PST, if applicable, in recognition of the substantial number of Eligible CEP Recipients each of them represents and the class action work they have done on behalf of Eligible CEP Recipients. Any lawyer who is a partner of, employed by or otherwise affiliated with a National Consortium member law firm is not entitled to the payments

described in Section 13.02 and 13.06 of this Agreement.

(2) The fees of the Merchant Law Group will be determined in accordance with the provisions of the Agreement in Principle executed November 20, 2005 and the Agreement between Canada and the Merchant Law Group respecting verification of legal fees dated November 20, 2005 attached hereto as Schedule "V", except that the determination described in paragraph 4 of the latter Agreement, will be made by Justice Ball, or, if he is not available, another Justice of the Court of Queen's Bench of Saskatchewan, rather than by an arbitrator.

(3) The Federal Representative will engage in such further verification processes with respect to the amounts payable to the National Consortium as have been agreed to by those parties.

(4) In the event that the Federal Representative and either the National Consortium or the Merchant Law Group cannot agree on the amount payable for reasonable disbursements incurred up to and including November 20, 2005, under Section 13.08(1) of this Agreement, the Federal Representative will refer the matter to:

> (a) the Ontario Superior Court of Justice, or an official designated by it, if the matter involves the National Consortium;
>
> (b) the Saskatchewan Court of Queen's Bench, or an official designated by it, if the matter involves the Merchant Law Group;

to fix such amount.

26 Attached as Schedule "V" to the Settlement Agreement was the Merchant Fee Verification Agreement executed November 20, 2005.

The Positions of the Parties

27 Canada and MLG both say that they support the approval of the entire Settlement Agreement, including those provisions which provide for payment of legal fees to MLG. However, they claim to have very different understandings of what the Agreement means.

28 MLG submits that the Settlement Agreement requires Canada to immediately pay legal fees of $40 million (plus GST and PST) and disbursements of $3,606,266.00 (plus GST) to MLG for a total of $49,369,243.00. Canada submits that it is not obligated to pay anything until MLG verifies facts relevant to its claim. As set out in my fiat of August 1, 2006 (2006 SKQB 362 (Sask. Q.B.)) Canada has filed affidavits asserting that MLG failed or refused to provide satisfactory verification. Canada says that by approving the Settlement Agreement the Court will only be approving a process whereby the appropriate fees payable to MLG can be determined.

29 In summary, both parties ask the Court to approve the Settlement Agreement as it relates to MLG, but they are almost $50 million apart in their understanding of what it requires. Obviously, the Court cannot approve an agreement for the payment of fees unless it understands how much is to be paid or how that amount is to be determined.

Interpretation of the Agreements

30 An agreement is to be interpreted according to its plain, literal and ordinary meaning. This reflects the common sense proposition that parties most often mean what they say, particularly in formal documents. The paramount question is the intention of the parties. Having regard to the context in which the agreement was reached, the law does not attribute an intention to the parties that they plainly could not have had.

31 Although both parties may now claim to have had different understandings of what the contractual terms mean, the intention of the parties can be ascertained from the contractual provisions quoted above. The language is reasonably plain and unambiguous.

32 The Merchant Fee Verification Agreement stated that Canada would pay legal fees to MLG after a firm to be chosen by Mr. Iacobucci received, for review and verification, "dockets, computer records of work in progress and any other evidence relevant" to MLG's claim. If Mr. Iacobucci was not satisfied from the evidence provided that the amount of legal fees to be paid was reasonable and equitable, he and MLG would "... make all reasonable efforts to agree to another amount." If they still could not agree, s. 13.08(2) of the Settlement Agreement stated that the amount to be paid would be determined by "... Justice Ball, or if he is not available, by another justice of the Court of Queen's Bench for Saskatchewan but that amount shall in no event be more than $40 million or less than $25 million."

33 The MFVA does not obligate MLG to provide proof that it had a substantial solicitor/client relationship, or that it had entered into contingency or any type of retainer agreements, with any specified number of clients, although all of that information is relevant. It does not obligate MLG to verify that it had accumulated any minimum amount of unbilled time on class action files or on a combination of class action files and individual files, although time spent is also relevant. Conversely, the MFVA does not obligate the Federal Representative to accept as satisfactory whatever information is provided by MLG.

34 Counsel for Canada submitted that the agreements with MLG amounted to nothing more than a verification process. This would mean that Canada has no obligation to pay anything until it is satisfied MLG has verified unspecified data. This would put Canada in the position of deciding when, and if, it would pay any amount. I do not agree with that submission.

35 Read together, the agreements anticipate that MLG and the Federal Representative might be in the situation they are now in — that is, in a dispute over whether MLG has provided enough relevant evidence to satisfy the Federal Representative that the fees to be paid are reasonable and equitable. The parties expressly agreed that if the Federal Representative is not so satisfied the matter will be determined by a judge of this Court. They also agreed that even if determined in that manner, the amount to be paid will be no less than $25 million and no more than $40 million. (In the MFVA, which was incorporated into the AIP, the parties had agreed that the dispute would be decided by one of four named arbitrators acting in accordance with the provisions of the Saskatchewan *Arbitration Act, 1992*, S.S. 1992, c. A-24.1. By changing the forum from arbitration to the court in the Settlement Agreement, they changed the method for resolving the dispute from an arbitration under *The Arbitration Act, 1992* to the trial of an issue under *The Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01).

36 I have stated that these agreements were negotiated by The Honourable Mr. Iacobucci, Q.C., as the Federal Representative, and by Mr. Merchant, Q.C., as MLG's representative. Both have a wealth of experience. Both had a thorough understanding of the issues. The Government of Canada surely knew that it had agreed to pay MLG at some point no less than $25 million dollars and as much as $40 million. MLG surely knew that it had agreed to verify its claim for payment of anything more than $25 million.

37 Although MLG joined with all other parties in urging the Court to approve the entire Settlement Agreement, including the provisions for payment of MLG's legal fees, written submissions filed by MLG argued that the MFVA attached as Schedule "V" to the Settlement Agreement is unenforceable because of ambiguity and/or illegality.

38 It is contradictory for MLG to argue that an entire agreement should be approved, and at the same time argue that part of it is unenforceable. The argument that the MFVA is too ambiguous to be enforced is rejected: I have already stated that the intent of the parties is sufficiently clear and unambiguous to be enforced. Winkler R.S.J. came to the same conclusion in *Baxter*, *supra*, at para. 67.

39 MLG's argument that the MFVA is "illegal" is based on the proposition that the MFVA may require disclosure of MLG's billing records and client files, which MLG says contain privileged solicitor/client information. MLG takes that argument a step further by asserting that it is not permitted to disclose who its clients are, whether or not it has been formally retained by them, or what those retainer agreements might provide, because all of that information is privileged.

40 In my fiat dated August 1, 2006, I accepted the proposition that the MFVA does not require MLG to disclose privileged solicitor/client information to the Federal Representative's designated firm, Deloitte and Touche, LLP, unless MLG's clients first provide informed consent. It follows that the MFVA does not require MLG to do anything "illegal."

41 It does not follow, however, that all of the information over which MLG claims privilege is, in fact, privileged. MLG's claim for legal fees is based on the proposition that it has spent many hours pursuing individual Residential School claims and a number of class actions. MLG is not entitled to be paid for work done for their clients without establishing who the clients are and that legal work was done on their behalf.

42 The names of MLG's clients have already been provided to Canada by way of individual statements of claim. At one point MLG provided information about many of its contingency agreements to the Federal Representative's designate, Deloitte and Touche, LLP. On this motion it placed in evidence copies of contingency agreements entered into with the plaintiffs in all of its proposed class actions. Thus, MLG has acknowledged by its actions that its fee arrangements with those clients are not privileged.

Analysis

43 I now turn to the question of whether the provisions of the Settlement Agreement requiring payment of legal fees and disbursements to MLG warrant court approval. All parties urge the Court to approve the entire Settlement Agreement, including those portions relating to MLG. They point out that the fees and disbursements will not be paid from the amounts available to the members of the class, but over and above those amounts. Although one party suggested that the fees and disbursements payable to all of the lawyers should be approved because they are not being paid by class members and because Canada has "unlimited resources," I do not agree. The Court must decide whether the fee arrangements, which are part of the overall settlement, are "fair and reasonable." This means that counsel are entitled to a fair fee which may include a premium for the risk undertaken and the result achieved. It also means however, that the fees must not bring about a settlement that is in the interests of the lawyers, but not in the best interests of the class members as a whole.

44 Fees payable to plaintiffs' counsel in class actions are determined by reference to factors established by judicial authorities. Those factors are often said to be:

(a) time expended by the solicitor;

(b) the legal complexity of the matters;

(c) the degree of responsibility assumed by the solicitor;

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

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

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

(g) the results achieved and the contribution of counsel to the result;

(h) the ability of the client to pay; and

(i) the client's expectations as to the amount of the fees.

(*Fischer v. Delgratia Mining Corp.*, [1999] B.C.J. No. 3149 (B.C. S.C. [In Chambers]) at para. 22; *Killough v. Canadian Red Cross Society*, [2001] B.C.J. No. 2631 (B.C. S.C.) (at paras. 22 and 23; *Knudsen (Guardian ad litem of) v. Consolidated Food Brands Inc.*, [2001] B.C.J. No. 2902 (B.C. S.C.) at para. 38; *Windisman v. Toronto College Park Ltd.* (1996), 3 C.P.C. (4th) 369 (Ont. Gen. Div.), para. 8; and *Gariepy v. Shell Oil Co.*, [2003] O.J. No. 2490 (Ont. S.C.J.) at para. 13).

45 Other decisions sometimes add additional factors to the list, such as the risk of no recovery, the expectation of a larger

fee in a contingency case, the integrity of the legal profession, and public policy concerns. (See, for example, *White v. Canada (Attorney General)*, 2006 BCSC 561, [2006] B.C.J. No. 760 (B.C. S.C.); *Endean v. Canadian Red Cross Society*, 2000 BCSC 971, [2000] 8 W.W.R. 294, 78 B.C.L.R. (3d) 28 (B.C. S.C.) and *Lam v. Ajinomoto U.S.A. Inc.*, 2004 BCSC 651, 47 C.P.C. (5th) 122 (B.C. S.C.)). Although some decisions have stated that a factor to be considered is "the character and standing of counsel in the profession," in my view that is not a factor that should be considered because it is not capable of measurement. Fees should not be based on a subjective sense of a lawyer's personality, public profile or popularity. They should be based on the factors listed above as supported by the evidence.

46 The "evidence" filed by MLG on this application was contentious. On July 17, 2006, Mr. Merchant filed a lengthy affidavit sworn by MLG's office manager, Donald Outerbridge, which I substantially ignored because it was replete with inadmissible evidence (see 2006 SKQB 362 (Sask. Q.B.) at para. 18). Mr. Merchant responded by filing another affidavit of Mr. Outerbridge on September 13, 2006 that was more argumentative and contained much more inadmissible evidence than the first affidavit. The second Outerbridge affidavit was filed much too late to allow Canada to fairly respond, yet MLG opposed any adjournment. The second affidavit was therefore held to have no evidentiary value and treated as nothing more than the written submission of Mr. Merchant. (As a submission, it will be referred to below as the "Outerbridge submission").

47 Quite apart from the evidence, MLG's position on which factor or factors should be most important was unclear. For example:

- MLG claims to act for clients numbering "in excess of 10,000" (at para. 250 of the Outerbridge submission the number is said to be "in the range of 8,000 to 10,000 individual claimants"), but argues that its fees should not be determined according to the number of clients it represents. (Edward Nagel, a Senior Manager of Deloitte and Touche LLP, deposes in an affidavit sworn June 15, 2006 that in January of 2006 MLG provided an electronic listing of 8,560 clients with whom it claimed to have a solicitor/client relationship);

- MLG says that it has contingency agreements with "over 4,000" clients, but contends that the number of clients with whom it had those agreements is not the most important consideration. (The affidavit of Edward Nagel deposes that in January of 2006 Deloitte's representatives obtained photocopies of 4,823 retainer agreements). For the purpose of this decision I will assume that all of those agreements provide for the payment of a contingency fee); and

- Although paragraph (2) of the MFVA expressly incorporated work in progress as a relevant consideration and referenced the Ontario approach of utilizing "a 3 to 3.5 multiple in respect of the time spent on class action files," MLG asserts that unbilled time or work in progress should not be the paramount consideration.

48 MLG also argues that in paying legal fees "the Government is buying out lawyers' contingency entitlement" because "MLG is giving up its right to one-third of anything that is recovered by our clients." That submission presupposes that MLG has entered into contingency agreements with all of its residential school clients; that those agreements obligate all of the clients to pay MLG a contingency fee of 33 1/3% of the total recovery at every stage of the litigation; and that MLG is in a position to "sell" its entitlement to contingent fees to Canada like some sort of commercial financing paper.

49 The flaws in the argument are manifest: MLG does not have contingency agreements with all of the clients it claims to represent; it is not entitled to a percentage of the recovery for clients with whom it does not have contingency agreements; it is not in a position to "sell" its representation of clients, retained or otherwise, to anyone; and there is no evidence the contingency agreements it does have provide for fees of 33% at any stage of the litigation.

50 MLG filed its contingency agreements with the plaintiffs in this and other class actions. All of those agreements provide for a contingency fee of 20% of any recovery effected prior to examinations for discovery. Thus, the only evidence is that where MLG has contingency agreements, it is *not* entitled to 33 1/3% of all recovery at all stages of the litigation.

51 Although I have rejected many of the arguments advanced by MLG, I find one comparison to be relevant. The MFVA stated that the fees payable to MLG will fairly compare to fees payable to other counsel. That means the fees payable to MLG should fairly compare to the fees of $40 million payable to the National Consortium of 19 law firms and of approximately $20 million payable to other independent lawyers. The affidavit of Darcy Merkur filed on behalf of the National Consortium establishes that its 19 law firms represent a total of 4,826 individual residential school claimants. This can be compared to the

4,823 retainer agreements identified by Edward Nagel in his review of MLG files in January of 2006.

52 I will now apply the evidence on this application to the factors listed in paragraphs 44 and 45 above.

(a) Time Expended by the Solicitor

53 Judicial decisions uniformly list time spent as the first factor to be considered in approving fees for plaintiffs' counsel in class actions. Paragraph (2) of the MFVA recognized that MLG had "incurred time on a combination of class action files and individual files" and stated that this time "... including the payment of a 3 to 3.5 multiplier" was a relevant factor to be considered.

54 Although MLG claims to have done "tens of millions of dollars worth of work in the last 10 years" it has not verified that claim: nor has it differentiated between time spent on client files with contingency agreements and time spent on files without contingency agreements. At para. 557 of its submission filed September 14, 2006, MLG claims to have spent $8.5 million worth of class action time and $43 million worth of individual action time. This can be contrasted with the statement at para. 510 of the Outerbridge submission that the value of work done to May 30, 2005 was "in the range of $36,000,000."

55 The Outerbridge submission also asserts at para. 327 that "MLG lawyers did 193,000 hours of work." At paragraph 494 it states that Mr. Merchant himself worked close to 5,000 billable hours annually in the years 2000, 2001 and 2003. Simple arithmetic says that equals 13.7 hours everyday for 365 consecutive days. The implication is that a significant portion of these hours were spent on residential school files.

56 Although a lawyer may arbitrarily assign time to files in a way that adds up to 5,000 hours each year, I do not accept that any lawyer, no matter how driven, actually works 5,000 meaningful hours each year. Taxing officers do not approve fees based on recorded hours multiplied by a claimed hourly rate (MLG's counsel on this motion, Mr. Meehan, is said to have an hourly rate of $750.00) without considering the nature of the problem and reasonable value to the client. Similarly, fees for counsel in class actions cannot be calculated using a multiplier of 3 to 3.5 times recorded hours without regard to whether the recorded time was actually worked and, more importantly, whether it represented value to the client.

57 Since time spent is relevant to approving legal fees in class actions, satisfactory verification of time actually worked by MLG on residential schools' litigation will be required if the parties are unable to reach agreement on fees without a trial. It will be incumbent on MLG to provide that verification in a reliable format that does not breach solicitor/client confidentiality. Although that verification has not yet been provided, for reasons to be explained below I accept that the time spent by MLG on residential schools' litigation has been substantial.

(b) The Legal Complexity of the Matters

58 All parties agree that members of the Survivor, Deceased and Family Classes were confronted by many significant legal and practical problems which could only be overcome by extensive litigation and political pressure and only resolved by a negotiated settlement. The legal issues were complex. They included a variety of limitation periods, the extent to which Canada and the churches were immune from or vicariously liable for the negligence of others, the limits of liability for the actions of others, and the extent to which damages could be recovered.

59 The litigation risks confronting individual plaintiffs and the members of each class were extremely high. Those risks were accepted by all counsel, including MLG. For a number of years, they represented a substantial number of clients at their own expense and without any assurance of meaningful recovery.

(c) The Degree of Responsibility Assumed by the Lawyer

60 The joint factum of the plaintiffs lists the number of active Indian Residential School litigation claims and plaintiffs in Canada:

Active Litigation and Plaintiffs	**Statements of Claim**	**Plaintiffs**
Alberta	1432	3950

British Columbia	313	830
Manitoba	289	1157
New Brunswick	1	1
NWT	20	29
Nova Scotia	1	582
Nunavut	6	191
Ontario	101	657
Quebec	16	89
Saskatchewan	2112	2949
Yukon	46	103
Total Active	4337	10538

The 2,112 individual residential school claims commenced in Saskatchewan amounted to almost one-half of the 4,337 claims commenced in Canada. I take judicial notice of the fact that MLG filed a significant majority of the individual Saskatchewan claims. MLG also commenced a total of 14 class proceedings in Canadian jurisdictions.

61 Although most MLG claims never reached the examination for discovery stage in Saskatchewan, some 155 individual MLG actions were scheduled for pre-trial conferences. A number were settled. Some went to trial, with mixed success. Appeals were taken to the Court of Appeal and at least one appeal was heard by the Supreme Court of Canada. (See *L. (H.) v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 (S.C.C.)).

62 MLG claims to have advanced some $3.6 million in recoverable disbursements for residential school plaintiffs. Given the number of actions commenced by the firm and the actual costs of carrying that litigation, the disbursements claimed are not inconceivable. However, as with time worked, it will be incumbent on MLG to verify its disbursements in a reliable format that does not breach solicitor/client privilege.

63 In addition to the litigation pressures brought to bear on Canada, political pressures were substantial. The joint factum of the plaintiffs states at paragraph 144:

> 144. By May 2005, at the time of entering into the Political Agreement, there were significant pressures on Canada to come to the negotiating table. Various stakeholders had pushed the IRS agenda in the media, to develop public awareness and obtain support. Pressure was also being brought to bear in the political arena, and of course, there was a significant and increasing volume of litigation, including the first certified IRS class proceeding.

64 MLG supplements this in its own submission. It argues that it made an important contribution to the settlement from both a legal and a political perspective. Mr. Merchant contends that he had access to many individuals who had the authority to make political decisions, including various Federal Cabinet Ministers, and that his efforts were instrumental in bringing about the Settlement Agreement.

65 Although MLG claims to be a law firm with multiple offices in various provinces, the number of lawyers in the firm is not significant by national standards. The Outerbridge submission states at para. 499 that "the Merchant family has injected $1.6 million after tax dollars into the firm over the past few years, in order to assist through their work and cash injection in funding the residential school disaster." Mr. Merchant states that he has three sons who are lawyers working for the law firm, and that neither he nor any of his sons have drawn any income from the firm since 1999. He appears to have "bet the firm" on an outcome that was far from certain.

(d) The Monetary Value of the Matter to the Client

66 The value of the CEP to be paid to each member of the Survivor Class can be calculated with some certainty. It is expected to average in excess of $23,000.00 per member with total payments amounting to as much as $1.9 billion. Each member of the Survivor Class will receive no less than $10,000.00. In view of the significant legal and practical hurdles facing individual class members, the monetary value to the client of the CEP recovery is significant. I will address this in more detail under the heading "Results Achieved."

(e) The Importance of the Matter to the Client

67 It would be an oversimplification to conclude that the settlement was equally important to all members of the Survivor Class, the Deceased Class and the Family Class. The reality is that the importance to each person will depend upon his or her individual experiences and the extent to which those experiences affected his or her life and the lives of others. While the monetary recovery may be most important to some, for others the acknowledgment that the misconceived Indian Residential School system was injurious to them will be much more significant. For the latter group, access to healing, truth telling and commemoration will be of more significant value. However "value" is to be determined by each member of each class. The importance of the matter to them cannot be understated.

(f) The Degree of Skill and Competence Demonstrated by the Lawyer

68 With respect, if the skill and competence demonstrated by MLG on this motion were the sole consideration it would not bode well for the approval of a substantial legal fee for MLG. On this application MLG twice filed voluminous affidavits and submissions immediately before or during hearings which gave Canada no reasonable opportunity to respond. The submissions were repetitive, self-serving, contradictory and at times incoherent. On the other hand, they contained candid assessments of the weaknesses in the Settlement Agreement when all of the other parties seeking approval tended to focus exclusively on the strengths.

69 No one suggests that the degree of skill and competence demonstrated by MLG on this application was representative of the work done by MLG over the years. Perhaps a better indicator of the work done was the end result, which would not have been achieved without the determined and ultimately effective efforts of all counsel, including MLG.

(g) The Results Achieved

70 The result achieved for the members of the class is to be considered, not in isolation, but as one part of the bigger picture. As a starting point in assessing the results achieved, due regard should be given to the difficulties confronting members of the class at the outset. There were major legal and practical hurdles facing members of each of the Survivor, Deceased and Family Classes in this action, including limitation issues and litigation realities. Suffice it to say that the hurdles to recovery and the litigation risks were daunting.

71 The results achieved are impressive, but difficult to quantify. The Settlement Agreement provides a lump sum compensation, the CEP, to all living Indian Residential School Survivors living as of May 30, 2005. It establishes the IAP which improves the Alternate Dispute Resolution process now in place for resolving claims for individual abuse. In addition, the settlement provides funding to the Aboriginal Healing Foundation, establishes a Truth and Reconciliation Commission, and provides funding for certain commemoration activities.

72 I have attempted to determine the potential value of the Settlement Agreement for class members by adding together the identifiable costs of each component. The value of some components can be estimated with relative certainty.

73 It is estimated that approximately 80,000 members of the Survivor Class may be entitled to apply for the CEP with the average claim being $23,750.00. The Government of Canada has set aside $1.9 billion to satisfy all of those potential claims. All parties agree that the total payments will probably be less than that, with MLG stating that the surplus may be as much at $500 million. If the actual amounts paid out are less than $1.9 billion, than the first $40 million of surplus will go to Aboriginal organizations for healing and education initiatives, and any remainder will provide former Residential School students with "personal credits" of up to $3,000.00 each.

74 In addition to the CEP, the Settlement Agreement provides for payments of an initial endowment of $125 million to the Aboriginal Healing Foundation to fund culturally appropriate healing programs to address the healing needs of the class; the sum of $60 million for a Truth and Reconciliation Commission to be established to engage in a collective process with the community of survivors; and the sum of approximately $20 million for national and community based commemoration

activities "... to honour and pay tribute to former Indian Residential School students and their families through acknowledging their experiences." When these payments are added to the anticipated $1.9 billion value of the CEP, the total value of the benefits is approximately $2.1 billion.

75 All parties suggest that if the Settlement Agreement is approved the total value to class members will be between $4 billion and $5 billion. If that is true, then under the IAP between $2 billion and $3 billion will be paid out as compensation to victims of serious physical or sexual assault while in attendance at a Residential School. However, no party could estimate either the number of individuals who might advance such claims or the anticipated payout to these claimants. Over and above the payout will be the unknown (or at least undisclosed) cost of administering the IAP. This is one of the deficiencies to be corrected as a condition of approving the settlement.

76 For these reasons I cannot begin to place a monetary value on the IAP benefits with any degree of reliability. Even if I could, I would not take them into account in determining the amount of legal fees to be approved now. The reason is that lawyers remain entitled to receive payment of fees for any amounts that may be recovered by their clients under the IAP *in addition* to any amounts to be awarded now for settling the class action. Not only has the Government of Canada agreed to increase any IAP award by 15% to pay for legal fees, but lawyers may charge an additional contingency fee to clients over and above that 15%. Regulating these additional fees has been identified as a concern by Winkler R.S.J. in *Baxter*, *supra*, at paras. 69 to 77 and in this decision at para. 18(c) above. Since the hearing of this motion all counsel have stated that they will limit their total fee to 30% of the amount recovered under the IAP, inclusive of the 15% to be paid by Canada. Even so, I agree that each adjudicator must have authority to approve the amount of legal fees and disbursements payable to counsel on IAP applications. I would add that no contingency fee should be permitted on the recovery of disbursements.

77 Plaintiffs' counsel submits that even if the value of the IAP cannot be quantified with any certainty, the fact that the process has been created with fewer limitations on what claimants may recover and more efficiency in processing their claims should be considered in awarding legal fees at this time. I do not accept that proposition. It is true that the IAP will enable claimants to recover awards that they might not have recovered otherwise, but it will also enable their lawyers to charge fees on the amounts recovered that they would not have otherwise been able to charge. In my view, to compensate lawyers for the creation of the IAP and to compensate them again when funds are recovered under the IAP would amount to double compensation.

78 I will proceed on the assumption that legal fees for class counsel should reflect recovery for class members of approximately $2 billion rather than the $4 or $5 billion figure advanced by the parties. That said, the recovery remains extremely large by all legal standards in Canada.

79 MLG claims to have contributed 40% to 50% to the overall settlement. The estimate is a self-serving one about a matter that cannot be measured with any certainty, but I accept that MLG's contribution was substantial. I have observed that the Settlement Agreement was the result of a combination of litigation and political pressures brought to bear on the Government of Canada. I have accepted that MLG made a significant contribution to the litigation pressures through the sheer quantity of individual claims filed in various Canadian jurisdictions. There is no reason to believe that MLG's contribution to the political pressure was any less than that of the law firms who form the National Consortium or the independent lawyers.

80 Even if it is arbitrarily assumed that MLG made a proportionate contribution to the total recovery of only one-half of what it claims, it would be credited with recovering perhaps $400 million to $500 million for class members. On those assumptions, a minimum fee of $25 million would amount to 5% to 6 1/4%. From that perspective the fee range agreed to by both parties was not unreasonable.

(h) The Ability of the Client to Pay

81 The ability to pay of class members who will benefit from the settlement is not relevant because Canada has agreed to pay the fees of plaintiffs' counsel over and above the amount to be paid to the members of each class. I have observed that the ability to pay of Canada and those who fund the public purse is not the issue; the question is whether they receive fair value for their expenditure.

(i) The Client's Expectations as to the Amount of the Fees

82 It would appear that slightly less than one-half of the MLG clients who commenced individual actions entered into contingency agreements which provided for payment of fees as a percentage of the eventual recovery. Others, the majority, presumably expected to pay for work done on a fee for service basis. How much work was done for the latter group has yet to be determined with any certainty. Suffice it to say, however, that both groups of clients expected to pay significant fees.

Summary

83 This action will be certified as a class action and the Settlement Agreement approved in its entirety upon the Court receiving satisfactory assurances that the deficiencies identified in para. 18 of this decision will be addressed. Approval of the Settlement Agreement will include those portions which provide for payment of legal fees to the National Consortium, to Merchant Law Group and to independent counsel.

84 I find that the provisions of the Settlement Agreement requiring payment of legal fees and disbursements to MLG are clear and enforceable. If the Federal Representative and MLG cannot agree on an amount, it shall be determined by an action to be brought in the Court of Queen's Bench for Saskatchewan with the amount of legal fees payable to MLG to in no event be more than $40 million or less than $25 million. If the parties cannot agree and an action becomes necessary, it will be incumbent on MLG to adduce all relevant evidence to verify its claim in a format that does not breach solicitor/client privilege. If MLG does not do so, it cannot expect to receive payment of more than $25 million.

85 Having regard to all relevant factors I find that the agreed minimum amount and the process for determining the actual amount payable to MLG will be approved as part of an entire Settlement Agreement.

Application granted in part.

2007 SKCA 37
Saskatchewan Court of Appeal

Sparvier v. Canada (Attorney General)

2007 CarswellSask 148, 2007 SKCA 37, [2007] 7 W.W.R. 682, [2007] S.J. No. 145, 156 A.C.W.S. (3d) 936, 293 Sask. R. 54, 397 W.A.C. 54, 39 C.P.C. (6th) 133

The Attorney General of Canada (Appellant) and Kenneth Sparvier, Dennis Smokeyday, Rhonda Buffalo, John Doe I, Jane Doe I, John Doe II, Jane Doe II, John Doe III, Jane Doe III, John Doe IV, Jane Doe IV, John Doe V, Jane Doe V, John Doe VI, Jane Doe VI, John Doe VII, Jane Doe VII, John Doe VIII, Jane Doe VIII, John Doe IX, Jane Doe IX, John Doe X, Jane Doe X, John Doe XI, Jane Doe XI, John Doe XII, Jane Doe XII, John Doe XIII, Jane Doe XIII, and other John and Jane Does Individuals and Entities to be added (Respondents)

Lane, Richards, Smith JJ.A.

Heard: March 22, 2007
Judgment: March 30, 2007
Docket: 1411

Proceedings: affirming *Sparvier v. Canada (Attorney General)* (2006), 290 Sask. R. 111, 2006 SKQB 533, 35 C.P.C. (6th) 110, 2006 CarswellSask 765 (Sask. Q.B.)

Counsel: Catherine Coughlan, Paul Vickery for Attorney General of Canada
E.F. Anthony Merchant, Q.C., Evatt Merchant for Respondents
Eugene Meehan, Q.C., Jeffrey Beedell for Merchant Law Group
John Phillips for Assembly of First Nations
W. Roderick Donlevy for Catholic Entities
Kirk Baert, Celeste Poltak for National Consortium

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.iv Court approval of agreement for payment of fees and disbursements

Headnote

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Court approval of agreement for payment of fees and disbursements
Plaintiffs brought action against federal government arising out of residential school system — Settlement provided for payment to each person who resided at residential school and for independent assessment process for former students to seek additional compensation for sexual or serious physical abuse — Settlement also provided for funding for commemorative and healing programs — Application to certify action as class action and to approve proposed settlement was granted in part —

Action was certified as class action and settlement was approved subject to certain deficiencies being addressed — Fee arrangements in MF Agreement (MFA) between Crown and plaintiffs' law firm MLG were interpreted to mean that MLG's legal fees were to be between $25 million and $40 million and that guarantee of $25 million dollars was fair and reasonable — Fee amount was to be agreed upon by parties or determined in action in Court of Queen's Bench — Time spent by plaintiffs' counsel was substantial — Legal issues were complex and litigation risks were extremely high — Amount recovered by plaintiffs was approximately $2 billion, not including payments under independent assessment process — Clients expected to pay significant fees — Crown appealed order as to fees payable to plaintiffs' law firm MLG — Appeal dismissed — Judge did not take into consideration issues not properly before court, nor misinterpret MFA — MFA was clear and unambiguous that MLG would make records available for review and verification by federal representative who would satisfy himself that quantum was reasonable and, if not, then another amount would be agreed to, failing which it would be determined by court but would be no more than $40 million and no less than $25 million — Record before judge was sufficient to allow him to conclude that providing minimum payment of $25 million to MLG was fair and reasonable and in best interests of class — Judge considered legal complexity of action, monetary value of settlement, importance of issues, ability of clients to pay, clients' expectation as to fees, and substantiality of amount of work done on file — Given overall recovery amount, fee range in MFA was reasonable.

Table of Authorities

Statutes considered:

Class Actions Act, S.S. 2001, c. C-12.01
s. 39 — referred to

Court of Appeal Act, 2000, S.S. 2000, c. C-42.1
s. 7 — referred to

APPEAL from judgment reported at *Sparvier v. Canada (Attorney General)* (2006), 290 Sask. R. 111, 2006 SKQB 533, 35 C.P.C. (6th) 110, 2006 CarswellSask 765 (Sask. Q.B.), approving comprehensive settlement of Indian Residential School claims, in particular, fees payable to law firm Merchant Law Group.

***Richards J.A.*:**

I. Introduction

1 This appeal concerns one of the orders made for the purpose of approving the recent comprehensive settlement of Indian Residential School claims. More particularly, it concerns an order made by Ball J. with respect to the fees payable to Merchant Law Group ("MLG"), a law firm heavily involved in Residential School litigation.

2 The appellant Attorney General of Canada ("Canada") contends that the order should be overturned because Ball J. erred in his consideration of an agreement governing MLG fees. It submits he misconstrued the agreement, dealt with issues not properly before the Court, unnecessarily approved specifics of MLG entitlements and made findings about the reasonableness of fees payable to MLG in the absence of adequate evidence.

3 I am not persuaded by Canada's arguments and conclude, for the reasons which follow, that its appeal must be dismissed.

II. Background

4 The facts underpinning the points raised by Canada are relatively straightforward.

5 The Honourable Frank Iacobucci, Q.C. was appointed on May 30, 2005 as Federal Representative to lead discussions aimed at achieving a national settlement of all class and individual Indian Residential School claims. The fees payable to law firms involved in Residential School litigation became a central element of the negotiations.

6 Mr. Iacobucci had serious concerns about the information put forward by MLG to justify its position on fees. As a result, he and Mr. Tony Merchant, Q.C. of MLG signed an agreement (the "Merchant Fee Agreement") on November 20, 2005. It sets out an approach for resolving the amount of fees payable to MLG and reads as follows.

> The Government of Canada and the Merchant Law Group agree that in addition to the requirement to provide an affidavit as set out in Article __ of the Agreement in Principle, the Merchant Law Group's fees shall be subject to the following verification process:
>
> > 1) 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 shall be made available for review and verification by a firm to be chosen by the Federal Representative the Honourable Frank Iacobucci.
> >
> > 2) The Federal Representative shall review the material from the verification process and consult with the Merchant Law Group to satisfy himself that the amount of legal fees to be paid to 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.
> >
> > 3) If the Federal Representative is not satisfied as described in 2) above, he and the Merchant Law Group shall make all reasonable efforts to agree to another amount to be paid to the Merchant Law Group for legal fees.
> >
> > 4) If the Federal Representative and the Merchant Law Group cannot agree as described in 3) above, the amount to be paid to the Merchant Law Group for legal fees shall be determined through binding arbitration, but that amount shall in no event be more than $40 million or less than $25 million. The arbitration shall be by a single arbitrator who shall be a retired judge...
>
> "Tony Merchant"
>
> "Frank Iacobucci"

7 Immediately after the Merchant Fee Agreement was signed, an Agreement in Principle ("AIP") was executed by all interested parties including Mr. Merchant on behalf of MLG and Mr. Iacobucci as Federal Representative. The AIP provided for the payment of fees to MLG, to a group of 19 other law firms known collectively as the "National Consortium" and to other individual lawyers. The relevant part of the AIP is set out below:

> WHEREAS legal counsel have done very substantial work on behalf of Eligible CEP Recipients for many years, have contributed significantly to the achievement of the Agreement in Principle and have undertaken not to seek payment of legal fees in respect of the Common Experience Payment to be paid to Eligible CEP Recipients, Canada agrees to compensate legal counsel in respect of their legal fees as follows.
>
> . . . . .
>
> 4. The National Consortium and the Merchant Law Group shall each be paid $40,000,000 plus reasonable disbursements, and GST and PST, if applicable, in recognition of the substantial number of Eligible CEP Recipients each of them represents and the class action work they have done on behalf of Eligible CEP Recipients. Paragraphs 1, 2 and 3 above shall not apply to any lawyer who is a partner of, employed by or otherwise affiliated with a National Consortium member law firm or the Merchant Law Group.
>
> 5. The Federal Representative shall engage in such further verification processes with respect to the amounts payable to the Merchant Law Group and National Consortium as have been agreed to.

> 6. No lawyer or law firm that has taken part in these settlement negotiations or who accepts a payment for legal fees from the [*sic*] Canada shall charge an Eligible CEP Recipient any fees or disbursements in respect of the Common Experience Payment paid to the Eligible CEP Recipient.

8 After the execution of the AIP, the Federal Representative sought to verify MLG's claim to legal fees. He retained Deloitte & Touche LLP to examine records at MLG's office. Deloitte's verification work ended on January 24, 2006 when MLG denied access to files, citing concerns about solicitor-client privilege.

9 Negotiations among the interested parties continued. They ultimately endorsed a comprehensive Settlement Agreement. It was approved by Cabinet on May 10, 2006.

10 On June 16, 2006 Canada applied for an order obliging MLG to allow verification efforts to continue. Ball J. denied the application on the basis that he should not make an order amounting to specific performance of the Merchant Fee Agreement before first hearing the application for certification and deciding whether to approve the Settlement Agreement.

11 In broad terms, the Settlement Agreement provided for the merger of existing class action and representative claims into a uniform omnibus statement of claim in each affected provincial and territorial jurisdiction. It specified that orders were to be sought for the purpose of certifying those actions as class proceedings and approving the terms of the Settlement Agreement as fair, reasonable and in the best interests of the class members. The Agreement was expressly stated to be effective only if approved by courts in all jurisdictions. There were nine of these including Saskatchewan.

12 The Settlement Agreement specified that the National Consortium would receive $40 million in fees. It also confirmed that MLG's fees would be determined in accordance with the Merchant Fee Agreement. It altered the fourth step of the Agreement by providing that, rather than an arbitrator, Ball J. or another judge of the Court of Queen's Bench of Saskatchewan would determine the amount to be paid to MLG. Clause 13.08 of the Settlement Agreement states:

> **13.08 The National Consortium and the Merchant Law Group Fees**
>
> (1) The National Consortium will be paid forty million dollars ($40,000,000.00) plus reasonable disbursements, and GST and PST, if applicable, in recognition of the substantial number of Eligible CEP Recipients each of them represents and the class action work they have done on behalf of Eligible CEP Recipients. Any lawyer who is a partner of, employed by or otherwise affiliated with a National Consortium member law firm is not entitled to the payments described in Section 13.02 and 13.06 of this Agreement.
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> (2) The fees of the Merchant Law Group will be determined in accordance with the provisions of the Agreement in Principle executed November 20, 2005 and the Agreement between Canada and the Merchant Law Group respecting verification of legal fees dated November 20, 2005 attached hereto as Schedule "V", except that the determination described in paragraph 4 of the latter Agreement, will be made by Justice Ball, or, if he is not available, another Justice of the Court of Queen's Bench of Saskatchewan, rather than by an arbitrator.
>
> (3) The Federal Representative will engage in such further verification processes with respect to the amounts payable to the National Consortium as have been agreed to by those parties.
>
> (4) In the event that the Federal Representative and either the National Consortium or the Merchant Law Group cannot agree on the amount payable for reasonable disbursements incurred up to and including November 20, 2005, under Section 13.08(1) of this Agreement, the Federal Representative will refer the matter to:
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> (a) the Ontario Superior Court of Justice, or an official designated by it, if the matter involves the National Consortium;
>
> (b) The Saskatchewan Court of Queen's Bench, or an official designated by it, if the matter involves the Merchant Law Group;

to fix such amount.

13 An application for the certification of the Saskatchewan action and for approval of the proposed settlement was argued before Ball J. in September of 2006. In a Fiat dated December 15, 2006, he said the action would be certified as a class proceeding and the Settlement Agreement approved in its entirety on receipt of satisfactory assurances relating to four matters concerning the ongoing administration of the settlement.

14 In the course of endorsing the settlement, Ball J. specifically examined the fee arrangements concerning MLG as set out in the Merchant Fee Agreement. In approving those arrangements, he interpreted the Fee Agreement as meaning MLG was to be paid no less than $25 million and no more than $40 million. He found the guarantee of $25 million to be fair and reasonable. At para. 84 of his reasons, Ball J. summarized his conclusions in this regard as follows:

> [84] I find that the provisions of the Settlement Agreement requiring payment of legal fees and disbursements to MLG are clear and enforceable. If the Federal Representative and MLG cannot agree on an amount, it shall be determined by an action to be brought in the Court of Queen's Bench for Saskatchewan with the amount of legal fees payable to MLG to in no event be more than $40 million or less than $25 million. If the parties cannot agree and an action becomes necessary, it will be incumbent on MLG to adduce all relevant evidence to verify its claim in a format that does not breach solicitor/client privilege. If MLG does not do so, it cannot expect to receive payment of more than $25 million.

15 Once each of the responsible courts had released reasons approving the settlement, further work was done by the parties in order to answer the administrative concerns which had been raised. The proceedings were then reconvened in Calgary on March 8, 2007 for a joint hearing. Each of the nine courts involved subsequently approved the settlement.

16 Ball J. issued five orders as part of this approval process. The first four are not contested by Canada. They amended the statement of claim, approved the provisions of the Settlement Agreement dealing generally with the payment of legal fees, certified the action as a class proceeding, approved the Settlement Agreement and dealt with implementation issues.

17 It is Ball J.'s fifth order which lies at the root of this appeal. It specifically addressed the payment of fees to MLG under the Merchant Fee Agreement and confirmed MLG's entitlement to a minimum of $25 million. In relevant part, the order reads as follows:

> **UPON HEARING** submissions from counsel for the parties, and having issued orders certifying the procedure as a class proceeding and approving the settlement as fair and reasonable (the "Approval Orders"), and having heard submissions from counsel for the Attorney General of Canada (the "Attorney General") and having considered the submissions of the Merchant Law Group ("MLG") relating to the interpretation of the legal fee provisions of the Agreement as approved by this Court in the Approval Orders, and for written reasons delivered this day,
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> 1. **THIS COURT ORDERS** that Article 13 of the Agreement, including Sections 13.08 thereof and the attached Schedule "V" [the Merchant Fee Agreement] are enforceable.
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> 2. **THIS COURT ORDERS** that, in accordance with Section 13.08(2) and Schedule "V" of the Agreement, if the Attorney General and MLG cannot agree on an amount of legal fees and disbursements payable to MLG, such amount will be determined by an action in the Court of Queen's Bench for Saskatchewan with the amount of legal fees payable to MLG to, in no event, be more than $40 million or less than $25 million.
>
> 3. **THIS COURT ORDERS** that the agreed minimum amount and the process for determining the actual amount payable to MLG are approved as part of the entire Agreement.

III. Issues

18 Canada says Ball J. committed several key errors in relation to the Merchant Fee Agreement and that, as a result, the order concerning MLG's fees should be set aside. It submits he erred by:

> (a) considering matters not properly before the Court and, in particular, deciding that Canada and MLG are at the fourth step of the Merchant Fee Agreement process when that issue was not before him;
>
> (b) incorrectly interpreting the Merchant Fee Agreement by holding that MLG is entitled to $25 million in fees without first having to verify that amount and demonstrate it to be reasonable; and
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> (c) approving $25 million in fees for MLG as being fair and reasonable in the absence of any or sufficient evidence to warrant such a conclusion.

19 MLG argues that Canada has no right of appeal in relation to these questions because they fall outside the scope of the right of appeal described in s. 39 of *The Class Actions Act*, S.S. c. C-12.01. Canada disagrees. It says s. 39 is not exhaustive and contends the source of its right of appeal is s. 7 of *The Court of Appeal Act, 2000*, S.S. 2000, c. C-42.1. However, in light of my conclusions concerning the merits of Canada's submissions about the substance of Ball J.'s decision, I find it unnecessary to resolve this issue. For the purpose of the analysis which follows I will assume, without deciding, that Canada has a right of appeal.

20 MLG filed a cross-appeal but abandoned it during the course of oral argument. It is therefore unnecessary to consider the issues it raised.

IV. Analysis

21 I propose to consider each of Canada's arguments in turn. By way of clarification, my analysis should not be construed as an endorsement of the practice of making the approval of a class action settlement conditional on the approval of legal fees. The propriety of that approach is not raised in these proceedings.

A. Issues Not Properly Before the Court

22 Canada's first submission is that Ball J. improperly ruled on the question of whether Canada and MLG were at step four of the process contemplated by the Merchant Fee Agreement. It submits this matter was not before the Court.

23 Canada's argument is grounded on comments made by Ball J. at paras. 34 and 35 of his December 15, 2006 Fiat. Those paragraphs note that Canada and MLG were in a dispute over fees and refer to the notion of such disputes being resolved by a judge of the Court of Queen's Bench. They read as follows:

> [34] Counsel for Canada submitted that the agreements with MLG amounted to nothing more than a verification process. This would mean that Canada has no obligation to pay anything until it is satisfied MLG has verified unspecified data. This would put Canada in the position of deciding when, and if, it would pay any amount. I do not agree with that submission.
>
> [35] Read together, the agreements anticipate that MLG and the Federal Representative might be in the situation they are now in — that is, in a dispute over whether MLG has provided enough relevant evidence to satisfy the Federal Representative that the fees to be paid are reasonable and equitable. The parties expressly agreed that if the Federal Representative is not so satisfied the matter will be determined by a judge of this Court. They also agree that even if determined in that manner, the amount to be paid will be no less than $25 million and no more than $40 million. ...

24 These statements must be read in context. It is clear there was a dispute about whether the information provided by MLG was sufficient to satisfy the Federal Representative as to the reasonableness of the fees MLG was demanding. In a letter dated August 3, 2006, Mr. Iacobucci had corresponded with Mr. Merchant and said:

> I am writing to advise that the Merchant Law Group has not satisfied me, as federal representative, that the fees it seeks are reasonable, as required by the fee verification agreement entered into between us. As a result, I have recommended that Canada not support any application brought by the Merchant Law Group for fee approval. ...

> It remains our intention to strictly enforce the fee verification agreement and, if you continue in your present course, we anticipate that, as suggested in Justice Ball's order, a trial of the issue will be required following the completion of the approval and certification process.

25 In my view, Ball J.'s comments do no more than reflect the situation described by the Federal Representative. There was a disagreement about the adequacy of the material provided by MLG and the Federal Representative had referred to the prospect of resolving matters by way of a trial. Ball J. merely recounted the facts as they had been presented to him. I do not read his comments as being a formal determination or finding that Canada and MLG were at any particular stage of the process described in the Merchant Fee Agreement.

26 If there was any doubt as to whether Ball J. purported to determine where the parties stood in relation to the various stages of the Fee Agreement, it is readily resolved by considering the terms of the order under appeal. The order does not deal with that issue. As noted above at para. 17, it says only that "...if the Attorney General and MLG cannot agree on an amount of legal fees and disbursements payable to MLG, such amount shall be determined by an action in the Court of Queen's Bench for Saskatchewan with the amount of legal fees payable to MLG to, in no event, be more than $40 million or less than $25 million."

27 As a result, I conclude there is no merit in this aspect of Canada's submissions. Ball J. did not decide that Canada and MLG were at a particular stage of the process described in the Merchant Fee Agreement. Moreover, there is nothing to suggest he considered that to be one of the issues before him.

B. Incorrect Interpretation of the Fee Agreement

28 Canada's next argument is that Ball J.'s interpretation of the Merchant Fee Agreement is incorrect in three respects. It says he erred: (a) in finding Canada and MLG were at step four of the verification process set out in the Fee Agreement; (b) in holding that MLG is entitled to $25 million in fees without providing verification for that amount; and (c) in proceeding on the basis that, in order to approve the Settlement Agreement, it was necessary to find a $25 million payment to MLG was fair and reasonable.

1. Parties at Step Four

29 The first branch of this part of Canada's argument can be disposed of quite readily. As noted above, Ball J. did not rule that Canada and MLG were at any specific stage of the Merchant Fee Agreement. Therefore, a submission to the effect he erred in finding the parties were at stage four is necessarily constructed on a false premise. Ball J. did not make the decision which Canada contests.

2. Requirement for Verification

30 The answer to the second branch of Canada's argument can also be arrived at rather simply. In my view, the order under appeal does not misinterpret the Merchant Fee Agreement.

31 The Fee Agreement is straightforward and unambiguous. Therefore, as Canada acknowledges, it falls to be interpreted according to its plain and ordinary meaning. That meaning is self-evident. The Agreement says: (a) MLG will make various records available for review and verification by a firm chosen by the Federal Representative, (b) the Federal Representative will review the material from the verification and satisfy himself that the amount of fees claimed by MLG is reasonable and equitable, (c) if the Federal Representative is not satisfied that the fees claimed are reasonable and equitable, he and MLG will attempt to agree on another amount, and (d) if they cannot agree, the amount to be paid to MLG will be determined by proceedings in the Court of Queen's Bench "but that amount shall in no event be more than $40 million or less than $25 million." I see no way to read this latter provision as meaning anything other than what it says, *i.e.* MLG shall "in no event" receive less than $25 million.

32 For its part, Canada suggests it is absurd to construe the Fee Agreement as meaning MLG does not have to verify $25

million in fees but does have to verify $25 million plus one dollar in fees. It says the Agreement contemplates the verification of *any* amount paid to MLG, regardless of whether it is more or less than $25 million.

33 This line of argument is unconvincing. It would have been entirely understandable for the parties to include a guaranteed minimum payment in the Fee Agreement. It is, after all, difficult to see why Mr. Merchant would sign an agreement which did no more than cap the potential amount of his firm's fees and oblige him to justify, by reference to unspecified criteria, an entitlement to every dollar paid to it. This would have left MLG in a position where its right to compensation was solely in the discretion of the Federal Representative. It seems more reasonable that, in the circumstances, the parties would have agreed that MLG would receive some guaranteed minimum amount but was also obliged to prove its entitlement to anything more than that amount, up to a limit of $40 million. In other words, I see nothing "absurd" in Ball J.'s interpretation of the Fee Agreement. It corresponds both with the plain meaning of the words used by the Federal Representative and Mr. Merchant and, at least in principle, reflects a rational compromise between MLG's demand for fees on the one hand and the Federal Representative's concerns about the integrity of those demands on the other.

34 I conclude, therefore, that the order under appeal does not misinterpret the Merchant Fee Agreement. The requirement that MLG's fees shall "in no event" be less than $25 million has a clear and unavoidable meaning.

35 Before leaving this point, I note that in oral argument, particularly in reply, Canada suggested the Fee Agreement should be read as meaning Canada is entitled to insist on verification of *all* MLG fees even if it is obligated to pay a minimum of $25 million. I choose not to decide that point both because it was not fully argued and because there is considerable room for doubt as to whether it is properly before the Court in an application restricted to the question of whether MLG's fees are fair, reasonable and in the best interests of the class.

3. Unnecessary to Consider $25 Million

36 The third branch of Canada's argument about the Merchant Fee Agreement is that Ball J. erred because it was not necessary for him to approve the minimum $25 million in legal fees for MLG in order to approve the settlement. Canada sees the Fee Agreement as involving nothing more than a *process* and says Ball J. erred by going so far as to find a particular payment amount to be fair and reasonable.

37 This argument cannot be sustained. The motion before Ball J. asked him to approve the Settlement Agreement including "the provisions of the Agreement with respect to legal fees for Plaintiffs' Counsel". Clause 13.08(2) of the Settlement Agreement provided that MLG fees would be determined in accordance with the terms of the Merchant Fee Agreement. As a result, Ball J. was required to determine whether the Fee Agreement itself was fair and reasonable and in the best interests of the class as a whole.

38 Any attempt to assess the fairness and reasonableness of the Fee Agreement in the abstract, or without reference to its specific terms, would have been misplaced. Ball J. had to proceed by interpreting the Agreement as a first step. In so doing, he correctly read it as meaning MLG was entitled to a minimum of $25 million. That done, he was driven to consider the fairness and reasonableness of the $25 million figure. He had no alternative if he was to rule on the application before him.

39 In short, I see no merit in Canada's argument on this point. Ball J. did precisely what was required of him in the circumstances.

D. Lack of Evidence Concerning Fairness of MLG Fee Payments

40 Canada's final submission is that Ball J.'s decision concerning the fees payable to MLG should be overturned because there was no evidence, or no sufficient evidence, to warrant a conclusion that the payment of $25 million to MLG is fair and reasonable. In this regard, Canada stresses that the affidavit material filed by MLG was contentious. Ball J. said he would substantially ignore the affidavit of Mr. Donald Outerbridge, the Executive Director of MLG, filed on July 17, 2006, because it was replete with inadmissible evidence. A second affidavit from Mr. Outerbridge, filed on September 13, 2006, was held to have no evidentiary value and was treated by Ball J. as nothing more than a written submission from Mr. Merchant himself. Canada says that, as a result, the only evidence properly before the Court was in the form of the affidavits it had filed.

41 Canada's approach in relation to this point involves a fundamental contradiction. The Settlement Agreement expressly provides, in Clause 2.02, that *none* of its provisions will become effective unless and until the courts approve *all* of its provisions. This has an inevitable consequence. By arguing that Ball J. should not have endorsed the payment of $25 million as fair and reasonable, Canada is asking that one aspect of the settlement not be approved. It is thereby necessarily contending that the Settlement Agreement as a whole should not be approved. In other words, once the Merchant Fee Agreement is interpreted as guaranteeing a minimum $25 million in fees, that amount must be found to be fair and reasonable and in the best interests of the class a whole. If it is not, the Residential Schools settlement fails.

42 The contradiction in Canada's position arises because it denies any desire to contest the integrity of the overall settlement. However, at the same time, it was unable to satisfactorily explain how that result could be avoided if its argument about the reasonableness of the $25 million fee payment is accepted.

43 These difficulties need not be finally resolved because I find that, in any event, Ball J. did not err in concluding the payment of the $25 million as a minimum amount was fair and reasonable. He began, at para. 44 of his Fiat, by listing the considerations typically identified in the case law as being relevant to the determination of counsel fees:

> (a) time expended by the solicitor;
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> (b) the legal complexity of the matters;
>
> (c) the degree of responsibility assumed by the solicitor;
>
> (d) the monetary value of the matters at issue;
>
> (e) the importance of the matter to the client;
>
> (f) the degree of skill and competence demonstrated by the solicitor;
>
> (g) the results achieved and the contribution of counsel to the result;
>
> (h) the ability of the client to pay; and
>
> (i) the client's expectations as to the amount of the fees.

Canada does not suggest these considerations were inappropriate.

44 Ball J. then went on to examine each of the factors he had identified. His analysis in that regard was quite extensive and I do not propose to retrace its detail for purposes of this decision. However, a few general comments are in order.

45 First, Canada's concern about the amount or quality of the evidence before the Court relates only to a limited number of the factors to be considered in determining whether the specification of the $25 million payment to MLG is fair and reasonable. More particularly, there is no basis for suggesting Ball J. did not have enough information before him to properly consider factors such as the legal complexity of the Residential Schools litigation, the monetary value of the settlement, the importance of the issues to those who had attended residential schools, the ability of clients to pay and the client's expectations as to fees. These matters generally weigh quite strongly in favour of approving the MFVA as fair and reasonable.

46 Second, I do not understand Canada to dispute Ball J.'s observations to the effect that (a) of the 4,337 residential school claims filed in Canada, 2112 were filed in Saskatchewan and that MLG filed a significant majority of those; (b) 155 individual MLG actions were scheduled for pre-trial conferences with some going to trial; (c) some MLG cases were taken on appeal, including one which was taken to the Supreme Court of Canada; and (d) MLG had commenced 14 residential school class proceedings in Canadian jurisdictions. As well, the affidavit of Mr. Edward Nagel of Deloitte & Touche LLP indicates that MLG provided Deloitte with 4,823 hardcopy retainer agreements. Thus, even though Canada has concerns about the precise number of agreements MLG had entered into with its clients, the amount of work in progress logged on those files and the amount of class action work actually done by MLG, it was clearly open for Ball J. to conclude, in general terms, that the time spent by MLG on Residential School litigation was substantial. Indeed, para. 4 of the Agreement in

Principle itself refers to the National Consortium and MLG and the "substantial number of Eligible CEP [Common Experience Payment] Recipients each of them represents and the class action work they have done on behalf of Eligible CEP Recipients".

47 Third, a comparison of the $25 million in fees payable to MLG with the overall recovery made on behalf of those who attended Residential Schools suggests that the fee range provided for in the Merchant Fee Agreement was reasonable. In this regard, Ball J. noted that all parties agreed the total value of the Settlement Agreement to class members will be between $4 billion and $5 billion. He then excluded IAP (Independent Assessment Process) benefits from that total because lawyers will be able to collect fees on such awards when they are made. This led him to conclude, for present purposes, that legal fees for class counsel should reflect recovery for class members of approximately $2 billion. He then wrote as follows:

> [79] MLG claims to have contributed 40% to 50% to the overall settlement. The estimate is a self-serving one about a matter that cannot be measured with any certainty, but I accept that MLG's contribution was substantial. I have observed that the Settlement Agreement was the result of a combination of litigation and political pressures brought to bear on the Government of Canada. I have accepted that MLG made a significant contribution to the litigation pressures through the sheer quantity of individual claims filed in various Canadian jurisdictions. There is no reason to believe that MLG's contribution to the political pressure was any less than that of the law firms who formed the National Consortium or the independent lawyers.
>
> [80] Even if it is arbitrarily assumed that MLG made a proportionate contribution to the total recovery of only one-half of what it claims, it would be credited with recovering perhaps $400 million to $500 million for class members. On those assumptions, a minimum fee of $25 million would amount to 5% to 6 1/4%. From that perspective the fee range agreed to by both parties was not unreasonable.

This is a helpful calculation which, in my view, was available to Ball J. on the basis of uncontested information before him.

48 I do not dispute that, if Deloitte & Touche LLP had been able to complete the verification process, Canada would have been in a position to present a clearer picture of the precise amount of work in progress MLG invested in Residential School files and a clearer picture of the clients MLG represented and the agreements it had made with them. I also do not dispute the numerous problems and inconsistencies in MLG's position which were identified and canvassed by Ball J. in his decision.

49 However, the issue before the Court is not whether it would have been possible to obtain more information about MLG's work on Residential School claims. The issue is whether the record was sufficient to allow Ball J. to conclude that the provision of a minimum payment of $25 million to MLG was fair and reasonable and in the best interests of the class. Considering all of the factors bearing on that question, and keeping in mind the information which was properly available to the Court, I conclude Canada's argument on this point cannot succeed. The record was slim in certain respects but, in all of the circumstances, it was adequate to sustain the finding made by Ball J.

V. Conclusion

50 Canada's appeal is dismissed with costs payable to MLG.

***Lane J.A.*:**
I concur.

***Smith J.A.*:**
I concur.

Appeal dismissed.

(9) the ability of the class to pay;
(10) the client and the class's expectation as to the amount of the fee;[35a.4]
(11) avoiding inconsistencies with awards made in similar cases in other Canadian jurisdictions;[35b] and
(12) the integrity of the legal profession.[35c]

Consideration of the appropriate fee is inherently subjective, and is not capable of refined econometric expert analysis.[35d] The weight placed on each of these factors will vary with the circumstances of the case. However, 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.[35d.1]

7.175 The fee may be approved on a variety of bases, including: percentage of recovery; a multiplier on time spent; or a flat fee. Approved contingency fees have ranged from 4-33%.[35e] Approved multipliers have varied between 1.1 and

35a.4 In a case where there are relatively few plaintiffs with substantial losses, considerable weight may be placed on the expectation of the parties, as reflected by the contingency agreement, in particular if there are no concerns expressed: *Catalyst Paper Corp. v. Atofina Chemicals Inc.* (2009), 183 A.C.W.S. (3d) 40, 2009 BCSC 1659, at para. 74.

35b *Killough v. Canadian Red Cross Society* (2001), 110 A.C.W.S. (3d) 23, 2001 BCSC 1745 at para. 22; *Bartolome v. Nationwide Payday Advance Inc.*, 2010 BCSC 1433, at paras. 25-26.

35c *White v. Canada (Attorney General)* (2006), 148 A.C.W.S. (3d) 691, 2006 BCSC 561.

35d *Endean v. Canadian Red Cross Society*, *supra*, footnote 35, para. 25 (S.C.); *Honhon v. Canada (Procureur General)* (unreported, August 30, 2000, 500-06-000016-96, Que. S.C.) at paras. 32-3; *Parsons v. Canadian Red Cross Society*, *supra*, footnote 33 at paras. 24-31 (S.C.).

35d.1 *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, 2013 CarswellOnt 17784 (S.C.J.), at para. 8. In *Cannon*, the court stated: "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."

35e **Ontario Cases:**
Montreal Trust Co. of Canada v. Armstrong (2006), 55 C.C.P.B. 117 (Ont. S.C.J.) (15%); *Bona Foods Ltd. v. Ajinomoto U.S.A., Inc.* (2004), 129 A.C.W.S. (3d) 456 [004/071/012 - 11 pp.], [2004] O.J. No. 908 (S.C.J.) (25%); *Nehme v. Civil Service Co-Operative Credit Society, Ltd.*, [2004] O.J. No. 2552 (S.C.J.) (30%); *Crown Bay Hotel Limited Partnership v. Zurich Indemnity Co. of Canada* (1998), 160 D.L.R. (4th) 186, 40 O.R. (3d) 83, 21 C.P.C. (4th) 272 (Gen. Div.) (20%); *Clients of JNP Financial Services Inc. (Re)* (2001), 10 C.P.C. (5th) 317 *sub nom. Delgrosso v. Paul*, [2001] O.J. No. 1616 *sub nom. Clients of JNP Financial Services Inc. v. Paul* (S.C.J.) (20%); *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.) (maximum of 15%); *Hoy v. Medtronic Inc.* (unreported, April 1, 2005, Vancouver M000047, B.C.S.C.) (maximum of 30%); *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.J. No. 175 (S.C.J.) (8% of the potential recovery); *Bellaire v. Daya* (2007), 49 C.P.C. (6th) 110 (Ont. S.C.J.) (18%); *Currie v. McDonald's*

Restaurants of Canada, [2007] O.J. No. 3622 (S.C.J.) (25.4%); *Lonsdale Printing Services (Trustee of) v. Cascades Fine Papers Group Inc.* (2008), 173 A.C.W.S. (3d) 695, [2008] O.J. No. 5280 (Ont. S.C.J.) (25%); *Georghiades v. Scotia Capital Inc./ Scotia Capitux Inc.* (unreported, January 23, 2009, 03-0CV-1982 (S.C.J.) (25%); *Nutech Brands Inc.v. Air Canada*, [2009] O.J. No. 710 (S.C.) (fee approval) (25% or 1.46 multiplier); *Meretsky v. Bank of Nova Scotia* (unreported, January 23, 2009, 97-CV-128599 (S.C.J.) (20%); *799376 Ontario Inc. (c.o.b. Lonsdale Printing Services) (Trustee of) v. Cascades Fine Papers Group Inc.*, [2008] O.J. No. 5280 (S.C.J.) (25% of $2.95M plus accrued interest); *Cassano v. Toronto-Dominion Bank*, [2009] O.J. No. 2922 (S.C.J.) (approving counsel fees of $11,000,000, representing 20% of settlement amount and 28% of net amount to be distributed to or for benefit of class members); *Nutech Brands Inc. v. Air Canada*, [2009] O.J. No. 710 (S.C.J.) (25%, representing approximately a 1.46 multiplier); *Nantais v. Easyhome Ltd.*, [2005] O.J. No. 5805 (10%, representing a 3.4 multiplier); *Butler v. Honda*, [2009] O.J. No. 2263 (25%); *Farkas v. Sunnybrook and Women's College Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.) (30% of individual class member settlement; 25% of OHIP settlement); *Marcantonio v. TVI Pacific Inc.*, [2009] O.J. No. 3409 (S.C.J.) (25%, equating to a multiplier of approximately 2.5); *Robertson v. Thomson Corp.*, [2009] O.J. No. 2650 (S.C.J.) (36%, equating to a multiplier of approximately 2.4); *Wamboldt v. Northstar Aerospace (Canada) Inc.*, [2009] O.J. No. 2583 (S.C.J.) (25%); *Skopit v. Merrill Lynch Canada Inc.* (unreported, August 6, 2009, Court File No. CV-09-13357CP, Ont. S.C.) (30%); *Schweyer v. Laidlaw Carriers Inc.*, [2009] O.J. No. 5399 (S.C.J.) (25% inclusive of disbursements, taxes and notices and administration costs); *Abdulrahim v. Air France*, 2011 ONSC 512 (30%); *Ainslie v. Afexa Life Sciences Inc.*, 2010 ONSC 4294 (19% staged); *Pichette v. Toronto Hydro*, 2010 ONSC 4060 (28.5%); *Lavier v. MyTravel Canada Holidays Inc.*, 2011 ONSC 1222 (21% on full take up, or multiplier of 1.2); *West Coast Soft Wear Ltd. v. 1000128 Alberta Ltd.*, 2010 ONSC 6388 (25%); *Robertson v. ProQuest Information & Learning Co.*, 2011 ONSC 2629 (24%); *Lewis v. Cantertrot Investments Ltd.*, 2011 ONSC 2713 (33%); *Travassos v. Tattoo*, 2011 ONSC 2290 (30%); *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962 (30%); *Fischer v. IG Investment Management Ltd.*, 2010 ONSC 7147 (25%); *Henault v. Bear Lake Gold Ltd.*, 2010 ONSC 4474 (25%); *Baker Estate v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 (15%); *Helm v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602 (25%); *Krajewski v. TNOW Entertainment Group Inc.*, 2012 ONSC 3908, 2012 CarswellOnt 8567 (Ont. S.C.J.) (25%); *Rowlands v. Durham Region Health*, 2012 ONSC 3948, 2012 CarswellOnt 8668 (Ont. S.C.J.) (25% of the value of any claim awarded through the claims process established in the settlement agreement); *Markson v. MBNA*, 2012 ONSC 5891 (30%); *Eidoo v. Infineon Technologies AG*, 2013 ONSC 853 (20%); *Elliot Estate v. Joseph Brant Memorial Hospital*, 2013 ONSC 124 (21.5% plus applicable taxes and disbursements); *Johnston v. Sheila Morrison Schools*, 2013 ONSC 1528 (25%, or about a 1.4X multiplier); *Sa'd v. Remington Group Inc.*, 2013 ONSC 1404 (25%); *Toronto Community Housing Corp. v. Thyssenkrupp Elevator (Canada) Ltd.*, 2012 ONSC 6626 (30%); *Sorenson v. Easyhome Ltd.*, 2013 ONSC 4017, 2013 CarswellOnt 7898 (Ont. S.C.J.) (25%); *Slark (Litigation guardian of) v. Ontario*, 2014 ONSC 1283, 2014 CarswellOnt 2725 (S.C.J.) (20.68%); *Frank v. Caldwell*, 2014 ONSC 1484, 2014 CarswellOnt 2704 (Ont. S.C.J.) (30%); *French v. Investia Financial Services Inc.*, 2013 ONSC 6220, 2013 CarswellOnt 13538 (S.C.J.) (31%, subject to adjustment to procedural structure of settlement); *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2014 ONSC 62, 2014 CarswellOnt 1268 (S.C.J. [Commercial List]) (16.9%, $17.8 million); *Roveredo v. Bard Canada Inc.*, 2013 ONSC 6979, 2013 CarswellOnt 15486 (S.C.J.) (30%, $412,500, and a multiplier less than 1); *Slark (Litigation guardian of) v. Ontario*, 2014 ONSC 1283, 2014

CarswellOnt 2725 (S.C.J.) (19.8% net of notice and administration costs, or multiplier of 2.38); *Snelgrove v. Cathay Forest Products Corp.*, 2013 ONSC 7282, 2013 CarswellOnt 17592 (S.C.J.) (21%, approximately $400,000); *Urlin Rent-A-Car Ltd. v. Champion Laboratories Inc.*, 2014 ONSC 577, 2014 CarswellOnt 1085 (S.C.J.) (19%, approximately $66,500);*Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, 2013 CarswellOnt 17784 (S.C.J.) (33%, $9.4 million); *Healey v. Lakeridge Health Corp, Horgan v. Lakeridge Health Corp.*, 2014 ONSC 5209 (30%); *Eidoo v. Infineon Technologies AG*, 2014 CarswellOnt 14546, 2014 ONSC 6082, 246 A.C.W.S. (3d) 730 (30%); *Bayens v. Kinross Gold Corp.*, 2015 ONSC 3944 (27.5%, or $3.4 million).

British Columbia Cases:

Campbell v. Flexwatt (unreported, February 26, 1996, Victoria 95/2895, B.C.S.C.) (pre-settlement approval of fee agreement stipulating fee ranging from 10%-33% depending on the time of settlement or recovery); *Harrington v. Dow Corning Corp.* (unreported, February 18, 1999) (15%); *Main v. Cadbury Schweppes plc* (2010), 193 A.C.W.S. (3d) 371, 2010 BCSC 1302 (25%); *MacKinnon v. National Money Mart Co.* (2010), 191 A.C.W.S. (3d) 1056, 2010 BCSC 1008 (30%); *Kotai v. "Queen of the North" (The)* (2010), 192 A.C.W.S. (3d) 42, 2010 BCSC 1180 (30%); *Knudsen v. Consolidated Food Brands Inc.* (unreported, January 4, 2001, Vancouver L000093, B.C.S.C.) (20%+1% to cover disbursements); *Sawatzky v. Société Chirurgicale Instrumentarium Inc.* (unreported, September 8, 1999, Vancouver C954740, B.C.S.C.) (20%); *Fischer v. Delgratia Mining Corp.* (unreported, December 7, 1999, Vancouver C974521, B.C.S.C.) (30%); *Killough v. Canadian Red Cross Society* (2001), 110 A.C.W.S. (3d) 23, 2001 BCSC 1745 (15%); *Head v. Miralex Health Care Ltd.* (unreported, April 18, 2002, B.C.S.C., docket No. Vancouver S000294) (settlement approval) (30%); *Mura v. Hoescht* (unreported, March 12, 2002, B.C.S.C., docket No. Vancouver S024333) (25%); *White v. Canada (Attorney General)* (2006), 148 A.C.W.S. (3d) 691, 2006 BCSC 561 (30%); *Pearson v. Boliden Ltd.* (2006), 151 A.C.W.S. (3d) 367, 2006 BCSC 1031 (25%); *Richard v. British Columbia* (2010), 191 A.C.W.S. (3d) 734, 2010 BCSC 773 (approving a fee of 15% for the common issues stage, with 15% plus taxes and disbursements to be charged to individual class members for the individual claims processing stage); *Catalyst Paper Corp. v. Atofina Chemicals Inc.*, 2009 BCSC 1659 (approving counsel fees of 21.45% of interim settlement); *Casavant v. Cash Money Cheque Cashing Inc.*, 2010 BCSC 148 (approving counsel fees of 30%); *Bodnar v. Cash Store Inc.*, 2010 BCSC 145 (approving counsel fees of 30%); *Bodnar v. Payroll Loans Ltd.*, 2010 BCSC 1460 (30%); *Jellma v. American Bullion Minerals Ltd.*, 2011 BCSC 925 (15%) plus disbursements and taxes); *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2012 BCSC 1136, 2012 CarswellBC 2303 (B.C. S.C.) (30%); *Smith v. Vancouver City Savings Credit Union*, 2012 BCSC 990, 2012 CarswellBC 1981 (B.C. S.C. [In Chambers]); *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2013 BCSC 316 (20%); *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2014 CarswellBC 3030, 2014 BCSC 1936, [2014] B.C.W.L.D. 7857 (30%); *Stanway v. Wyeth Canada Inc.*, 2015 BCSC 983 (33.33%); *Steele v. Toyota Canada Inc.*, 2015 BCSC 1014 (20%, or $980,000).

Newfoundland Cases:

Doucette v. Eastern Regional Integrated Health Authority (2010), 908 A.P.R. 13, 294 Nfld. & P.E.I.R. 13 (Nfld. & Lab. S.C.T.D.) (33.3%).

Nova Scotia Cases:

King v Attorney General of Nova Scotia (unreported, Hfx. No. 32140, September 26, 2012) (15% of each class member's award inclusive of disbursements and taxes plus $450,000 in costs); *Elwin v. Nova Scotia Home for Colored Children*, 2014 CarswellNS 777, 2014 NSSC 375, 1111 A.P.R. 363 (17%).

5.5.[35f] A study of Ontario fee approvals from 1996-2006 found that the median

Quebec Cases:

Cilinger c. Centre hospitalier de Chicoutimi, [2004] J.Q. no 2058 (S.C.), 2009 QCCS 4438 and 2009 QCCS 4445; *Coalition pour la Protection de l'Environnement du Parc Lineair v. Laurentides (Municipalité régionale de comté des)* (2009), 182 A.C.W.S. (3d) 845, 2009 QCCS 5070, [2009] J.Q. no 13352 (S.C.); *Communication Mèga-Sat inc. c. LG Phillips LCD Co.*, 2011 QCCS 6804 (7.2%); *Cornellier v. Province canadienne de la congrégation de Ste-Croix*, 2011 QCCS 6670 (20%); *Dorion v. Centre de santé et de services sociaux Richelieu Yamaska (Hôpital Honoré-Mercier)*, 2012 QCCS 727 (25%); *Option Consommateurs v. Fédération des caisses Desjardins du Québec*, 2011 QCCS 4841, 207 A.C.W.S. (3d) 634 (25%); *Doyer v. Dow Corning Corp.* (unreported, September 1, 1999, Montreal 500-06-000013-934, Que. S.C.) (20%, yielding a fee of $10,400,000); *Pelletier v. Baxter Health Care Corp*, [1999] J.Q. no 3038 (S.C.) (16.9% yielding $3,648,000 in fees); Gérald R. Tremblay, *supra*, footnote 15, at p. 4; *Association pour l'accès à l'avortement v. Québec (Procureur général)*, 2007 QCCS 1796 (25%); *Communication Méga-sat inc. v. Sharp Electronics of Canada Ltd.*, 2010 QCCS 4451 (7.2%); *Deronvil v. Univers Gestion multi-voyages inc. (Canada Air Charter)*, 2010 QCCS 5754 (25%); *Communication Méga-Sat inc. c. LG Philips LCD Co.*, 2011 QCCS 6804, 2011 CarswellQue 14490, EYB 2011-200200 (Que. S.C.) (25%); *Sigouin c. Merck & Co. inc.*, 2012 QCCS 4732, 2012 CarswellQue 10358, EYB 2012-212249 (Que. S.C.) (20%); *Union des consommateurs v. Banque Nationale du Canada*, 2012 QCCS 6388 (25% of the first $2 million and 20% on the balance); *405341 Ontario Ltd. v. Midas Canada Inc.*, 2013 ONSC 5714, 2013 CarswellOnt 12627 (Ont. S.C.J.) (25%); *Clark v. 4107781 Canada inc.*, 2013 QCCS 4164, 2013 CarswellQue 8779 (Que. S.C.); *Clark c. 4107781 Canada inc.*, 2013 QCCS 4165, 2013 CarswellQue 8714 (Que. S.C.) (25%); *Option Consommateurs c. Infineon Technologies, a.g.*, 2013 QCCS 1191, 2013 CarswellQue 2525 (20%)); *Option Consommateurs c. Union canadienne (L'), Cie d'assurances*, 2013 QCCS 5505, 2013 CarswellQue 11439 (C.S. Que.) (25%, $11.5 million); *Option Consommateurs v. Banque Royale*, 2014 QCCS 2540, 2014 CarswellQue 5573, EYB 2014-238232 (C.S. Que.) (25%); *Conseil pour la protection des malades v. CHSLD Manoir Trinite*, 2014 QCCS 2280, 2014 CarswellQue 5006, EYB 2014-237709 (C.S. Que.) (20%); *Boyer v. Agence métropolitaine de transport (AMT)*, 2014 QCCS 5518 (25%); *Léveillé v. Avantage Link inc.*, 2014 CarswellQue 10593, 2014 QCCS 5121, EYB 2014-243854 (25%); *Option Consommateurs v. Infineon Techonologie a.g.*, 2014 CarswellQue 10551, 2014 QCCA 2134, 2014 QCCS 4949 (30%); *Tremblay v. Lavoie*, 2014 CarswellQue 10923, 2014 QCCS 4955, 247 A.C.W.S. (3d) 279, (25%); *Marcotte v. Banque de Montreal*, 2015 QCCS 1915 (25%).

Federal Cases:

Manuge v. Canada, 2013 FC 341 (4% of $887 million value of past and future pension increases, which was approximately an 11X multiplier).

35f *Alfresh Beverages Canada Corp. v. Hoechst AG* (2002), 16 C.P.C. (5th) 301 (Ont. S.C.J.) (multiplier of 3); *Alfresh Beverages Canada Corp. v. Archer Daniels Midland Co.* (unreported, October 23, 2001, Ont. S.C.J., London Court File No. 322562/99) (multiplier of 3); *Gagne v. Silcorp. Ltd., supra*, footnote 34 (multiplier of 2), *Maxwell v. MLG Ventures Ltd., supra*, footnote 33 (multiplier of 1.5); *Windisman v. Toronto College Park Ltd., supra*, footnote 32a (multiplier of 2.5); *Serwaczek v. Medical Engineering Corp.* (unreported, July 31, 1995, 17629/94, Ont. Ct. (Gen. Div.)) (certification decision) (multiplier of 3); further proceedings (1996), 3 C.P.C. (4th) 386 (Gen. Div.) (fees hearing); *Bisignano v. La Corporation Instrumentarium Inc.* (unreported, July 25, 1996, 22404/96, Ont. Ct. (Gen. Div.)) (certification); (unreported, September 1, 1999) (S.C.)) (endorsement approving settlement); (unreported, November 16, 1999 (S.C.)) (fee approval) (multiplier of 2.86); *A.C.E.F. Centre v.*

multiplier was 2.74 and the median percentage fee was 14.73%.[35f.1] A fee of 25% has been held to be "a reasonably standard fee agreement in class proceedings litigation" in Ontario.[35f.2] Historically, certain courts suggested that there is a rough upper limit on any fee award equivalent to a multiplier of 3 to 4[35g] in Ontario, and 5.5 in B.C.[35h] However, courts have departed from these rough limits. For example, in *Hislop v. Canada (Attorney General)*,[35h.1] a class

Bristol-Myers Squibb Co., *supra*, footnote 32a (multiplier of 2 plus 5% of total recovery); *Honhon v. Canada (Procureur General)*, *supra*, footnote 35d (multiplier of 3); *Page v. Canada (Procureur General)* (unreported, August 30, 2000, 500-06-000068-987, Que. S.C.) (multiplier of 2.5); *Godi v. Toronto Transit Commission* (unreported, September 20, 1996, 95-CU-89529, Ont. Ct. (Gen. Div.)). (According to report in the Siskinds Class Action Newsletter SCAN2000/10, multiplier of 2.25 up to time of settlement and no multiplier thereafter). It has been said that a multiplier of 5.5 would be at the high end of the appropriate spectrum: *Endean v. Canadian Red Cross Society*, *supra*, footnote 35, at para. 100 (S.C.); *Burleton v. Royal Trust Corp. of Canada* (2003), 34 C.P.C. (5th) 182, [2003] O.J. No. 2168 (S.C.J.) (multiplier of 2.4); *Penton v. Parker Canada Holding Co.*, [2003] O.J. No. 2253 (S.C.J.) (multiplier of 1.65); *Bona Foods Ltd. v. Ajinomoto U.S.A., Inc.* (2004), 129 A.C.W.S. (3d) 456, [2004] O.J. No. 908 (S.C.J.) (contingency agreement at 25%, which resulted in a multiplier of "slightly less than 3"); *Hislop v. Canada (Attorney General)* (2004), 130 A.C.W.S. (3d) 907, [2004] O.J. No. 1867 (S.C.J.) (multiplier of 4.8); *La Cie McCormick Canada Co. v. Stone Container Corp.* (2006), 150 A.C.W.S. (3d) 771, [2006] O.J. 3321 No. (S.C.J.) (multiplier of 1.4); *Hotte v. Servier Canada Inc.*, 2006 QCCS 4007 (multiplier of 1.14); *Martin v. Barrett* (2008), 55 C.P.C. (6th) 377 (Ont. S.C.J.) (multiplier of 2.5); *Walker v. Union Gas Ltd.* (2009), 174 A.C.W.S. (3d) 947, [2009] O.J. No. 536 (Ont. S.C.J.) (multiplier of 2.19); *Lawrence v. Atlas Cold Storage* (unreported, February 12, 2009, 04-CV-263289CP (Ont. S.C.J.), affd [2009] O.J. No. 4067 (C.A.) (multiplier of 2.6 on adjusted time), affd [2009] O.J. No. 4067 (C.A.); *Association de protection des epargnants et investisseurs du Québec (APEIQ) v. Corp. Nortel Networks*, 2009 QCCS 2407 (request for $6.7 million was reduced to $3 million, or about a 2X multiplier. The court held that most of the difficult work was performed in other jurisdictions); *Cassano v. Toronto-Dominion Bank*, [2009] O.J. No. 2922 (multiplier of 5.5); *Smith Estate v. National Money Mart Co.*, 2010 ONSC 1334 (settlement approval) (multiplier of 1.35); *Ford v. Degussa-Hüls AG*, 2010 ONSC 2787, 188 A.C.W.S. (3d) 998 (multiplier of 1.78); *Toronto District School Board v. Field*, 2010 ONSC 3865, 190 A.C.W.S. (3d) 688 (multiplier of 2); *Griffin v. Dell Canada Inc.*, 2011 ONSC 3292 (multiplier of 1.3); *Wiggins v. Mattel Canada Inc.*, 2011 ONSC 2964 (multiplier of 1.75); *Morgan v. Lee*, 2013 ONSC 859 (multiplier of 1.5, plus $75,000 to counsel appointed by one representative plaintiff at the time of settlement); *Fulawka v. Bank of Nova Scotia*, 2014 ONSC 4743, 2014 CarswellOnt 11626 (Ont. S.C.J.) (2.75).

35f.1 Alarie, Benjamin, "Rethinking the Approval of Class Counsel's Fees in Ontario Class Actions", Third National Symposium on Class Actions (Toronto: Osgoode Hall Law School of York University, 2006) at p. 15 (cited in *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 4324 (S.C.J.).

35f.2 *Helm v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602, at para. 22. See also *Baker Estate v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105, at para. 63, where the court stated: "A contingent fee retainer in the range of 20% to 30% is very common in class proceedings" in Ontario.

35g *Gagne v. Silcorp Ltd.*, *supra*, footnote 34.

35h *Endean v. Canadian Red Cross Society*, *supra*, footnote 35.

35h.1 (2004), 130 A.C.W.S. (3d) 907, [2004] O.J. No. 1867 (S.C.J.).

Class Proceedings Act

CHAPTER 28

OF THE

ACTS OF 2007

An Act Respecting Class Proceedings

Short title

1 This Act may be cited as the Class Proceedings Act. *2007, c. 28, s. 1.*

Interpretation

2 In this Act,

(a) "certification order" means an order certifying a proceeding as a class proceeding;

(b) "class or subclass" means two or more persons with common issues respecting a cause of action or potential cause of action;

(c) "class or subclass member" means a person who is or becomes a member of a class or subclass in accordance with a certification order, and who has not opted out of the class or subclass;

(d) "class proceeding" means a proceeding under this Act, even if an application for certification of the proceeding as a class proceeding has not yet been determined by the court;

(e) "common issues" means

(i) common but not necessarily identical issues of fact, or

(ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

(f) "court" means the Supreme Court of Nova Scotia, and includes any judge of that court;

(g) "decertification order" means an order decertifying a proceeding as a class proceeding;

(h) "defendant" includes a respondent;

(i) "party" means a representative plaintiff, a plaintiff, a representative defendant, a defendant or a person that the court adds as a party, but does not include any other individual class or subclass members;

(j) "plaintiff" includes an applicant;

(k) "representative defendant" means a person who is appointed under this Act as the representative defendant for a class or subclass in respect of a class proceeding and, where the context requires, includes a person who is seeking to be appointed as a representative defendant;

(l) "representative party" means a representative plaintiff or representative defendant;

(m) "representative plaintiff" means a person who is appointed under this Act as the representative plaintiff for a class or subclass in respect of a class proceeding and, where the context requires, includes a person who is seeking to be appointed as a representative plaintiff;

(n) "settlement class" means those persons who constitute a settlement class under Section 6. *2007, c. 28, s. 2.*

Application of Act

3 (1) Subject to the Proceedings against the Crown Act, this Act binds Her Majesty in right of the Province.

(2) For greater certainty,

(a) notice required to be given to the Crown under the Proceedings against the Crown Act must be given by the proposed representative plaintiff; and

(b) the notice referred to in clause (a) must clearly state that the action is a class proceeding and provide particulars regarding the intended class.

(3) Subject to subsection (4), this Act does not apply to

(a) a proceeding that may be brought in a representative capacity under another Act;

(b) a proceeding required by law to be brought by a plaintiff in a representative capacity; or

(c) a proceeding brought in a representative capacity that was commenced before the coming into force of this Section.

(4) Where a proceeding is commenced under Rule 5.09 of the Civil Procedure Rules before the coming into force of this Section, the court may, on the application of a party to the proceeding, order that the proceeding be continued under this Act, subject to the terms or conditions the court considers appropriate. *2007, c. 28, s. 3.*

CERTIFICATION

Application for certification of proceeding

4 (1) One member of a class of persons may commence a proceeding in the court on behalf of the members of that class.

(2) In a proceeding referred to in subsection (1), the originating process must indicate that the proceeding is brought under this Act.

(3) The person who commences a proceeding under subsection (1) shall make an application to the court for an order certifying the proceeding as a class proceeding and, subject to subsection (5), appointing the person as representative plaintiff for the class.

(4) An application under subsection (3) must be made

(a) within one hundred and twenty days of the date upon which the proceeding is commenced; or

(b) at any other time with leave of the court.

(5) The court may appoint a person who is not a member of the class as the representative plaintiff for the class only if, in the opinion of the court, it is necessary to do so in order to avoid a substantial injustice to the class.

(6) A defence to a class proceeding does not need to be filed until forty-five days after a certification order is issued in respect to the proceeding. *2007, c. 28, s. 4.*

Application by defendant for certification

5 (1) A defendant in two or more proceedings may, at any stage of one of the proceedings, make an application to the court for an order certifying some or all of the proceedings as a class proceeding and appointing a representative plaintiff for the class that will be involved in the class proceeding.

(2) Any party to a proceeding against two or more defendants may, at any stage of the proceedings, make an application to the court for an order certifying the proceeding as a class proceeding and appointing a representative defendant. *2007, c. 28, s. 5.*

Settlement class

6 Where as a condition of settlement between a plaintiff and a defendant certification of a proceeding as a class proceeding is being sought in order that the settlement will bind the class members, the class members constitute a settlement class. *2007, c. 28, s. 6.*

Certification by the court

7 (1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,

(a) the pleadings disclose or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by a representative party;

(c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute; and

(e) there is a representative party who

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and

(iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members.

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the court shall consider

(a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members;

(b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings;

(c) whether the class proceeding would involve claims or defences that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means; and

(f) any other matter the court considers relevant.

(3) Notwithstanding subsection (1), where an application is made to certify a proceeding as a class proceeding in order that a settlement will bind the members of a settlement class, the court shall not certify the proceeding as a class proceeding unless the court approves the settlement. *2007, c. 28, s. 7.*

Adjournment of application and effect of certification

8 (1) The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence to be introduced.

(2) An order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding. *2007, c. 28, s. 8.*

Subclasses

9 Where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members requires that the subclass members be separately represented, the court may, in addition to appointing the representative party for the class, appoint for each subclass a representative party who, in the opinion of the court,

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the subclass and of notifying subclass members of the class proceeding; and

(c) does not have, with respect to the common issues for the subclass, an interest that is in conflict with the interests of other subclass members. *2007, c. 28, s. 9.*

Certain matters not bar to certification

10 The court shall not refuse to certify a proceeding as a class proceeding by reason only that

(a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;

(b) the relief claimed relates to separate contracts involving different class members;

(c) different remedies are sought for different class members;

(d) the number of class members or the identity of each class member is not ascertained or may not be ascertainable; or

(e) the class includes a subclass whose members have claims that raise common issues not shared by all class members. *2007, c. 28, s. 10.*

Contents of certification order

11 (1) A certification order shall

(a) describe the class in respect of which the order was made by setting out the class's identifying characteristics;

(b) appoint the representative parties;

(c) state the nature of the claims or defences asserted on behalf of the class;

(d) state the relief sought by the class;

(e) set out the common issues for the class;

(f) state the manner in which and the time within which a class member may opt out of the class proceeding; and

(g) include any other provisions the court considers appropriate.

(2) Where a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members requires that the subclass members be separately represented, the certification order shall include the same information in relation to the subclass that, under subsection (1), is required in relation to the class.

(3) Where the certification order is made in respect of a settlement class, the court may, as the court considers appropriate, modify the contents of the order to reflect the existence of the settlement and its terms.

(4) The court may, at any time, amend a certification order on an application of a party or class member or on its own motion. *2007, c. 28, s. 11.*

Refusal to certify

12 Where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for that purpose, the court may

(a) order the addition, deletion or substitution of parties;

(b) order the amendment of the pleadings or the notice of application; and

(c) make any other order it considers appropriate. *2007, c. 28, s. 12.*

Where conditions for certification not satisfied after certification

13 (1) Without limiting subsection 11(4), where at any time after a certification order is made under this Part it appears to the court that the conditions referred to in Section 7 or subsection 9(1) are not satisfied, the court may amend the certification order, decertify the proceeding as a class proceeding or make any other order it considers appropriate.

(2) Where the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties and may make any order referred to in Section 12 in relation to each of those proceedings. *2007, c. 28, s. 13.*

CONDUCT OF CLASS PROCEEDINGS

Stages of class proceedings

14 (1) Unless the court otherwise orders under Section 15, in a class proceeding,

(a) common issues for a class shall be determined together;

(b) common issues for a subclass shall be determined together; and

(c) individual issues that require the participation of class members shall be determined in accordance with Sections 30 and 31.

(2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue. *2007, c. 28, s. 14.*

Court may determine conduct of class proceeding

15 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 or conditions the court considers appropriate. *2007, c. 28, s. 15.*

Court may stay other proceeding

16 The court may at any time stay or sever any proceeding related to the class proceeding on the terms or conditions the court considers appropriate. *2007, c. 28, s. 16.*

Hearing of applications

17 (1) All applications, whether contested or not, in the class proceeding that are made before the trial of the common issues shall be heard by the same judge but, where that judge becomes unavailable for any reason to hear an application in the class proceeding, the Chief Justice of the court may assign another judge of the court to hear the application.

(2) A judge who hears an application under subsection (1) may, but need not, preside at the trial of the common issues. *2007, c. 28, s. 17.*

Participation of class members

18 (1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time, in a class proceeding permit one or more class members to participate in the class proceeding.

(2) Participation under subsection (1) must be in the manner and on the terms or conditions, including terms or conditions as to costs, that the court considers appropriate. *2007, c. 28, s. 18.*

Opting out of class proceeding and determination by Court

19 (1) A person who is a member of a class involved in a class proceeding may opt out of the class proceeding

(a) in the manner and within the time specified in the certification order; or

(b) with leave of the court and on the terms or conditions the court considers appropriate.

(2) A person referred to in subsection (1) who opts out of the class proceeding ceases, from the time the person opts out and subject to any terms or conditions referred to in subsection (1), to be a member of the class involved in the class proceeding.

(3) Notwithstanding anything contained in this Section, the court may at any time determine whether or not a person is a class or subclass member, subject to any terms or conditions the court considers appropriate. *2007, c. 28, s. 19.*

Discovery

20 (1) Except as otherwise provided in this Act or the regulations, parties to a class proceeding are subject to discovery in the same manner as parties to any other proceeding, but only after the proceeding has been certified, unless leave of the court has been obtained.

(2) Except as otherwise provided in this Act or the regulations, parties may discover a class member only with leave of the court and after all representative parties have been discovered or their discoveries have been waived.

(3) In deciding whether to grant a party leave to conduct discovery under subsection (1) or (2), the court shall consider

(a) the stage of the class proceeding and the issues to be determined at that stage;

(b) the presence of subclasses;

(c) whether the discovery is necessary in view of the claims or defences of the party seeking leave;

(d) the approximate monetary value of individual claims, if any;

(e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered; and

(f) any other matter the court considers relevant.

(4) A class member is subject to the same sanctions under the Civil Procedure Rules as a party for failure to submit to discovery and, for greater certainty, the court may dismiss the claims of or allow a claim against any individual class member who fails to submit to discovery. *2007, c. 28, s. 20.*

Examination of other parties

21 (1) Before the certification hearing, parties to a class proceeding may examine any other party to the proceeding, or any deponent of an affidavit filed with respect to the certification application, or, with leave of the court, any other person, and such examination is limited to issues arising from the certification application.

(2) With respect to any other application, including an interlocutory application, a party shall not examine a person before the hearing of the application or interlocutory application, except with leave of the court.

(3) In deciding whether to grant a party leave to conduct an examination under subsection (1) or (2), the court shall consider the factors set out in subsection 20(3). *2007, c. 28, s. 21.*

Notice of certification

22 (1) Subject to subsection (2), notice that a proceeding has been certified as a class proceeding must be given by the representative party for the class to the class members in accordance with this Section.

(2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so.

(3) Subject to subsection (2), the court shall make an order setting out when and by what means notice is to be given under this Section and in doing so shall have regard to

(a) the cost of giving notice;

(b) the nature of the relief sought;

(c) the size of the individual claims of the class members;

(d) the number of class members;

(e) the presence of subclasses;

(f) the places of residence of class members; and

(g) any other matter the court considers relevant.

(4) The court may order that notice be given by

(a) personal delivery;

(b) mail;

(c) posting, advertising or publishing;

(d) individually notifying a sample group within the class;

(e) creating and maintaining an Internet site; or

(f) any other means or combination of means that the court considers appropriate.

(5) The court may order that notice be given to different class members by different means.

(6) Unless the court orders otherwise, a notice under this Section must

(a) describe the class proceeding, including the names and addresses of the representative parties and the relief sought;

(b) state the manner in which and the time within which a class member may opt out of the class proceeding;

(c) describe any counterclaim or third party claim being asserted in the class proceeding, including the relief sought;

(d) summarize any agreements respecting fees and disbursements between the representative parties and their solicitors;

(e) describe the possible financial consequences of the class proceeding to class and subclass members;

(f) state that the judgment on the common issues for the class, whether favourable or not, will bind all class members who do not opt out of the class proceeding;

(g) state that the judgment on the common issues for a subclass, whether favourable or not, will bind all subclass members who do not opt out of the class proceeding;

(h) describe the rights, if any, of class members to participate in the class proceeding;

(i) give an address to which class members may direct inquiries about the class proceeding; and

(j) give any other information the court considers appropriate.

(7) Where the application to certify a proceeding as a class proceeding was made in respect of a settlement class, a notice under this Section must refer to the existence of the settlement and describe its terms, and must be modified otherwise as the court considers appropriate.

(8) With leave of the court, an application under this Section may include a solicitation of contributions from class members to assist in paying solicitors' fees and disbursements. *2007, c. 28, s. 22.*

Notice of determination of common issues

23 (1) Where the court determines common issues in favour of a class or subclass and considers that the participation of individual class or subclass members is required to determine individual issues, the representative party for that class or subclass shall give notice to those members in accordance with this Section.

(2) Subsections 22(3) to (5) apply with the necessary modifications to a notice given under this Section.

(3) A notice under this Section must

(a) state that common issues have been determined;

(b) identify the common issues that have been determined and explain the determinations made;

(c) state that class or subclass members may be entitled to individual relief;

(d) describe the steps that must be taken to establish an individual claim;

(e) state that failure on the part of a class or subclass member to take those steps will result in the member not being entitled to assert an individual claim except with leave of the court;

(f) give an address to which class or subclass members may direct inquiries about the class proceeding; and

(g) give any other information the court considers appropriate. *2007, c. 28, s. 23.*

Notice to protect interests of affected persons

24 (1) At any time in a class proceeding, the court may order any party to give any notice that the court considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the class proceeding.

(2) Subsections 22(3) to (5) apply with the necessary modifications to a notice given under this Section. *2007, c. 28, s. 24.*

Approval of notice by court

25 A notice under Sections 22 to 24 must be approved by the court before it is given. *2007, c. 28, s. 25.*

Another party may be ordered to give notice

26 Where a party is required to give notice under this Act, the court may order another party to give the notice in addition to or instead of the party that was required to give the notice. *2007, c. 28, s. 26.*

Costs of notice

27 (1) The court may make any order it considers appropriate as to the costs of any notice under Sections 22 to 24, including an order apportioning costs among parties.

(2) In making an order under subsection (1), the court may have regard to the different interests of a subclass. *2007, c. 28, s. 27.*

ORDERS, AWARDS AND RELATED PROCEDURES

Contents of order respecting judgment on common issues

28 An order made in respect of a judgment on common issues of a class or subclass must

(a) set out the common issues;

(b) name or describe the class or subclass members to the extent possible;

(c) state the nature of the claims or defences asserted on behalf of the class or subclass; and

(d) specify the relief granted. *2007, c. 28, s. 28.*

Judgment on common issues is binding

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

(a) are set out in the certification order;

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

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

(2) A judgment on common issues of a class or subclass does not bind a party to the class proceeding in any subsequent proceeding between the party and a person who opted out of the class proceeding. *2007, c. 28, s. 29.*

Determination of issues affecting certain individuals

30 (1) Where the court determines common issues in favour of a class or subclass and determines that there are issues, other than those that may be determined under Section 35, that are applicable only to certain individual

class or subclass members, the court may

(a) determine those individual issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;

(b) appoint one or more persons, including, without limiting the generality of the foregoing, one or more independent experts, to conduct a reference into those individual issues under the Civil Procedure Rules and report back to the court; or

(c) with the consent of the parties, direct that those individual issues be determined in any other manner.

(2) The court may give any necessary directions relating to the procedures that shall be followed in conducting hearings, references and determinations under subsection (1).

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the individual issues that, in the opinion of the court, is consistent with justice to the class or subclass members and the parties and, in doing so, the court may

(a) dispense with any procedural step that it considers unnecessary; and

(b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

(4) The court shall set a reasonable time within which individual class or subclass members may make claims under this Section in respect of the individual issues.

(5) A class or subclass member who fails to make a claim within the time set under subsection (4) shall not later make a claim under this Section in respect of the individual issues applicable to that member except with leave of the court.

(6) The court may grant leave under subsection (5) if, in the opinion of the court,

(a) there are apparent grounds for relief;

(b) the delay was not caused by any fault of the person seeking the relief; and

(c) the defendant would not suffer substantial prejudice if leave were granted.

(7) Unless otherwise ordered by the court making a direction under clause (1)(c), a determination of issues made in accordance with that clause is deemed to be an order of the court. *2007, c. 28, s. 30.*

Individual assessment of liability

31 Without limiting the generality of Section 30, where, after determining common issues in favour of a class or subclass, the court determines that a defendant's liability to individual class or subclass members cannot reasonably be determined without proof by those individual class or subclass members, Section 30 applies with the necessary modifications to the determination of the defendant's liability to those class or subclass members. *2007, c. 28, s. 31.*

Aggregate monetary awards

32 (1) Once a defendant has been found liable, the court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class or subclass members and may give judgment accordingly if

(a) monetary relief is claimed on behalf of some or all class or subclass members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class or subclass members can, in the opinion of the court, reasonably be determined without proof by individual class or subclass members.

(2) Before making an order under subsection (1), the court shall provide the defendant with an opportunity to make submissions to the court in respect of any matter relating to the proposed order including, without limiting the generality of the foregoing,

(a) submissions that contest the merits or amount of an award under that subsection; and

(b) submissions that individual proof of monetary relief is required due to the individual nature of the relief.

(3) Before making an order under subsection (1), the court may permit the admission of additional evidence that, in the opinion of the court, is relevant in the circumstances. *2007, c. 28, s. 32.*

Statistical evidence may be admitted

33 (1) For the purpose of determining issues relating to the amount or distribution of an aggregate monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

(2) A record of statistical information purporting to be prepared or published under the authority of an Act of the Parliament of Canada or of the legislature of any province or territory of Canada may be admitted as evidence without proof of its authenticity.

(3) Statistical information must not be admitted as evidence under this Section unless the party seeking to introduce the information

(a) has given to the party against whom the statistical evidence is to be used a copy of the information at least sixty days before that information is to be introduced as evidence;

(b) has complied with subsections (4) and (5); and

(c) introduces the evidence by an expert who is available for cross-examination on that evidence.

(4) A notice under this Section must specify the source of any statistical information sought to be introduced that

(a) was prepared or published under the authority of an Act of the Parliament of Canada or of the legislature of any province or territory of Canada;

(b) was derived from market quotations, tabulations, lists, directories or other compilations generally used and relied on by members of the public; or

(c) was derived from reference material generally used and relied on by members of an occupational group.

(5) Except with respect to information referred to in subsection (4), a notice under this Section must

(a) specify the name and qualifications of each person who supervised the preparation of the statistical information sought to be introduced; and

(b) describe any documents prepared or used in the course of preparing the statistical information sought to be introduced.

(6) Unless this Section provides otherwise, the law and practice with respect to evidence tendered by an expert in a proceeding applies to a class proceeding.

(7) Except with respect to information referred to in subsection (4), a party against whom statistical information is sought to be introduced under this Section may require the party seeking to introduce it to produce for inspection any document that was prepared or used in the course of preparing the information, unless the document discloses the identity of persons responding to a survey who have not consented in writing to the disclosure. *2007, c. 28, s. 33.*

Average or proportional share of aggregate awards

34 (1) Where the court makes an order under Section 32, the court may further order that all or a part of the aggregate monetary award be applied so that some or all individual class or subclass members share in the award on an average or proportional basis if, in the opinion of the court,

(a) it would be impractical or inefficient to

(i) identify the class or subclass members entitled to share in the award, or

(ii) determine the exact shares that should be allocated to individual class or subclass members; and

(b) failure to make an order under this subsection would deny recovery to a substantial number of class or subclass members.

(2) Where an order is made under subsection (1), any class or subclass member in respect of whom the order was made may, within the time specified in the order, make an application to the court to be excluded from the proposed distribution and to be given the opportunity to prove that member's claim on an individual basis.

(3) In deciding whether to exclude a class or subclass member from an average or proportional distribution, the court shall consider

(a) the extent to which the class or subclass member's individual claim varies from the amount that the person would receive on an average or proportional basis;

(b) the number of class or subclass members seeking to be excluded from an average or proportional distribution; and

(c) whether excluding the class or subclass members referred to in clause (b) would unreasonably deplete the amount to be distributed on an average or proportional basis.

(4) An amount recovered by a class or subclass member who proves the person's claim on an individual basis must be deducted from the amount to be distributed on an average or proportional basis before the distribution. *2007, c. 28, s. 34.*

Individual share of aggregate

35 (1) Where the court orders that all or a part of an aggregate monetary award under subsection 32(1) be divided among individual class or subclass members on an individual basis, the court shall also determine whether individual claims need to be made to give effect to the order.

(2) Where the court determines under subsection (1) that individual claims need to be made, the court shall specify the procedures for determining the claims.

(3) In specifying the procedures under subsection (2), the court shall minimize the burden on class or subclass members and, for that purpose, the court may authorize

(a) the use of standard proof of claim forms;

(b) the submission of affidavit or other documentary evidence;

(c) the auditing of claims on a sampling or other basis; and

(d) any other procedure the court considers appropriate.

(4) When specifying the procedures under subsection (2), the court shall set a reasonable time within which individual class or subclass members may make claims under this Section.

(5) A class or subclass member who fails to make a claim within the time set under subsection (4) may not later make a claim under this Section except with leave of the court.

(6) Subsection 30(6) applies with the necessary modifications to a decision whether to grant leave under subsection (5).

(7) The court may amend a judgment given under subsection 32(1) to give effect to a claim made with leave under subsection (5) if the court considers it appropriate to do so. *2007, c. 28, s. 35.*

Distribution

36 (1) The court may direct any means of distribution of amounts awarded under Sections 32 to 35 that it considers appropriate.

(2) In giving directions under subsection (1), the court may order that

(a) the defendant distribute directly to the class or subclass members the amount of monetary relief to which each class or subclass member is entitled by any means authorized by the court, including abatement or credit;

(b) the defendant pay into court or some other appropriate depository the total amount of the monetary relief to which all of the class or subclass members are entitled until further order of the court; or

(c) any person other than the defendant distribute directly to each of the class or subclass members, by any means authorized by the court, the amount of monetary relief to which that class or subclass member is entitled.

(3) In deciding whether to make an order under clause (2)(a), the court

(a) shall consider whether distribution by the defendant is the most practical way of distributing the award; and

(b) may take into account whether the amount of monetary relief to which each class or subclass member is entitled can be determined from the records of the defendant.

(4) The court shall supervise the execution of judgments and the distribution of awards under Sections 32 to 35 and may stay the whole or any part of an execution or distribution for a reasonable period on the terms or conditions it considers appropriate.

(5) The court may order that an award made under Sections 32 to 35 be paid

(a) in a lump sum, promptly or within a time set by the court; or

(b) in instalments, on the terms or conditions the court considers appropriate.

(6) The court may

(a) order that the costs of distributing an award under Sections 32 to 35, including the costs of any notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment; and

(b) make any other order it considers appropriate. *2007, c. 28, s. 36.*

Undistributed award

37 (1) The court may order that all or any part of an award under Sections 32 to 35 that has not been distributed within a time set by the court

(a) be applied in any manner that, in the opinion of the court, may reasonably be expected to benefit class or subclass members;

(b) be applied against the cost of the class proceeding;

(c) be forfeited to Her Majesty in right of the Province; or

(d) be returned to the party against whom the award was made.

(2) In deciding whether to make an order under clause (1)(a), the court shall consider

(a) whether the distribution would result in unreasonable benefits to persons who are not class or subclass members; and

(b) any other matter the court considers relevant.

(3) The court may make an order under clause (1)(a) whether or not all the class or subclass members can be identified or all their shares can be exactly determined.

(4) The court may make an order under clause (1)(a) even if the order would benefit

(a) persons who are not class or subclass members; or

(b) persons who may otherwise receive monetary relief as a result of the class proceeding. *2007, c. 28, s. 37.*

Settlement, discontinuance and dismissal

38 (1) A class proceeding may be settled or discontinued only

(a) with the approval of the court; and

(b) on the terms or conditions the court considers appropriate.

(2) A settlement in relation to the common issues affecting a subclass may be concluded only

(a) with the approval of the court; and

(b) on the terms or conditions the court considers appropriate.

(3) A settlement under this Section is not binding unless approved by the court.

(4) Where a proceeding has been certified as a class proceeding, a settlement of the class proceeding or of common issues affecting a subclass that is approved by the court binds every class or subclass member who has not opted out of the class proceeding, but only to the extent provided by the court.

(5) In dismissing a class proceeding or in approving a settlement or discontinuance, the court shall consider whether notice should be given and whether the notice should include any of the following:

(a) an account of the conduct of the class proceeding;

(b) a statement of the result of the class proceeding;

(c) a description of any plan for distributing any settlement funds.

(6) Subsections 22(3) to (5) apply with the necessary modifications to a notice referred to in subsection (5). *2007, c. 28, s. 38.*

Appeals

39 (1) Any party may appeal, without leave, to the Nova Scotia Court of Appeal from

(a) a judgment on common issues; or

(b) an order under Sections 32 to 37, other than an order that determines individual claims made by class or subclass members.

(2) With leave of a judge of the Nova Scotia Court of Appeal, a class or subclass member or any party may appeal to that court any order

(a) determining an individual claim made by a class or subclass member; or

(b) dismissing an individual claim for monetary relief made by a class or subclass member.

(3) With leave of a judge of the Nova Scotia Court of Appeal, any party may appeal to that court from

(a) a certification order or an order refusing to certify a proceeding as a class proceeding; or

(b) a decertification order.

(4) Where a representative party for a class or subclass does not appeal or seek leave to appeal as permitted by subsection (1) or (3) within the time limit for bringing an appeal set under the Civil Procedure Rules or where a representative party abandons an appeal under subsection (1) or (3), any member of the class or subclass may make an application to a judge of the Nova Scotia Court of Appeal for leave to act as the representative party for the purposes of subsection (1) or (3).

(5) Where a representative party intends to abandon an appeal under subsection (1) or (3), the representative party shall apply to a judge of the Nova Scotia Court of Appeal for approval to abandon the appeal and, where approval is granted, the judge of the Nova Scotia Court of Appeal shall consider whether the appellant should be ordered to provide notice to class or subclass members that the appeal has been abandoned.

(6) An application by a class or subclass member for leave to act as the representative party under subsection (4) must be made within thirty days after the expiry of the appeal period available to the representative party or by such other date as the judge of the Nova Scotia Court of Appeal may order.

(7) For greater certainty, an application for leave to appeal pursuant to this Section must be made before a single judge of the Nova Scotia Court of Appeal. *2007, c. 28, s. 39.*

COSTS, FEES AND DISBURSEMENTS

Costs

40 (1) With respect to any proceeding or other matter under this Act, costs may be awarded in accordance with the Civil Procedure Rules.

(2) When awarding costs pursuant to subsection (1), the court may consider whether

(a) the class proceeding was a test case, raised a novel point of law or involved a matter of public interest; and

(b) a cost award would further judicial economy, access to justice or behaviour modification.

(3) The court may apportion costs against various parties in accordance with the extent of the parties' liability.

(4) A class member, other than a representative party, is not liable for costs except with respect to the determination of the class member's own individual claims. *2007, c. 28, s. 40.*

Agreements respecting fees and disbursements

41 (1) An agreement respecting fees and disbursements between a solicitor and a representative party must be in writing and shall

(a) state the terms or conditions 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;

(c) where interest is payable on fees or disbursements referred to in clause (a), state the manner in which the interest will be calculated; and

(d) 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 party is not enforceable unless approved by the court, on the application of the solicitor.

(3) An application under subsection (2) may

(a) unless the court otherwise orders, be made without notice to any other party; or

(b) where notice to any other party is required, be made on the terms or conditions that the court may order respecting disclosure of the whole or any part of the agreement respecting fees and disbursements.

(4) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

(5) Where 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 that a taxation be conducted in accordance with the Civil Procedure Rules; or

(c) direct that the amount owing be determined in any other manner.

(6) Sections 65 to 70 of the Legal Profession Act do not apply in respect of an agreement referred to in this Section. *2007, c. 28, s. 41.*

GENERAL

Limitation periods

42 (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the proceeding and resumes running against the class member when

(a) a ruling is made by the court refusing to certify the proceeding as a class proceeding;

(b) the class member opts out of the class proceeding;

(c) an amendment is made to the certification order that has the effect of excluding the class member from the class proceeding;

(d) a decertification order is made under Section 13;

(e) the class proceeding is dismissed without an adjudication on the merits;

(f) the class proceeding is discontinued with the approval of the court; or

(g) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

(2) Where there is a right of appeal in respect of an event described in clauses (1)(a) to (g), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

(3) Where the running of a limitation period is suspended under this Section and the period has less than six months to run when the suspension ends, the limitation period, notwithstanding anything contained in this Section, is extended to the day that is six months after the day on which the suspension ends. *2007, c. 28, s. 42.*

Civil Procedure Rules

43 The Civil Procedure Rules apply to class proceedings to the extent that those rules are not in conflict with this Act. *2007, c. 28, s. 43.*

Certain provisions subject to regulations

44 Any provision of this Act with respect to discovery, damages, expert evidence or any procedural or substantive matter relating to a class proceeding is subject to the regulations. *2007, c. 28, s. 44.*

Regulations

45 (1) The Governor in Council may make regulations

(a) respecting discovery, damages, expert evidence or any procedural or substantive matter relating to a class proceeding;

(b) defining any word or expression used but not defined in this Act;

(c) the Governor in Council considers necessary or advisable to carry out effectively the intent and purpose of this Act.

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is regulations within the meaning of the Regulations Act. *2007, c. 28, s. 45.*

Proclamation

46 This Act comes into force on such day as the Governor in Council orders and declares by proclamation. *2007, c. 28, s. 46.*

Proclaimed - June 3, 2008
In force - June 3, 2008